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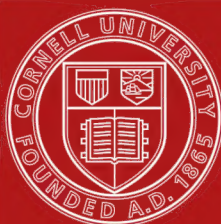
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**The Encyclopaedia of pleading and practi**



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THE  
ENCYCLOPÆDIA  
OF  
PLEADING AND PRACTICE

UNDER THE CODES AND PRACTICE ACTS,  
AT COMMON LAW, IN EQUITY  
AND IN CRIMINAL CASES.

COMPILED UNDER THE EDITORIAL SUPERVISION OF  
WILLIAM M. MCKINNEY.

VOL. X.

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# THE ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

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## HAWKERS AND PEDDLERS.

### I. CIVIL ACTIONS AGAINST, FOR VIOLATION OF LICENSE LAWS, 1.

1. *Generally*, 1.

2. *Declaration—Essential Averments*, 1

### II. CRIMINAL ACTIONS, 2.

1. *Generally*, 2.

2. *Indictment—Essential Averments*, 2.

### I. CIVIL ACTIONS AGAINST, FOR VIOLATION OF LICENSE LAWS—

1. **Generally.**—In some states the offense of following the occupation of a hawker or peddler without a license is not indictable as a criminal offense. The proper form of action in such states is an action of debt to recover the penalty.<sup>1</sup>

2. **Declaration—Essential Averments**—That Defendant Is a “Hawker and Peddler.”—In an action of debt to recover the penalty for

1. *Webster v. People*, 14 Ill. 365; *State v. Aiken*, 7 Yerg. (Tenn.) 268; *Com. v. Stiles*, 7 Pa. Co. Ct. Rep. 665; *Com. v. Winslow*, 7 Pa. Co. Ct. Rep. 667.

“This is not a criminal action either in form or substance. It is not found

in the criminal code, but is given by the revenue law, and is for the protection of the revenue. It is not an offense at the common law, nor is it indictable under the statute. In form it is an action of debt, and not a criminal

hawking and peddling without a license, the declaration must aver that the defendant is a "hawker and peddler,"<sup>1</sup> and, according to some decisions, that he did sell goods.<sup>2</sup>

**II. CRIMINAL ACTIONS — 1. Generally.** — In some jurisdictions the violation of the law requiring the procurement of a license by those engaging in the business of hawking and peddling subjects the offender to a criminal action, and is an indictable offense.<sup>3</sup>

**2. Indictment — Essential Averments — Want of License.** — An indictment for hawking and peddling must aver that the defendant had not obtained a license to engage in such occupation.<sup>4</sup>

**That Defendant Acted as Hawker or Peddler.** — The want of an allegation that the sale of goods charged was made by the defendant as a hawker or peddler, or while going about as such, has been held to render an indictment insufficient.<sup>5</sup>

prosecution. It is not even required to be instituted or carried on in the name of the people of the state of Illinois, as all criminal prosecutions must be, but simply in the name of the state of Illinois, and the statute might with equal propriety have required the prosecution to have been conducted in the name of the complainant. The violation of the statute, for which the action is given, is not even made a misdemeanor." *Webster v. People*, 14 Ill. 365.

1. "A peddler or hawker, whose known avocation is such, is liable to the penalty, and if he offended against the revenue laws, he may be sued. Against him the plaintiff has title and none other. He must therefore allege the defendant to be a hawker or peddler, for many persons may sell small articles and not be hawkers or peddlers." *Catron, C. J., in State v. Aikin*, 7 Yerg. (Tenn.) 268.

In *qui tam* action for selling goods as a peddler without license the declaration must aver that the defendant was such peddler, etc., as is required to have license, and that he did sell. *Prigmore v. Thompson, Minor* (Ala.) 420. See also *Bacon v. Wood*, 3 Ill. 265; *Merriam v. Langdon*, 10 Conn. 460.

**Insufficient Averment.** — An averment that defendant was not a person qualified as the statute required will not aid the want of an averment that he was a merchant, hawker, or peddler. *Greer v. Bumpass, Mart. & Y. (Tenn.)* 94.

2. *Prigmore v. Thompson, Minor* (Ala.) 420.

3. *Sterne v. State*, 20 Ala. 43; *May v. State*, 9 Ala. 167; *Alcott v. State*, 8 Blackf. (Ind.) 6; *Com. v. Dudley*, 3

*Metc. (Ky.)* 221; *Page v. State*, 6 Mo. 206; *State v. Powell*, 10 Rich. L. (S. Car.) 373.

4. *May v. State*, 9 Ala. 167. In this case the court said: "It is an established principle of criminal pleading that if there be an exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant does not come within the exception. \* \* \* Such is the case here. It is not peddling which the law prohibits, but peddling without first obtaining a license."

5. *Com. v. Bruckheimer*, 14 Gray (Mass.) 29. The indictment in this case averred that the defendant on, etc., at, etc., "was a hawker, peddler, and petty chapman, and did then and there go from place to place, and from dwelling-house to dwelling-house, in said town of M., on foot, exposing to sale goods, wares, and merchandise, and did then and there sell certain jewelry, to wit, one gold chain and compass, to one B. C." In his opinion, *Metcalf, J.*, said: "The statute \* \* \* on which this indictment is founded does not render any sale of jewelry unlawful, besides sales thereof by a hawker, peddler, or petty chapman or other person going from place to place, carrying it for sale, or exposing it for sale. A person who is hawker, peddler, or petty chapman may sell jewelry as lawfully as any other person, unless he sells it in the capacity or character of hawker, peddler, or petty chapman. Unless, therefore, an indictment avers that he sold jewelry in such capacity or character, no offense is charged against him."

**Specification of Particular Act.**—According to some decisions, an indictment for peddling without a license must specify the particular act or acts intended to be relied on.<sup>1</sup> Other decisions, however, hold that the indictment need not allege the facts which constitute hawking and peddling.<sup>2</sup>

**Alleging to Whom Sale Was Made.**—The decisions differ, also, as to the necessity of alleging to whom the sale was made, some holding that, while the indictment must allege a sale or other disposition of the goods in the way of trade, it need not allege to whom the sale was made;<sup>3</sup> while others hold that such allegation is essential.<sup>4</sup>

In *Alcott v. State*, 8 Blackf. (Ind.) 6, it was held that an indictment against a person for defrauding the revenue by selling clocks without a license should allege that such person made the vending of clocks his business or occupation.

1. *Com. v. Dudley*, 3 Metc. (Ky.) 221. In this case the court said: "There are two provisions of the statute which enumerate and define the several classes of persons who shall be deemed peddlers. \* \* \* These statutes not only declare who shall be deemed peddlers, but they also, by necessary implication, specify the various acts which constitute the offense of peddling, the punishment for which is fixed in other provisions. It is obvious that this offense may be committed in various ways, and by various distinct acts—such as the retailing of goods, etc., not the product or manufacture of this state, or the offer to sell the same, by any person not a resident merchant who has listed his goods for taxation; or the vending of goods, wares, etc., by itinerant persons. \* \* \* The commission of any one of these various acts subjects the offender to the penalties against peddling without license. And in an indictment for such offense, can it be deemed unreasonable strictness to require that it should specify the particular act or acts intended to be relied upon?"

**Indictment Insufficient for Want of Specification.**—An indictment charging in substance that the defendant did "peddle and sell," in the county of M., buggies, pleasure carriages, etc., not having a license to peddle the same, and said articles not being the product or manufacture of the state of Kentucky, is insufficient. *Com. v. Dudley*, 3 Metc. (Ky.) 221.

2. "It may be that if the law had

made it a penal offense for any one to hawk or peddle, that it might be necessary to allege the particular act of hawking and peddling, and that the charge in general terms, although in the words of the statute, would not be sufficient. But such is not the case we are called upon to decide. In the case presented, the gist of the offense is not the hawking and peddling, but the being engaged in it under such circumstances as show that the defendant followed the pursuit as a business. It is not necessary, therefore, under the operation of the rule referred to, to set forth the facts which constitute hawking and peddling, any more than it would be required in an indictment for keeping a pool or bagatelle table without a license, to state what constitutes such table." *Goldthwaite, J., in Sterne v. State*, 20 Ala. 43.

3. *Page v. State*, 6 Mo. 205.

4. *State v. Powell*, 10 Rich. L. (S. Car.) 373. As to the indictment in this case the court said: "Proper legal tests applied to this indictment reveal uncontestedly that it is defective in form. It alleges that the defendant 'on,' etc., 'at,' etc., 'did sell and expose to sale divers goods, wares, and merchandise, the said A. P. then and there being a peddler, and not having obtained a lawful license for that purpose,' etc. In all criminal proceedings the party charged should not be led blindfold to the altar. He should know the crime he is called to answer, and it should be so definitely charged that he may know how to shape his defense. \* \* \* A sale proved at any time anterior to the bill found, and within six months preceding the warrant, at any point in the district of Chester, of any article of merchandise, and to any person, would sustain the allegation in this indictment."

# HEALTH REGULATIONS.

## I. CIVIL ACTIONS FOR VIOLATION OF HEALTH REGULATIONS, 4.

1. *By Whom Maintainable*, 4.
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3. *Violation of Quarantine Orders*, 7.

### I. CIVIL ACTIONS FOR VIOLATION OF HEALTH REGULATIONS —

1. **By Whom Maintainable.** — A board of health may maintain an action to recover a penalty imposed for violation of its health regulations.<sup>1</sup> Where a health statute imposes a forfeiture upon property owners for failure to remove filth or other cause of sickness, and requires the town in which such property is situated to remove the filth, etc., in case of the property owners' refusal, giving to the town the imposed forfeiture, the town may maintain a civil action of debt for such forfeiture.<sup>2</sup>

2. **Essential Averments of Declaration.** — In such an action the declaration should, according to the terms of the statute, aver that the thing removed was a "cause of sickness," or it will be demurrable.<sup>3</sup>

### II. CRIMINAL ACTIONS FOR VIOLATION OF HEALTH STATUTES —

1. **Selling Adulterated Food** — **Description of Substance Adulterated.** — An indictment for selling an adulterated article of food should describe with certainty the substance alleged to have been adulterated.<sup>4</sup>

1. *McNall v. Kales*, 61 Hun (N. Y.) 231; *Gould v. Rochester*, 105 N. Y. 51; *Board of Health v. Valentine*, (Supreme Ct.) 11 N. Y. Supp. 112; *Bell v. Rochester*, (Supreme Ct.) 11 N. Y. Supp. 305. See, in general, article PENALTIES AND PENAL ACTIONS.

**Complaint by Agent of Board.** — In *Massachusetts* it has been held that it is not necessary that a complaint to recover the forfeiture provided by statute for permitting a nuisance to remain on premises after the time prescribed by the board of health of the town for its removal, should be made by the town treasurer; it may be made by an agent of the board of health, appointed under

the statute. *Com. v. Alden*, 143 Mass. 113.

2. *Rockland v. Farnsworth*, 87 Me. 473.

3. *Rockland v. Farnsworth*, 87 Me. 473. See also *State v. Wahl*, 35 Kan. 608.

4. *Com. v. Chase*, 125 Mass. 202. In this case it was held that an indictment charging the defendant with unlawfully and fraudulently adulterating "a certain substance intended for food, to wit, one pound of confectionery," did not sufficiently describe the substance alleged to have been adulterated, and would be quashed if seasonably objected to for that cause.

**Averment of Seller's Knowledge of Adulteration.** — As a general rule it is not necessary to aver that the defendant had knowledge that the article sold by him was adulterated,<sup>1</sup> the act of selling without knowledge being regarded as an act of criminal carelessness.<sup>2</sup> In some decisions it is held that the necessity of averring a knowledge on the part of the vendor that food sold by him was adulterated, depends upon whether or not he was engaged in selling as a regular trade or business;<sup>3</sup> and that when the defendant is not a regular dealer knowledge must be averred,<sup>4</sup> while if he makes the selling of such article of food his business or a part thereof, such averment is unnecessary.<sup>5</sup> It must, however, in the latter case be alleged that the defendant was engaged in the business of selling the article of food.<sup>6</sup>

**Allegation of Party to Whom Sale Was Made.** — An indictment for selling an adulterated article should allege to whom the sale was made by the defendant,<sup>7</sup> or, if the purchaser is unknown, such fact should be alleged in the indictment.<sup>8</sup>

**Milk.** — Where it was objected that an indictment for selling adulterated milk did not allege that the milk sold was cow's milk, it was held that as the statute did not mention cow's milk it must be held to include all the milk of commerce, and that the objection was groundless. *Com. v. Farren*, 9 Allen (Mass.) 489.

1. *Com. v. Evans*, 132 Mass. 11; *Com. v. Farren*, 9 Allen (Mass.) 489; *Com. v. Waite*, 11 Allen (Mass.) 264; *Com. v. Nichols*, 10 Allen (Mass.) 199; *Com. v. Smith*, 103 Mass. 444; *State v. Smith*, 10 R. I. 258; *People v. Zeiger*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 355.

2. *Com. v. Smith*, 103 Mass. 444.

**Knowledge as Aggravation.** — In *Massachusetts* a statute prescribing for the offense of selling adulterated milk, with the additional fact that the seller knows the milk to be adulterated, a fine of one hundred dollars, treats the knowledge as an aggravation of the offense. *Com. v. Smith*, 103 Mass. 444.

3. *Com. v. Flannelly*, 15 Gray (Mass.) 195.

4. *Com. v. Flannelly*, 15 Gray (Mass.) 195.

5. *Com. v. Flannelly*, 15 Gray (Mass.) 195. In this case the court said: "The legislature, knowing the difficulty of proving the guilty knowledge or belief of adulteration, intended to hold those who were engaged in the sale of milk as a business or trade to a stricter rule, and to impose on them the duty of ascertaining the purity of the article

which they offered for sale." See also *People v. Kibler*, 106 N. Y. 321.

**Averment of Knowledge Immaterial.** — In *Com. v. Farren*, 9 Allen (Mass.) 489, where the defendant was indicted for selling adulterated milk, it was held that the averment that he sold the milk knowing that it was adulterated, not being material, was to be rejected as surplusage and need not be proved.

**Contra.** — In *Com. v. McCarron*, 2 Allen (Mass.) 157, it is seemingly held that the allegation of knowledge on the part of the dealer is necessary.

6. *Com. v. Flannelly*, 15 Gray (Mass.) 195.

An indictment which charges that the defendant "did unlawfully keep, offer for sale, and sell" adulterated milk, is sufficient and charges but one offense. *Com. v. Nichols*, 10 Allen (Mass.) 199. See also *People v. Burns*, 53 Hun (N. Y.) 274, in which it was held that the offenses of exposing for sale and selling, being charged conjointly in the indictment, are to be regarded as constituting one transaction and one crime under the statute relating thereto, and as subjecting the defendant to but one penalty.

7. *People v. Burns*, 53 Hun (N. Y.) 274.

8. "The omission of such statement in the indictment constituted a material defect, as without it the defendant would be liable to surprise upon the trial, and quite likely to be prejudiced by such omission." *People v.*



**Allegation of Intent to Sell.** — According to some decisions, it is necessary for the indictment to aver that the adulteration was with the view of offering the article for sale.<sup>1</sup>

**Charging Offense in Words of the Statute.** — An indictment for selling adulterated articles of food is sufficient if it charges the facts constituting the offense in the language of the statute,<sup>2</sup> and contains averments as to time, place, person, and other circumstances identifying the particular transaction.<sup>3</sup>

**2. Selling Unwholesome Provisions — Allegation of Defendant's Knowledge.** — Where a statute imposes a penalty for knowingly selling unwholesome provisions "without making the same fully known to the buyer," the knowledge of the vendor as to their unwholesomeness is the gist of the offense, and must be distinctly averred in the indictment.<sup>4</sup>

**Allegation that Article Was Sold for Food.** — It is not necessary, it seems from the decisions, for such indictment to aver in terms that the provisions were sold as food for man.<sup>5</sup>

**Allegation of Cause of Unwholesomeness.** — Nor is it necessary to set forth what rendered the provisions unwholesome.<sup>6</sup>

**Allegation of Intent to Injure.** — Nor that the defendant intended to injure the health of those eating them.<sup>7</sup>

**Allegation that Injury Resulted.** — Nor that the health of those who ate them was injured thereby.<sup>8</sup>

**Allegations as to Whom Defendant Sold to.** — A failure to name the persons to whom the defendant sold will not render the in-

Burns, 53 Hun (N. Y.) 274. See also *People v. DuBois*, 25 N. Y. St. Rep. 101; *People v. Harris*, (Supreme Ct.) 28 N. Y. St. Rep. 297.

1. *People v. Fauerback*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 311.

2. *People v. West*, 106 N. Y. 293.

3. *People v. West*, 106 N. Y. 293.

An information which charges that the defendant "did unlawfully and knowingly offer for sale an adulterated article of food, to wit, milk," though not following the statute literally and directly charging that the milk was known by the defendant to be adulterated, is substantially sufficient. *Sanchez v. State*, 27 Tex. App. 14.

Where a statute prohibits the sale of articles of food containing other ingredients than those properly implied from the name of such article — as in the case of compound lard, etc. — unless with a label denoting the presence of such ingredients, an information charging a sale without a label is sufficient if in the language of the statute. *State v. Snow*, 81 Iowa 642.

4. *Com. v. Boynton*, 12 Cush. (Mass.) 499. See also *Goodrich v. People*, 19 N. Y. 574; *Teague v. State*, 25 Tex. App. 577.

An allegation that he did "knowingly sell" such provisions, without making fully known to the vendee that the same were diseased, is not sufficient. There should be an averment that the seller knew the provisions to be in a diseased and unhealthy state, or unfit for food, at the time of the sale. *Com. v. Boynton*, 12 Cush. (Mass.) 499.

5. *Goodrich v. People*, 19 N. Y. 574. In this case it was held that an indictment for selling unwholesome provisions sufficiently averred a sale for consumption as food for man by stating that the prisoner sold to divers citizens beef as wholesome food, well knowing the same to be diseased, unwholesome, and not fit to be eaten. See also *Rex v. Dixon*, 3 M. & S. 11.

6. *Goodrich v. People*, 19 N. Y. 574.

7. *Goodrich v. People*, 19 N. Y. 574.

8. *Goodrich v. People*, 19 N. Y. 574.

dictment defective, where such persons are unknown to the jurors.<sup>1</sup>

**3. Violation of Quarantine Orders.** — A criminal information which charges that the accused openly disobeyed a quarantine order must allege that he had knowledge of such order.<sup>2</sup>

1. *Goodrich v. People*, 19 N. Y. 574.

2. *State v. Butts*, 3 S. Dak. 577.

**Knowledge not Imputed.** — "Such an order is unlike a law, knowledge of which is charged against every one. The order might have been duly and

properly made, and after it was so made plaintiff in error might have done the very thing which the order prohibited, and still be innocent of offense unless he knew of such prohibition." *State v. Butts*, 3 S. Dak. 577.

# HEARING.

BY CHARLES C. MOORE.

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*Hearing Before Master*, see article *REFERENCES*.

*Hearing in Chambers or Vacation*, see article *CHAMBERS AND VACATION*, vol. 4, p. 336.

**I. DEFINITION.** — The trial of a chancery suit is called a hearing, and technically considered this includes not only the introduction of the evidence and the arguments of the solicitors, but the pronouncing of the decree by the chancellor.<sup>1</sup>

1. *Babcock v. Wolf*, 70 Iowa 679, citing 1 *Bouvier Law Dict.* 745. " 'Hearing' is an equity term, and is properly applied to the argument and

**II. NECESSITY FOR A HEARING.** — It is error to render a decree on the merits in a suit at issue by the pleadings without any hearing or submission.<sup>1</sup>

**III. PREPARATION FOR HEARING — 1. In Respect of Parties — The General Rule.** — Ordinarily a plaintiff cannot regularly bring a cause to a hearing and have a decree in his favor unless it is clear that all the defendants in the bill who are necessary parties have appeared, or been duly served with process,<sup>2</sup> and this rule is especially applicable where the interests of defendants are so intimately connected that either could object to a bill because the others were not made parties.<sup>3</sup>

**Exceptions to the Rule.** — But where the liability of the defendants is several and not joint, the cause may proceed to a hearing as to some of them without serving the others with process.<sup>4</sup>

**Hearing at Instance of Defendant.** — A defendant who has answered may urge the hearing of a cause which is in a state for hearing as to him, although the plaintiff may not have brought other necessary parties before the court.<sup>5</sup>

consideration of a case at the several stages of its orderly progress, but when applied to that upon which the case is absolutely determined — disposed of — it is qualified by the word 'final.' " *Miller v. Tobin*, 18 Fed. Rep. 616.

"The word 'hearing' has an established meaning as applicable to equity cases. It means the same thing in those cases that the word 'trial' does in cases at law. And the words 'final hearing' have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory." *Akerly v. Vilas*, 24 Wis. 171.

"'Trial' appropriately designates a trial by the jury of an issue which will determine the facts in an action at law; and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity." *Galpin v. Critchlow*, 112 Mass. 343.

1. *Blair v. Reading*, 99 Ill. 600.

2. *Gale v. Clark*, 4 Bibb (Ky.) 415; *Lee v. Wickcliffe*, 1 T. B. Mon. (Ky.) 110; *Walton v. Fretwell*, 3 A. K. Marsh. (Ky.) 519; *Hurt v. Crane*, 36 Md. 29; *Graham v. Elmore*, Harr. (Mich.) 265; *Schwab v. Mabley*, 47 Mich. 512. See also *Moore v. Murrah*, 40 Ala. 573.

**Insufficient Return of Service.** — A decree in favor of the plaintiff was reversed where there were two necessary

defendants of the same name, of whom one had been served with process and the other was dead, and the return did not indicate in unequivocal terms whether the service was upon the deceased before his death, or upon the survivor. *Grider v. Payne*, 9 Dana (Ky.) 188.

3. *Cox v. Strode*, 2 Bibb (Ky.) 273; *Evans v. Wait*, 5 J. J. Marsh. (Ky.) 110; *Beauchamp v. Davis*, 3 Bibb (Ky.) 111, holding that a decree in the absence of the proper parties was erroneous, although the objection was not taken at the hearing. See also *Dougherty v. Walters*, 1 Ohio St. 201.

"It is a settled rule that a suit in chancery never can be heard and disposed of as to some of the parties, unless it be in a situation to be heard and disposed of as to all those who are necessary parties." *M'Clain v. French*, 2 T. B. Mon. (Ky.) 147.

4. *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1; *Dougherty v. Walters*, 1 Ohio St. 201.

"Where the relative situation of the defendants is such that the complainant might or might not at his election have made them parties, we can see no impropriety in bringing the cause to hearing as to some, before it may be prepared for hearing as to the others." *Cox v. Strode*, 2 Bibb (Ky.) 273; *Evans v. Wait*, 5 J. J. Marsh. (Ky.) 110.

5. *Thompson v. Peebles*, 6 Dana (Ky.) 387.

*Chiles v. Allen*, 2 A. K. Marsh. (Ky.)

**2. In Respect of Issues.** — It is contrary to the general course of the court to compel a party to proceed to a hearing against his objection until the cause is at issue on the pleadings,<sup>1</sup> unless the issue has been waived.<sup>2</sup> Thus it is error to render a final decree

350, where the court said: "But in such case the court will not decree finally on the merits against or for the complainant, but will direct his bill to be dismissed without prejudice, for the want of proper parties before the court, and then the chancellor will frequently in his discretion render a decree *nisi*, that unless the necessary parties are brought before the court, on or before a given day, the bill shall be dismissed without prejudice to a future suit." See, however, *Graham v. Elmore*, Harr. (Mich.) 265, holding that where a cause is in readiness for hearing against one defendant, and there is another defendant as to whom the cause is not in readiness, the defendant who has appeared and answered cannot notice the cause for hearing, but must move to dismiss the bill for want of prosecution if the plaintiff fails to expedite it.

1. *Culver v. Elwell*, 73 Ill. 538; *Brachen v. Colquhoun*, 4 Hawks (N. Car.) 410, where the court said: "The cause could not have been properly set for hearing without the defendants having answered or been in contempt for not answering." See also *Tedder v. Stiles*, 16 Ga. 1.

**Bill and Cross-bill Without Answer.** — A cause cannot be set down for hearing on bill and cross-bill without answers. *Byrd v. Sabin*, 8 Ark. 279.

**No Issue on Counter-claim.** — Rendering judgment for the defendant in an equitable action, upon his counter-claim against infant plaintiffs, before the reply is filed by the guardian *ad litem*, is fatally erroneous. *Smith v. Ferguson*, 3 Met. (Ky.) 424.

**No Answer to Amendment.** — After the submission of a cause for hearing upon the pleadings and proofs, the court allowed the plaintiff to amend his bill so as to make an entirely distinct separate issue, and proceeded to hear the case as made by the amendment, and further proof touching the same, against the defendant's protest and without laying a rule upon him to answer the amendment so that he could be placed in default. It was held to be manifest error to refuse a continuance. *Gage v. Brown*, 125 Ill. 522. See *Scott v. Harris*, 113 Ill. 447. As to the neces-

sity of requiring an answer to an amended bill before proceeding to a hearing against the defendant on the bill as amended, see also *Tedder v. Stiles*, 16 Ga. 1; *Sumrall v. Ryan*, 1 J. J. Marsh. (Ky.) 97.

But where, after a defendant has filed his answer, the bill is amended by making a new party, against whom a decree *pro confesso* is rendered; and the cause is set down for a hearing upon the bill, answer, replication, etc., by the consent of the defendant, he cannot be heard to complain that he was not required to file a new answer upon the amendment of the bill. He was at liberty to file a new answer, but the complainant was not obliged to require him to do so. *Miller v. Whittaker*, 33 Ill. 386.

**Non-compliance with Statute.** — In *Holly v. Powell*, 63 Ill. 139, a plaintiff filed exceptions to the defendant's answer, which were allowed and the decree thereupon entered for the plaintiff. A statute provided that if an answer was adjudged insufficient on exceptions filed, the defendant should be ruled to answer further before the cause could be set down for a hearing. It was held that the decree was premature and erroneous.

**Harmless Error.** — In *Vaughan v. Smith*, 69 Ala. 92, one of several defendants had failed to appear, but no decree *pro confesso* was taken against him. The other defendants answered, testimony was taken, and the cause went to a hearing and the bill was dismissed. It was held that the proceeding was erroneous, but that the plaintiff was responsible for not having the cause put at issue as to the defaulting defendant, that the plaintiff was not injured, and that the error was not available to reverse the decree.

And in *Rucker v. Howard*, 2 Bibb (Ky.) 166, it was held that if the plaintiff fails to enforce an answer from one of two defendants or to take the bill *pro confesso* as to him, he cannot for that cause reverse a decree upon a hearing brought on by the other defendant.

2. "When the cause is heard, without objection by either party, all steps

upon the bill and proofs, without first compelling an answer, or defaulting the defendants, and taking the bill as confessed.<sup>1</sup> But the parties may, by agreement, dispense with an answer or waive the necessity of the default and order *pro confesso* and proceed to a hearing on the bill and proofs alone, and the decree, if warranted by the evidence, will be binding.<sup>2</sup> And where no formal replication is filed, and the defendant proceeds to a hearing on pleadings and evidence without objection, it is a waiver of the defective condition of the pleadings.<sup>3</sup>

**3. Setting Causes for Hearing — By Rule Entered.** — The English practice of setting down causes for hearing by rule entered or supposed to be entered for that purpose has been continued in some of the United States.<sup>4</sup> In other jurisdictions the case

not taken by either, which the other had a right to insist upon for the orderly bringing the cause to a hearing, must be considered as waived." *Allen v. New York*, 7 Fed. Rep. 483.

**No Issue as to Some of the Defendants.** — In *Davenport v. Auditor Gen.*, 70 Mich. 192, all of the several defendants appeared, and one of them answered but the others did not. Before the plaintiff had entered an order to take proofs, and before the time had expired for his doing so, the defendant's solicitor noticed the cause for hearing on bill and answer. The cause was not then at issue as to the other defendants, nor had their default for not pleading been entered. Without making any objection, however, the plaintiff's solicitor went to a hearing and a decree was rendered dismissing his bill. It was held on appeal that he must be considered as having waived the defect in the proceedings. *Distinguishing Graham v. Elmore*, Harr. (Mich.) 265, and *Schwab v. Mabley*, 47 Mich. 512.

1. *Wilson v. Spring*, 64 Ill. 14.

As to the necessity of an interlocutory order taking the bill as confessed against an absent defendant before proceeding to a hearing and taking a decree *pro confesso*, see article DECREEs, vol. 5, p. 984.

2. *Wilson v. Spring*, 64 Ill. 17, conceding, however, that the practice is loose and irregular.

3. *Jones v. Brittan*, 1 Woods (U. S.) 667; *Fischer v. Wilson*, 16 Blatchf. (U. S.) 220; *Holt v. Weld*, 140 Mass. 578; *Cobb v. Rice*, 130 Mass. 231. See also *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405.

**Replication a Matter of Form.** — Where

a cause has been brought to a hearing upon bill, answer, and depositions, the replication is considered but as a matter of form. *Scott v. Clarkson*, 1 Bibb (Ky.) 277; *Jameson v. Conway*, 10 Ill. 227. See generally article REPLICATION.

**Filing Nunc Pro Tunc.** — The court may permit a replication to be put in *nunc pro tunc* at the hearing, or even after a decree. *Hind's Pr.*, tit. Replication, p. 289. See also *Jones v. Brittan*, 1 Woods (U. S.) 667; *Jameson v. Conway*, 10 Ill. 227.

**Submission by Agreement.** — Where a cause was submitted by agreement as upon bill, answer, and general replication, though no general replication was in fact filed, the answer was considered as replied to, and accorded no more weight as evidence than it would be entitled to if a replication had been filed. *Glenn v. Hebb*, 12 Gill & J. (Md.) 271.

**Presumption of Regularity.** — Where a cause is set for hearing at the next term "on the issue formed," and at that term "submitted on bill, answer, replication, exhibits, and depositions," it will be presumed on appeal that a replication was filed, though the record shows none, and that its failure to appear in the record is due to a clerical error. *Sneed v. Town*, 9 Ark. 537.

4. Such is the practice in *New Jersey*, according to *Morris v. Taylor*, 23 N. J. Eq. 131. See also *Reed v. Rawlings*, 1 Mo. 753; *Poling v. Johnson*, 2 Rob (Va.) 255; *Ronald v. Princeton Bank*, 90 Va. 813; *Lange v. Jones*, 5 Leigh (Va.) 192; *Brachen v. Colquhoun*, 4 Hawks (N. Car.) 410.

In *Mississippi* the court said it was usual to give the clerk an order in

stands for hearing at a time prescribed by statute, or when the pleadings are in a certain condition, and no order formally setting the cause down is necessary.<sup>1</sup>

**On Bill and Answer.** — It is a general rule that a plaintiff may at any time, without a replication or by withdrawing his replication, set the cause down for final hearing on bill and answer.<sup>2</sup> And when a cause stands on bill and answer, without further proceedings, the plaintiff is the only party competent to set it down for final hearing.<sup>3</sup>

**On Pleadings and Proof.** — When the cause is ripe for hearing on the pleadings and evidence, it may be set down for hearing at the instance of either party.<sup>4</sup>

**On Equity Reserved.** — Where a decree reserves further directions

writing directing him to set down a cause upon the docket for hearing, but that it was not essential that the order thus given should be in writing. *Reynolds v. Nelson*, 41 Miss. 83.

**In the Federal Circuit Courts.** — In *Electrolibration Co. v. Jackson*, 52 Fed. Rep. 773, it was said that an equity case, at least in the Tennessee circuit, was rarely set down for hearing formally, but that "when the case is ready for hearing \* \* \* the parties appear informally in court, and proceed with the matter, no attention being paid to a formal entry setting the hearing down in writing on the minutes, order-book, or docket."

**Not Jurisdictional.** — Setting causes for hearing is not a jurisdictional proceeding, and even where it is required by statute the court has authority to hear and determine the case without first setting it for hearing if the parties go to trial without objection. *Keatts v. Rector*, 1 Ark. 391.

**On Bills Taken Pro Confesso.** — As to the practice of setting causes down for hearing on orders taking the bill as confessed, see article DECREES, vol. 5, p. 999.

1. *Thomas v. Coultas*, 76 Ill. 493.

**In the New York Chancery** it was not necessary to obtain an order to set the cause down for hearing. Rule 88 in Chancery.

2. *Contee v. Dawson*, 2 Bland (Md.) 267; *Hughes v. Phelps*, 3 Bibb (Ky.) 198. See also *Holmes v. Williams*, 4 Hawks (N. Car.) 371.

3. *Somerville v. Marbury*, 7 Gill & J. (Md.) 275.

**In Florida** the Rules of Practice for the circuit courts in suits in equity only authorize the "plaintiff or complainant

to set down the cause for hearing on bill and answer." *Gary v. Mickler*, 21 Fla. 539.

**By the English Practice** a defendant could not set down the cause for hearing on bill and answer without previously giving a rule for a replication. The practice was so stated and followed in *Lowry v. M'Gee*, 5 Yerg. (Tenn.) 238, and no rule for replication having been given, the rule for hearing on bill and answer was held to be irregular and the hearing erroneous.

4. *Barton's Suit in Equity*, p. 132, and note, where it is said that "by the ancient rule of the court there was always a term between passing publication and hearing the cause, that the several suitors might have time to prepare themselves for attendance. See *For. Rom.* 134, 151. But the later rule in chancery was that the plaintiff should have liberty to set down his cause for hearing on the next term after publication, and on failure it might be set down by the defendant on the term next following, and if the plaintiff did not then appear, his bill would be dismissed for want of prosecution."

In *Somerville v. Marbury*, 7 Gill & J. (Md.) 275, it was said that "by the settled practice of courts in equity in Maryland, after the return of the commissioner appointed to take the testimony has remained in the office of the county clerk, or register in chancery, the time prescribed by the rules or practice of the court, it is competent for either the complainant or defendant to set the cause down for a final hearing." See also *Richardson v. Stillinger*, 12 Gill & J. (Md.) 477; *Hatton v. Weems*, 12 Gill & J. (Md.) 83.



and equity, the cause should be set down for hearing on the equity reserved.<sup>1</sup>

**Notice of Hearing.**—The subpoena to hear judgment which was used in the English Chancery has not been adopted in this country, but notice of the hearing, according to the exigency of the case, is substituted in its place.<sup>2</sup>

**4. Cause to Be Heard Entire.**—It is the principal object of a hearing to leave nothing undecided that is capable of decision.<sup>3</sup> A party is entitled to only one hearing on the merits,<sup>4</sup> and to

1. *Ruckman v. Decker*, 28 N. J. Eq. 5, where, however, it was held that an omission to set the cause down for hearing had been waived.

**Decree on Further Directions.**—“ ‘Further directions’ are not given upon motion. They are only granted upon a hearing after a master’s report, or upon the case coming on again for the purpose, in pursuance of a former order or decree. The court may then add to a decree; for instance, by allowing interest upon a sum reported by the master to be due, *Creuze v. Hunter*, 2 Ves. Jr. 164, or by declaring what are the rights of parties as ascertained under the first order or decree, and thus carry out and effectuate the object of the suit. But, upon a hearing for further directions on points of equity reserved, the court cannot materially alter or vary the first decree. *Parnell v. Price*, 14 Ves. Jr. 502.” *Gardner v. Dering*, 2 Edw. Ch. (N. Y.) 131.

2. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 363; *Morris v. Taylor*, 23 N. J. Eq. 131.

**Noticing by Anticipation.**—“A party cannot notice a cause for hearing by anticipation. If a suit be waiting for a report, it cannot, merely because such report will be obtained before the cause can be heard, be put upon a calendar for a hearing.” *Mix v. Mackie*, 2 Edw. Ch. (N. Y.) 426.

**Service of Notice.**—Notice of final hearing dated on Sunday, but served on Monday at the solicitor’s dwelling-house in his absence, was held to be good service in *Taylor v. Thomas*, 2 N. J. Eq. 106.

**On Bills Taken Pro Confesso.**—As to the right of a defendant to notice of the hearing on a bill taken as confessed against him, see article DECREES, vol. 5, p. 999. *Price v. Boden*, (Fla. 1897) 22 So. Rep. 657.

**Alabama.**—“Neither the English practice of setting down a cause for hearing at the term after publication is

made and issuing a subpoena *ad audiendum judicium*, nor that in respect to speeding causes, etc., has ever been adopted or followed in this state. Our statute requires that ‘in all cases where the answer is filed ten days before the sitting of the court, or the bill is taken *pro confesso* for want of an answer, the cause shall be heard and determined at that term, if practicable, unless on good cause shown either party may continue the same.’ Clay’s Digest, 351, § 38. No notice is required as to the term the cause will be heard. The law fixes this, and causes in chancery stand upon the chancery docket for trial at the next term after the bill is filed, if the subpoena has been served upon the defendant thirty days before the commencement of the term, for he has that period within which to answer or demur to the bill. *Ib.*, § 35.” *Hodges v. Wise*, 16 Ala. 509.

3. *Goodrich v. Goodrich*, 66 Mich. 522.

4. *Hume v. Commercial Bank*, 1 Lea (Tenn.) 220, the court saying: “The sound and safe rule is to have only one trial of all the questions involved in a cause;” *Clark v. Garrett*, 6 Lea (Tenn.) 267, where the court said: “Undoubtedly it is erroneous to dispose of one part of a case between the same parties by a decree not only settling rights, but directing those rights to be enforced accordingly, before the whole of the matters of litigation between those parties are ready to be finally determined. The reason is that the dissatisfied party may be thus deprived of his right of imperative appeal, which the law concedes to him before the execution of the decree.” See also *Graham v. Elmore*, *Harr.* (Mich.) 265.

**Plea Embodied in Answer.**—If a defense which may be pleaded is relied upon in the answer, its validity can only be determined at the hearing. That part of the answer cannot be set down for argument, as a plea. *M’Lin*

split up defenses and try each defense separately is not permissible.<sup>1</sup>

**5. Consolidation of Causes for Hearing.**—In some cases it is the practice of the court of chancery to consolidate two or more causes for hearing together,<sup>2</sup> but if the party in interest fails to make a motion to that end, it is not erroneous for the chancellor to proceed to a hearing and decree in one cause alone.<sup>3</sup>

**6. Premature Hearing and Waiver of Irregularity — Premature Hearing Without Consent.**—Where a cause is heard before the time prescribed by statute or rule of court, a decree rendered thereon against a party is erroneous as to him in the absence of his express or implied consent to the premature hearing.<sup>4</sup>

*v. M'Namara*, 1 Dev. & B. Eq. (N. Car.) 407, where the court said: "The defense, it is true, is proper for a plea, the office of which is to render an answer unnecessary. If the defendant does not, indeed, choose to bring it forward, by way of plea, he may insist on it in an answer. But if he does, the whole case made by the bill and answer is open for consideration, and the party cannot claim to have that part of his answer, as constituting a distinct and substantive bar, disposed of before the cause is ready for hearing on all the pleadings and proofs. It is, doubtless, competent for the court, upon the hearing, to decline entering into other parts of a cause, if there be one decisively against the plaintiff. But that is only to save time and unnecessary labor, and is a decision of the court in the cause, when the whole of it is open to discussion upon the hearing, and is very different from setting the case down to be heard upon the bill; one particular part of the answer, and the replication to it. There is, in fact, no plea to be argued. There is an answer, and the cause now stands on a general replication to it; and therefore the equity cannot be denied until the case shall come on regularly to a hearing."

**Demurrer Clause in Answer.**—A separate hearing ought not to be granted on a demurrer clause in an answer. *Zabel v. Harshman*, 68 Mich. 270.

*Contra.*—*Holt v. Daniels*, 61 Vt. 93.

**1.** *Hume v. Commercial Bank*, 1 Lea (Tenn.) 220, where it was said that "the court below probably erred, even with the consent of parties, in trying a part of the defendant's defense to the original bill separate from his other defenses."

**2.** "Where there are, in the same chancery court, two or more suits in

which different creditors, or creditors and others, severally claim interests adversely to each other in the same property, and the facts upon which the rights of each depend need to be investigated before the rights of any can be definitely settled, there should be ordinarily a consolidation of the causes when that is possible, to the end that they may be heard and decided together, or if that cannot be effected, one or more of them should be stayed until a determination shall be reached in another, or to the others. And when such a stay is ordered, the cases involving the more important questions upon the determination of which the rights of the respective contestants chiefly depend ought to be first considered." *Ex p. Brown*, 58 Ala. 541, citing *Daniell Ch. Pr.* (4th ed.) 797, 798. See also article CONSOLIDATION OF ACTIONS, vol. 4, p. 689.

**3.** *Ex p. Brown*, 58 Ala. 536.

**4.** *Clark v. Carnall*, 18 Ark. 212; *Beveridge v. Mulford*, 62 Ill. 177; *Holly v. Powell*, 63 Ill. 139; *Pursley v. Davidge*, 3 A. K. Marsh. (Ky.) 237; *Baltzell v. Hackley*, 4 Litt. (Ky.) 129; *Gregory v. Powers*, 3 Litt. (Ky.) 339; *Sumrall v. Ryan*, 1 J. J. Marsh. (Ky.) 97; *Smith v. Ferguson*, 3 Metc. (Ky.) 424; *Harris v. Adams*, 2 Duv. (Ky.) 141; *Gruell v. Smalley*, 1 Duv. (Ky.) 359; *Richardson v. Stillinger*, 12 Gill & J. (Md.) 477; *Reed v. Rawlings*, 1 Mo. 753; *Trammell v. Ford*, Phil. Eq. (N. Car.) 339; *Lowry v. McGee*, 5 Yerg. (Tenn.) 238; *Gray v. Dickenson*, 4 Gratt. (Va.) 87.

**Harmless Error.**—If a cause is prematurely heard and the bill dismissed, it will not be remanded for that reason, where there could be no other result than delay and increased costs. *Mayse v. Biggs*, 3 Head (Tenn.) 36.

**Waiver of Irregularity.** — But where a party expressly consents to a premature hearing,<sup>1</sup> or appears and participates therein without objection, it is a waiver of the irregularity.<sup>2</sup>

**IV. THE HEARING** — 1. **Formal Mode of Hearing.** — In the English Chancery the formal mode of hearing a cause where all the parties appear upon its being called was stated as follows: The plaintiff's bill is first opened, or the substance of it briefly stated, and the defendant's answer also, by the junior counsel on each side, after which the plaintiff's leading counsel states the case and the matters in issue and the points of equity arising therefrom; and then such depositions and parts of the defendant's answer as are intended to be used on the part of the plaintiff are read by the junior counsel. It is, however, now usual for the court to dispense with the opening of the bill and answer by the junior counsel, so that the hearing is commenced by the leading counsel stating the case of the plaintiff.<sup>3</sup> When all are heard the court pronounces the decree either immediately or at a subsequent day.<sup>4</sup>

In the State Courts of Chancery, the English practice as above described is followed in substance<sup>5</sup> or the mode of hearing

Nor will a decree rendered against one defendant upon a cause prematurely heard without his consent be reversed upon the appeal of other defendants whose interests were not prejudiced and against whom no relief was asked. *Clark v. Carnall*, 18 Ark. 212. See also *Johnson v. Rankin*, 3 Bibb (Ky.) 86.

As to presumption of injury, see *Tedder v. Stiles*, 16 Ga. 1.

1. *Baltzell v. Hackley*, 4 Litt. (Ky.) 129; *McConnell v. Donnell*, *Sneed* (Ky.) 314. See also *Young v. Young*, 17 N. J. Eq. 161; *Ronald v. Princeton Bank*, 90 Va. 813.

2. *Ferguson v. Collins*, 8 Ark. 253; *Keatts v. Rector*, 1 Ark. 391; *Anderson v. Moore*, 145 Ill. 61; *Jameson v. Conway*, 10 Ill. 227; *Jones v. Chappell*, 5 T. B. Mon. (Ky.) 422; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Moss v. Rowland*, 3 Bush (Ky.) 505; *Hart v. Bloomfield*, 66 Miss. 100; *Poling v. Johnson*, 2 Rob. (Va.) 255. See also *Armstrong v. Pitts*, 13 Gratt. (Va.) 235.

**Presumption of Waiver.** — In *Gardner v. Landcraft*, 6 W. Va. 36, where a cause was prematurely heard and the record did not disclose that objection was made to the hearing, there was held to be a presumption that the cause was heard without objection. See also *Poling v. Johnson*, 2 Rob. (Va.) 255; *Gregg v. Brower*, 67 Ill. 525.

3. *Daniell Ch. Pr.* (2d Am. ed.) 1185, 1186.

4. *Daniell Ch. Pr.* (6th Am. ed.) 980.

5. In *Gibson's Suits in Chancery*, § 524, the practice is described as follows: "The complainant's solicitor makes a brief statement of the nature of his bill. The defendant's solicitor then states his defense, or reads the material part of his answer. If there be any defendants in default, as to whom no judgment *pro confesso* has been entered, the complainant may now have a *pro confesso* entered against them. The evidence is then read in the following order: 1st, the evidence in support of the bill is read by the complainant's solicitor; 2d, the evidence of the defendant is read by his solicitor; and, 3d, if the complainant has any rebutting evidence it is read last. The evidence having been all read, the junior counsel for the complainant opens the argument; he is followed by the junior and senior counsel for the defendant in turn; and then the senior counsel for the complainant is heard in reply. On the conclusion of the argument the chancellor announces the decision if he has reached one; if not, he reserves his decision until a future day, and the papers and briefs of counsel and authorities relied on are sent to his chambers."

In *Barton's Suit in Equity* (Am. ed.),

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is prescribed by rule of court.<sup>1</sup>

2. "Submission" of the Cause. — Where a cause is "submitted" by counsel, it means that it is left to the court to determine without argument.<sup>2</sup>

p. 133, it is said: "The parties appearing by their counsel, when the cause is reached on the call of the docket, the allegations of the plaintiff and the answer of the defendant are briefly stated to the court by the junior counsel on each side. The leading counsel of the plaintiff then enters more particularly into the nature, circumstances and merits of his case, and informs the court of the points in issue between the parties. Such parts of the depositions and answer of the defendant as the plaintiff chooses to call for are then read for the purpose of receiving the remarks and animadversions of his counsel. The defendant afterwards proceeds in the same manner to make his defense, and the plaintiff's counsel are heard in reply."

**Right to Open and Close.** — If a cause is heard upon a plea or demurrer, the defendant opens; if upon bill and answer or pleadings and proofs, the plaintiff opens. Hoffman Ch. Pr. 495.

Upon hearing on bill, cross-bill, answers and depositions, where both causes come on to be heard together, and each party has material allegations to sustain under the respective bills, the plaintiff in the original bill is entitled to the opening and reply. Murphy v. Stults, 1 N. J. Eq. 560.

1. In Maine the 18th Rule of Practice in Chancery Cases, 37 Me. 588, provides as follows: "The abstract [required by the preceding rule and mentioned in this note] will be read by the opening counsel for the plaintiff with assistance in reading if he desires it. He will then in argument present all the points and positions taken upon the law and the facts in the case, and make his references to books and cases to sustain them; and state what decree he hopes to obtain. The opening counsel for the defendant will then, in like order, present his case, and only when no other counsel argues for the defendant also reply to the preceding argument. The reply may be made by another counsel, but he will be strictly limited to it; and cannot be allowed to make new points, or to repeat or reinforce the preceding argument. The reply to the argument for the defend-

ant will then be made, and will, in like manner, be strictly limited to a reply. Counsel may present an argument in writing instead of one orally, or may submit his case without argument."

**Copies, Abstracts and Points.** — In the New York Chancery Court a rule required that where the cause was submitted on bill and answer the plaintiff must furnish the court with a copy of the pleadings and also an abstract thereof; and on a hearing on pleadings and proofs the plaintiff was to furnish copies of necessary papers, except that each party was to furnish copies of the testimony and abstracts of the exhibits on his part. Hoffman Ch. Pr. 494. And upon the argument of a cause heard on pleadings and proofs each party was required to furnish his opponent and the court a copy of the points on which he relied. Beatty v. McNaughton, 1 Barb. Ch. (N. Y.) 319.

In Maine, by the 17th Rule of Practice in Chancery Cases, 37 Me. 588, the counsel for the plaintiff is required, after publication of the testimony, to make an abstract of the material part of the pleadings and testimony, and to furnish the court and opposite counsel with copies thereof. If the opposing counsel deems the abstract materially incorrect, he may make out copies of "corrections of the abstract," one of which is to be presented to the plaintiff's counsel.

2. Ridgely v. Carey, 4 Har. & M. (Md.) 174, where the court said: "Like other terms indeed, it may be modified or qualified by concomitant words, such as 'submitted' on notes of the counsel 'filed' or 'to be filed.' But never yet was the term 'submitted' in this court, without such modification or qualification, understood to mean otherwise than that the party or parties who 'submitted' dispensed with the benefit of argument. The practice of the chancellor on the submission of causes is generally known. He proceeds to examine the papers; if no doubt or difficulty occurs, he decrees without hesitation; if a doubt occurs, and he does not think proper to investigate the point without the aid of the counsel's argument, or if, on investigation, the doubt remains,

**3. Objections at the Hearing.** — Speaking generally, mere formal objections to the pleadings or other prior proceedings,<sup>1</sup> or objections which do not present insuperable obstacles to a decree providing substantial justice to all the parties, will not be entertained when first made at the hearing. Objections at the hearing are treated in this work under the various titles characterizing or suggesting the particular ground of objection. Thus, as to objections for want of parties, see article PARTIES; for multifariousness, see article MULTIFARIOUSNESS; for want of jurisdiction generally, see article JURISDICTION; on the ground of adequate remedy at law, see article REMEDY AT LAW; for laches, see article LACHES; for uncertainty in the allegations of the bill, see article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 289; and as to objections at the hearing of bills of interpleader, see article INTERPLEADER; and objections to depositions at the hearing, see article DEPOSITIONS, vol. 6, p. 471.

**4. Power to Vacate Prior Interlocutory Decrees.** — By the modern practice, on the final hearing of a suit in chancery, all previously rendered interlocutory orders and decrees are before the court and may be altered, modified, or vacated, as justice may require.<sup>2</sup>

**5. Evidence on the Hearing.** — By the ancient practice in the English Chancery the testimony was taken privately in writing by an examiner or commissioner upon written interrogatories and cross-interrogatories previously framed for that purpose.<sup>3</sup> And at the hearing of the cause the court would not receive *viva voce* testimony unless to prove an exhibit.<sup>4</sup> The same general course of practice has prevailed in the federal courts and in those states having a separate court of chancery, while in other states distinctions in the mode of trial of common-law and equity cases have been wholly or partly abolished, and witnesses may be examined

or he thinks it more safe and prudent to learn in what light it strikes the counsel, he then lays aside the papers and notifies the counsel of his desire to have the cause argued."

**Register's Note of Submission.** — In *Jackson v. Hooper*, 107 Ala. 634, on appeal from an interlocutory decree appointing a receiver, the cause having been submitted for such appointment on affidavits, it was held that a rule of the chancery court requiring the register to make a note of submission for hearing was not intended to apply to such applications, and that the omission to make such note was immaterial. Moreover, the court said that "it does not appear that any such objection was raised at the hearing."

1. "Objections to pleadings which involve no substantial interest are not

allowed upon a final hearing." *Freeman v. Scofield*, 16 N. J. Eq. 30.

In *Airs v. Billops*, 4 Jones Eq. (N. Car.) 17, a defendant who was named in the bill and was the only necessary party defendant appeared and answered, and moved for the dissolution of an injunction, which was dissolved, and after further pleadings and proofs the cause was regularly set down for hearing. It was held too late for him to move to dismiss the bill on the ground that it contained no prayer for process against him.

2. See article DECREES, vol. 5, p. 1044.

3. *Langdell Eq. Pl.* (2d ed.), § 90.

4. *De Butts v. Bacon*, 1 Cranch (C. C.) 569. As to proof of exhibits at the hearing, see article EXHIBITS, vol. 8, p. 737.

orally in open court, or by depositions taken in the same manner and for the same causes as at law.<sup>1</sup>

**6. Trial of Equitable Issues Under the Codes.** — In code practice law and equity cases are usually placed on separate dockets.<sup>2</sup> And in equitable actions under the codes, and in actions at law in which an equitable defense is pleaded, the general rule is that issues both of law and of fact must be tried by the judge sitting as

<sup>1</sup> 3 Greenl. Evidence, §§ 251, 256 *et seq.*

As to answers as evidence, see article ANSWERS IN EQUITY PLEADING, vol. 1, p. 864.

As to bills of discovery and production of documents, see article DISCOVERY, vol. 6, p. 728.

As to evidence taken by depositions, see article DEPOSITIONS, vol. 6, p. 471.

As to bills to perpetuate testimony, see article PERPETUATION OF TESTIMONY. See further article BILLS DE BENE ESSE, vol. 3, p. 329.

**Hearing on Bill and Answer.** — In *Durham v. Mulkey*, 59 Ill. 91, a defendant filed his answer at the return term, and no replication being filed, the court ordered the cause to be set down for hearing on bill and answer at the next term of the court, as provided by statute. At that term the parties came by their respective solicitors, and the cause was submitted for a final hearing upon bill, answer, and proofs, and the court rendered a decree. It was objected on appeal that the court having set the case for hearing on bill and answer, it was error to hear evidence. The court disposed of this contention as follows: "It is a sufficient reply to this position to say that both parties appeared and went to trial without objection. If appellant was not disposed to proceed to trial on the evidence, he should have objected, and insisted upon a hearing alone on bill and answer. Having failed to object, he must be held to have waived his right to insist that the trial should have been on bill and answer."

**Examining Witnesses Before Hearing.** — In equity proceedings the chancellor may, in his discretion, examine witnesses before the case is taken up. *Morey v. Staley*, 54 Mo. 419.

**Further Evidence After Hearing Closed.** — After the cause has been fully argued and submitted to the court for its decision, it is error for the court to receive additional evidence from either party without the knowledge of the other. *Comstock v. Purple*, 49 Ill.

160. When the evidence to prove a particular fact necessary to support the case is held incompetent at the hearing upon the bill, by reason of the non-production of a paper, or want of proof of its loss, the court may, in its discretion, order the cause to stand over, to enable the party to exhibit further interrogatories, for the purpose of making an exhibit of the paper, or accounting for its non-production. *Doe v. Doe*, 37 N. H. 268. See also *Desplaces v. Goris*, 5 Paige (N. Y.) 252; *Cogswell v. Burtis*, Hoffm. Ch. (N. Y.) 198.

**Register's Note of Testimony.** — In *Alabama*, Rule 77 in Chancery, Ala. Code, p. 824, provides that the register shall make note of the testimony produced on the hearing, and that any testimony not so noted must not be considered as a part of the record, nor be considered by the chancellor. In *Carter v. Thompson*, 41 Ala. 375, the court said that if the record does not show any note of the testimony "it becomes a grave question \* \* \* whether this court can review the decree of the court below upon the pleadings and proof."

But where a cause was submitted on the bill, decree *pro confesso* and proofs, as the decree *pro confesso* is ordinarily sufficient to entitle the plaintiff to relief without further proof (see article DECREES, vol. 5, p. 990), the omission of the register to make a note of the evidence as required by the rule was not a reversible error. *Jones v. Beverly*, 45 Ala. 161.

In *Iowa*, Laws 1878, c. 145, requires that oral evidence taken in court on the trial of equitable actions shall be in writing. Stenographic notes of the evidence cannot be regarded as a compliance with the statute. *Godfrey v. McKean*, 54 Iowa 127.

In *South Carolina*, in equity cases, the court may, in its discretion, have the testimony taken and reported to him by a referee. *McSween v. McCown*, 21 S. Car. 373.

<sup>2</sup> See article CALENDARS AND TRIAL DOCKETS, vol. 3, pp. 801, 808.

a chancellor, except that he may in his discretion, as under the former chancery practice, take the verdict of a jury for the information of his conscience.<sup>1</sup> In some states, however, the parties have an absolute right to the trial of issues of fact in equity cases as in common-law cases.<sup>2</sup>

1. In Missouri, where counts at law and in equity are included in the same petition, they require separate trials and separate judgments. *Crowe v. Peters*, 63 Mo. 429; *Boeckler v. Missouri Pac. R. Co.*, 10 Mo. App. 448.

In Montana cases in equity, in which equitable relief is demanded, and actions at law, in which an equitable defense is made, cannot be tried by a jury as at law, but the decree must be rendered by the judge, sitting as a chancellor in a court of chancery. *Gallagher v. Basey*, 1 Mont. 457.

In New York, in a case of an equitable nature, the awarding of issues of fact, for trial by a jury, rests wholly in the discretion of the court. It is not a matter of right. *Paul v. Parshall*, 14 Abb. Pr. N. S. (Buffalo Super. Ct.) 138, where the court said: "Under our present system, in place of one chancellor for the state, we have a large number of judicial officers who are each invested with the same powers, prerogatives and functions as the chancellor under the former system. Those powers and prerogatives are as well defined now as ever; nothing having been added to them, and in nothing have they been diminished; and the court proceeds to administer equity between the suitors, guided by the same rules, and aided by the same machinery of practice." See *Davis v. Morris*, 36 N. Y. 569.

In Oregon the general rule in equity cases is, that both issues of law and fact shall be tried by the court, but whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, a statement of the question may be made and submitted to them, and their verdict may be read in evidence. *Swegle v. Wells*, 7 Oregon 222.

In South Carolina, where an equitable defense is made in an action at law, "at the trial, the legal and the equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by jury, while those which would formerly have been properly triable in equity must be determined by the judge in the exercise of his chancery power. In the latter class, when questions of fact are submitted to the jury, the purpose can only be to enlighten the understanding of the judge by giving him the aid of a verdict, but the verdict is not binding, and may be totally disregarded by the judge in arriving at his final determination." *Adickes v. Lowry*, 12 S. Car. 97; *Smith v. Bryce*, 17 S. Car. 538; *Chapman v. Lipscomb*, 18 S. Car. 222.

And where legal and equitable causes of action are embraced in one complaint they must be separately tried, each according to its distinctive mode. *McMahan v. Dawkins*, 22 S. Car. 314.

In Washington it is error to compel the trial of a cause as an action at law, when both the complaint and answer invoke the equity powers of the court. *Distler v. Dabney*, 7 Wash. 431.

But, although an action may be commenced as an equitable one, yet where there is nothing to give a court of equity jurisdiction thereof the court has authority to permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial. *Surber v. Kittenger*, 6 Wash. 240.

2. 3 Greenl. Evidence, § 260 *et seq.*

# HEIRS AND DEVISEES.

BY CHARLES C. MOORE.

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**I. LIABILITY FOR ANCESTOR'S OR TESTATOR'S DEBTS — 1. By the Common Law of England. — a. OF HEIRS — On What Contracts of the Ancestor. —** At common law, when the ancestor expressly bound himself and his heirs<sup>1</sup> in an obligation under seal, the heir, even to remote generations,<sup>2</sup> was liable to an action by the

1. To make the heir responsible, it was essential that he be expressly named in the bond or covenant of his ancestor. *McDonald v. McElroy*, 60 Cal. 484; *Gilchrist v. Filyau*, 2 Fla. 94; *Rohrbaugh v. Hamblin*, 57 Kan. 393; *Lawrence v. Hayden*, 4 Bibb (Ky.) 229; *Sneed v. Phillips*, 2 J. J. Marsh. (Ky.) 131; *Monroe v. Winlock*, 4 Litt. (Ky.) 135; *Lawrence v. Buckman*, 3 Bibb (Ky.) 23; *Scott v. King*, 3 Dana (Ky.) 470; *Chambers v. Davis*, 17 B. Mon. (Ky.) 532; *Evans v. Fisher*, 40 Miss. 643; *Titterton v. Hooker*, 58 Mo. 598; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282; *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311;

*Read v. Patterson*, 134 N. Y. 131; *Hauselt v. Patterson*, 124 N. Y. 356; *Haynes v. Colvin*, 19 Ohio 396; *Neal v. M'Combs*, 2 Yerg. (Tenn.) 10; *Johnston v. Dew*, 5 Hayw. (Tenn.) 224.

**Personal Covenants. —** Even though an agreement under seal expressly purport to bind the heirs of the obligor, yet if the covenant be essentially personal, and affect only the acts of the parties themselves, the heirs are not liable to an action at common law for a breach of the contract. *Chambers v. Wright*, 40 Mo. 482.

2. **Heirs Liable Ad Infinitum. —** "When the lands of the obligor, descended to his heir, who died seized of the same,

obligee.<sup>1</sup> In respect to simple contract debts of the ancestor the heir was not liable, and the creditor's only remedy was against the executor or administrator of the deceased to reach the personal estate in his hands.<sup>2</sup>

the heir of the obligor's heir was liable." *Hutchinson v. Stiles*, 3 N. H. 404. To the same point, see *Crocker v. Smith*, 10 Ill. App. 376; *Merrill v. Atkin*, 59 Ill. 19; *Waller v. Ellis*, 2 Munf. (Va.) 88.

"The remote heir was held liable to the extent of the assets descended to him, not because his immediate ancestor was liable, but because his remote ancestor had made him liable." *Scott v. King*, 3 Dana (Ky.) 471.

"If the lands have passed through more than one descent, the heir of the heir is liable upon the bond of the ancestor from whom the lands originally descended. \* \* \* The liability continues, says one of the books, to many generations." *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311.

**Personal Representatives of Heir.** — "It seems never to have been doubted that an action might be maintained against an executor or administrator of the heir. In *Rastall's Entries*, 171, the form of a declaration against the executor of an heir may be found." *Hutchinson v. Stiles*, 3 N. H. 404. But compare *Bacon Abr.*, tit. Heir and Ancestor (F.).

1. *Florida*. — *Gilchrist v. Filyau*, 2 Fla. 94.

*Illinois*. — *Dugger v. Oglesby*, 3 Ill. App. 106; *People v. Brooks*, 123 Ill. 246.

*Kentucky*. — *Estill v. Hoy*, Hard. (Ky.) 94; *South v. Hoy*, 3 Bibb (Ky.) 522; *Holder v. Com.*, 3 A. K. Marsh. (Ky.) 407; *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 401.

*Maryland*. — *Tessier v. Wyse*, 3 Bland (Md.) 40.

*Massachusetts*. — *Hall v. Bumstead*, 20 Pick. (Mass.) 2; *Russ v. Alpaugh*, 118 Mass. 369.

*Mississippi*. — *Evans v. Fisher*, 40 Miss. 643.

*Missouri*. — *State v. Hoshaw*, 86 Mo. 193; *Sauer v. Griffin*, 67 Mo. 654; *Walker v. Deaver*, 79 Mo. 664; *State v. Pohl*, 30 Mo. App. 321; *Metcalf v. Smith*, 40 Mo. 572.

*New Hampshire*. — *Ticknor v. Harris*, 14 N. H. 272; *Hutchinson v. Stiles*, 3 N. H. 404; *Russ v. Perry*, 49 N. H. 547;

*Mead v. Harvey*, 2 N. H. 341; *Hall v. Martin*, 46 N. H. 337.

*New York*. — *Gere v. Clarke*, 6 Hill (N. Y.) 350.

*North Carolina*. — *Winfield v. Burton*, 79 N. Car. 388.

*South Carolina*. — *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257.

*Tennessee*. — *Neal v. M'Combs*, 2 Yerg. (Tenn.) 10.

*Virginia*. — *Alexander v. Byrd*, 85 Va. 690.

*West Virginia*. — *Rex v. Creel*, 22 W. Va. 373.

*United States*. — *Chewett v. Moran*, 17 Fed. Rep. 820; *Payson v. Hadduck*, 8 Biss. (U. S.) 293.

**Nature of Liability.** — The heir was not liable as tenant of the land descended, but as a debtor in the *debit and detinet*. *Hutchinson v. Stiles*, 3 N. H. 404; *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311; *State v. Hoshaw*, 86 Mo. 193.

*The Body of the Heir* could not be taken except when he had aliened before suit brought. *Hopkins v. Ladd*, 12 R. I. 282.

**Option to Sue Personal Representative of Ancestor.** — The creditor might, at his election, sue either the heir or the administrator or executor of the obligor. *Hutchinson v. Stiles*, 3 N. H. 404; *Davies v. Churchman*, 3 Lev. 189; *Gilchrist v. Filyau*, 2 Fla. 94; *Tessier v. Wyse*, 3 Bland (Md.) 40; *Cox v. Strode*, 2 Bibb (Ky.) 276; *Rex v. Creel*, 22 W. Va. 373; *Johnston v. Dew*, 5 Hayw. (Tenn.) 224.

**Effect of Assignment of Bond to Co-heir.** — Where the obligee in a bond assigns the same to one of several heirs of the obligor the assignment operates as a satisfaction of the bond, and the assignee has no remedy thereon. *Sneed v. Mayfield*, *Cooke* (Tenn.) 60.

2. *Alabama*. — *Scott v. Ware*, 64 Ala. 174.

*Arkansas*. — *Williams v. Ewing*, 31 Ark. 233.

*Illinois*. — *Ryan v. Jones*, 15 Ill. 1; *Hoffman v. Wilding*, 85 Ill. 453.

*Kentucky*. — *Kentucky Female Orphan School v. Fleming*, 10 Bush (Ky.) 234; *Estill v. Hoy*, Hard. (Ky.) 94; *Bedell v. Keethley*, 5 T. B. Mon. (Ky.)

**On Judgments Against Ancestor.** — If a judgment was obtained against the ancestor in his lifetime, the obligation became thereby extinguished, and the heir not being named in the judgment was not bound thereby; and no action could be maintained against him upon it nor his interest be otherwise affected by it.<sup>1</sup>

**To What Extent.** — While the creditor, by specialty in which the heir was named, could reach the land itself in such heir's hands, the heir was bound no further than he had assets by descent,<sup>2</sup> and real estate was alone regarded as assets, for nothing else descended to him.<sup>3</sup>

598; *Monroe v. Winlock*, 4 Litt. (Ky.) 135.

*Maryland.* — *Lodge v. Murray*, 1 Har. & J. (Md.) 499.

*Minnesota.* — *Bryant v. Livermore*, 20 Minn. 313.

*Mississippi.* — *Evans v. Fisher*, 40 Miss. 643.

*New Hampshire.* — *Hall v. Martin*, 46 N. H. 337.

*New Jersey.* — *New Jersey Gas Co. v. Meeker*, 37 N. J. L. 282.

*New York.* — *Read v. Patterson*, 134 N. Y. 131; *Hauselt v. Patterson*, 124 N. Y. 356.

*North Carolina.* — *Winfield v. Burton*, 79 N. Car. 388.

*Tennessee.* — *Gray v. Darby*, Mart. & Y. (Tenn.) 396; *Johnston v. Dew*, 5 Hayw. (Tenn.) 224; *Neal v. M'Combs*, 2 Yerg. (Tenn.) 10.

*United States.* — *Payson v. Hadduck*, 8 Biss. (U. S.) 293.

**Ancestor's Real Estate Not Liable.** — "However large his real estate might be, no recourse could be had to it to pay simple contract debts, although his personal property was utterly insufficient to meet them." *Clark v. Hornthal*, 47 Miss. 469.

1. *South v. Hay*, 3 Bibb (Ky.) 523; *Holder v. Com.*, 3 A. K. Marsh. (Ky.) 407; *Johnston v. Dew*, 5 Hayw. (Tenn.) 224.

As to the remedy by *scire facias*, see *infra*, IV. *Scire Facias on Judgments*, etc.

2. Unless by failure to plead or by false pleading he made himself liable personally for the entire debt. See *infra*, II. 1. *g. Judgment*.

3. *People v. Brooks*, 123 Ill. 248; *Rohrbaugh v. Hamblin*, 57 Kan. 393; *Phillips v. Munsell*, 5 J. J. Marsh. (Ky.) 253; *Ready v. Stephenson*, 7 J. J. Marsh. (Ky.) 351; *Russ v. Alpaugh*, 118 Mass. 369; *State v. Hoshaw*, 86 Mo. 193; *Chauvin v. Wagner*, 18 Mo. 531;

*Walker v. Deaver*, 79 Mo. 664; *Hall v. Martin*, 46 N. H. 337; *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311; *Hauselt v. Patterson*, 124 N. Y. 356; *Haynes v. Colvin*, 19 Ohio 396; *State v. Lewellyn*, 25 Tex. 798; *Yancy v. Batte*, 48 Tex. 57; *Payson v. Hadduck*, 8 Biss. (U. S.) 293.

**Legal Assets.** — As to what are and what are not legal assets in the hands of the heir that can be reached by an action at law, see *Hall v. Martin*, 46 N. H. 337; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Hawkins v. Hulburd*, 10 Ohio 178.

Lands not lying in the state or country where the action is brought are not assets in the hands of the heir. *Payne v. Logan*, 4 Bibb (Ky.) 402; *Brown v. Bashford*, 11 B. Mon. (Ky.) 67.

**Profits of the Land.** — The heir was not liable at law for the profits he derived from the land during the time he had it in possession. *Chambers v. Davis*, 17 B. Mon. (Ky.) 532; *Moore v. Shields*, 68 N. Car. 327; *Washington v. Sasser*, 6 Ired. Eq. (N. Car.) 336; *Combs v. Young*, 4 Yerg. (Tenn.) 218; *Boyd v. Martin*, 9 Heisk. (Tenn.) 387; *Blow v. Maynard*, 2 Leigh (Va.) 29. See, however, *Fredericks v. Isenman*, 41 N. J. L. 214, where the court said: "For, although perhaps in the books of forms no precedent for such an injury can be found, nevertheless, in *Henningham's Case*, 3 Dyer 344a, the chief justice distinctly declares that such a recovery is allowable, his language being: 'That if the profits of the land descended from the death of the father until the day of the writ amount sufficiently to satisfy the debt, and the plaintiff will show that to the court, and the defendant cannot deny it, the plaintiff shall have a general judgment and execution immediately.'"

**Effect of Alienation by Heir.**—If the heir had *bona fide*<sup>1</sup> aliened the lands<sup>2</sup> which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent, at the time of suing out the writ or filing the bill, and the obligee had no remedy at law against either the heir or the lands.<sup>3</sup> If, however, the alienation was not *bona fide*, or was made after the commencement of the suit, or after the original purchased, as the older books express it, the lands were chargeable and might be taken in execution under the judgment against the heir.<sup>4</sup>

**b. OF DEVISEES.**—At common law a devisee was not liable for the debts, either by specialty or simple contract, of the testator, even in respect of the lands descended,<sup>5</sup> nor was the devisee

**1. Fraudulent Alienation.**—“If he had made a fraudulent alienation before the action, it was void at the common law, and is so now by the statute 13 Eliz., c. 5, which is in this respect declaratory of the common law, and the obligee may either have a general judgment against the heir, or a special one, and take out execution of the land in the hands of the alienee.” Jeffreson v. Morton, 2 Saund. 7, note 4.

**Bona Fides of Alienation.**—The facts that a mortgagee of the heir, before suit brought against the latter, knew at the time the mortgage was given that the land had belonged to the decedent, and that the decedent left debts unpaid, would not of themselves be evidence of bad faith in the mortgagee. Den v. Jaques, 10 N. J. L. 259.

In Mead v. Orrery, 3 Atk. 235, and in Nugent v. Gifford, 1 Atk. 463, knowledge that the property assigned was assets, and the purchaser's knowledge of debts in general, were not of themselves, in the opinion of Chancellor Hardwicke, sufficient to affect the validity of assignments made for a valuable consideration and when no collusion existed.

For a further discussion of the question of *bona fides* in an alienation, see Warren v. Raymond, 17 S. Car. 163.

**2.** A mortgage by the heir of the lands descended before suit brought is considered as an alienation. Den v. Jaques, 10 N. J. L. 259.

**3.** Bacon Abr., tit. Heir and Ancestor (F.); Gibson v. Mitchell, 16 Fla. 519; People v. Brooks, 123 Ill. 248; Dugger v. Oglesby, 3 Ill. App. 106; Hoffman v. Wilding, 85 Ill. 453; Ryan v. Jones, 15 Ill. 1; Cox v. Strode, 2 Bibb (Ky.) 273; Ready v. Stephenson,

7 J. J. Marsh. (Ky.) 351; Buford v. Pawling, 5 Dana (Ky.) 283; Chambers v. Davis, 17 B. Mon. (Ky.) 532; Sauer v. Griffin, 67 Mo. 654; Whittelsey v. Brohammer, 31 Mo. 108; Ticknor v. Harris, 14 N. H. 272; Fredericks v. Isenman, 41 N. J. L. 213; Den v. Jaques, 10 N. J. L. 259; Roosevelt v. Fulton, 7 Cow. (N. Y.) 82; Hopkins v. Ladd, 12 R. I. 279; State v. Lewellyn, 25 Tex. 798; Rex v. Creel, 22 W. Va. 373.

“By such alienation both the heir and the lands were placed at law out of the reach of the creditor.” Den v. Jaques, 10 N. J. L. 259.

**4.** Bacon Abr., tit. Heir and Ancestor (F.); Den v. Jaques, 10 N. J. L. 259. But see Whittelsey v. Brohammer, 31 Mo. 108, where the court said: “Lord Coke says: ‘If an action of debt be brought against the heir, and he alieneth, hanging the writ, yet shall the land, which he had at the time of the original purchase, be charged, for that the action was brought against the heir in respect of the land.’ Folio 102b. But we conceive that this would depend on the nature of the judgment obtained against the heir. If the judgment was a special one against the land descended, an alienation of it pending the writ would not defeat the execution of the creditor. But where the judgment was general one \* \* \* such judgment will not operate by way of relation to the original, but binds only in common cases from the time of the judgment given. Gree v. Oliver, Carth. 245.”

**5.** Bacon Abr., tit. Heir and Ancestor (F.); Scott v. Ware, 64 Ala. 174; People v. Brooks, 123 Ill. 248; Ryan v. Jones, 15 Ill. 1; Scott v. King, 3 Dana (Ky.) 470;

of an heir so liable on the bonds or covenants of the testator's ancestor.<sup>1</sup>

**2. By English Statutes**—Act of 3 and 4 Wm. and Mary.—To prevent the wrong and injury to creditors by alienation of the lands descended,<sup>2</sup> the statute of 3 and 4 Wm. and Mary, c. 14, made provision that where the heir had aliened he should be liable to pay the ancestor's bond debts to the value of the land descended, in an action of debt.<sup>3</sup> And to remedy the evils arising from the common-law exemption from liability of the devisee<sup>4</sup> the same statute enacted that devises of lands with intent to defraud bond or other specialty creditors of the testator should be utterly void as against such creditors,<sup>5</sup> who were by the terms of the act

Burford v. Pawling, 5 Dana (Ky.) 283; Nelson v. George, 1 B. Mon. (Ky.) 281; Chambers v. Davis, 17 B. Mon. (Ky.) 533; State v. Pohl, 30 Mo. App. 321; Sauer v. Griffin, 67 Mo. 654; State v. Miller, 18 Mo. App. 41; Titterington v. Hooker, 58 Mo. 598; Ticknor v. Harris, 14 N. H. 272; New Jersey Ins. Co. v. Meeker, 37 N. J. L. 282; Plasket v. Beeby, 4 East 491.

"There is no principle of the common law, which has been more uniformly recognized by elementary writers and jurists than that which precludes a creditor of the testator from maintaining an action either against the devisee of lands or the legatee of chattels." Rogers v. Farrar, 6 T. B. Mon. (Ky.) 422, quoted in State v. Miller, 18 Mo. App. 41.

**No Liability in Equity.**—In Holley v. Weedon, 1 Vern. 400, an action at law was brought against the heir at law upon a bond of the ancestor. The heir put in a false plea, and after verdict in the plaintiff's favor, but before the time for entering judgment on it, the defendant died, having devised the lands descended. On a bill against a devisee to be paid the debt, Lord Chancellor King said: "Dismiss the bill. There is no color of equity in the case, unless you'll have it that the heir died maliciously before day in bank on purpose to defeat plaintiff in his debt." The case is cited with approval in Edwards v. McClave, (N. J. 1896) 35 Atl. Rep. 829.

1. Holley v. Weedon, 1 Vern. 400; Nelson v. George, 1 B. Mon. (Ky.) 281; Scott v. King, 3 Dana (Ky.) 470.

2. See *supra*, I. 1. a. Of Heirs.

3. Section 5 of the statute, quoted in Bacon Abr., tit. Heir and Ancestor (F.), provided: "That in all cases where any heir at law shall be liable to pay the

debt of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before any action brought or process sued out against him, that such heir at law shall be answerable for such debt or debts in an action or actions of debt to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir to the value of the said land as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution."

Section 6 prescribed the manner of raising an issue concerning the lands aliened, and provided for verdict and judgment in an action on the statute. See *infra*, III. 4, 5, 6, 7.

4. See *supra*, I. 1. b. Of Devisees.

5. Section 2 of the statute quoted in Bacon Abr., tit. Heir and Ancestor (F.), reciting that several persons had by bonds or other specialties bound themselves and their heirs, and afterwards by will disposed of their lands, with an intent to defraud their creditors, enacted: "That all wills and testaments, limitations, dispositions, or appointments of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seized in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be

enabled to maintain actions of debt against the heirs and devisees jointly,<sup>1</sup> and the devisees were made liable in the same manner as the heirs-at-law,<sup>2</sup> notwithstanding an alienation of the lands devised before action brought.<sup>3</sup> It is very clear that by this statute devisees and heirs were liable to the suit of creditors by bond and specialty only.<sup>4</sup>

**Act of 5 Geo. II.** — But the remedy was subsequently extended to all creditors by the third section of the act of 5 Geo. II., c. 7, made expressly for the American colonies.<sup>5</sup>

**Acts of 1 Wm. IV. and 3 and 4 Wm. IV.** — And now, in England, by the statutes 1 Wm. IV., c. 47, and 3 and 4 Wm. IV., c. 104, real estate of a deceased owner is chargeable with all his just debts, as well those due on simple contract as on specialty.<sup>6</sup>

**3. In the United States — Liability by Statute.** — By virtue of statutes now in force it is the universal rule in the United States that the real estate of a decedent is assets for the payment of his just debts

deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators, and assigns, and every of them) to be fraudulent and clearly, absolutely, and utterly void, frustrate and of none effect; any pretense, color, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

1. Section 3 of the statute, quoted in Bacon Abr., tit. Heir and Ancestor (F.), was as follows: "And for the means that such creditors may be enabled to recover their said debts, it is further enacted, That in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt, upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees jointly, by virtue of this act; and such devisee or devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

The case of *Farley v. Briant*, 3 Ad. & El. 839, 30 E. C. L. 239, held that the statute applied only where a "debt," in the ordinary sense of the word, existed between the parties in the lifetime of the debtor, and, therefore, that an action of debt did not lie against the heirs and devisees of a surety for breaches of covenant which did not occur in his lifetime, even though the

damages upon the occurrence of such breach were liquidated.

2. See the preceding note.

3. Section 7 of the statute, quoted in Bacon Abr., tit. Heir and Ancestor (F.). Devisees being put on the same footing with heirs by this clause, it followed that lands aliened by a devisee before suit brought by a creditor of the testator were equally protected in the hands of the alienee as if they had been so alienated by the heir, though there was no express provision in the statute to protect the alienee of the devisee, as there was to protect the alienee of the heir. *Matthews v. Jones*, 2 Anst. 506.

4. *Ticknor v. Harris*, 14 N. H. 272.

5. The third section of the act 5 Geo. II., "for the more easy recovery of debts in his majesty's plantations and colonies in America," enacted that after the 20th of September, 1732, the houses, lands, negroes, and other hereditaments and real estates, situate and being within any of the said plantations belonging to any person indebted shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, etc., and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, etc. The act is quoted in *Ticknor v. Harris*, 14 N. H. 272.

6. 3 Williams on Executors (7th Am. ed. 1895) 144, 225.

of every description, but the methods of appropriating it by action at law against heirs or devisees are far from uniform. In some of the states the creditor may sue the heirs or devisees jointly with the personal representatives, or separately under certain specified conditions.<sup>1</sup> In others the legal liability of heirs

1. In Illinois the same actions which will lie against personal representatives upon contractual liabilities of the deceased may be maintained against them jointly with the heirs or devisees. 2 Starr & Curt. Annot. Stat. Ill. 1896, p. 2029, § 11.

The heir or devisee is liable only when there is an insufficiency of personal estate. *People v. Brooks*, 123 Ill. 246; *Hoffman v. Wilding*, 85 Ill. 453; *Guy v. Gericks*, 85 Ill. 428; *McLean v. McBean*, 74 Ill. 134; *Bishop v. O'Conner*, 69 Ill. 431; *Ryan v. Jones*, 15 Ill. 1. And *a multo fortiori* the heir is not liable where he has not derived and cannot derive anything from the ancestor's estate. *Tennant v. Neal*, 20 Ill. App. 571.

The creditor may sue the personal representative and the heirs jointly; he may sue the personal representative and the devisees jointly; or he may sue the personal representative and the heirs and devisees jointly. *Ryan v. Jones*, 15 Ill. 4. See also *Campbell v. Potter*, 147 Ill. 587.

A separate action against the heir or devisee may be brought only where in an administration proceeding it appears by a judgment of record or a proper officer's return that there is not sufficient personal property to satisfy it. 2 Starr & Curt. Annot. Stat. Ill. 1896, p. 2032, § 14; *Campbell v. Potter*, 147 Ill. 587. See also *Ryan v. Jones*, 15 Ill. 1; *Hoffman v. Wilding*, 85 Ill. 453. Or where the estate is not administered on within one year from the death of the testator or intestate. 2 Starr & Curt. Annot. Stat. Ill., p. 2032, § 15.

*Exclusiveness of Statutory Remedy.* — In *Crocker v. Smith*, 10 Ill. App. 378, it was held that the statute did not work a repeal of the common-law remedies on specialty debts, and an action for breach of a covenant of warranty by the ancestor was sustained against the heirs, although the personal representative who had made a final settlement of the estate was not joined as a defendant, and the averments in the plaintiff's declaration did not bring the case within the provisions of the statute authorizing a separate action against the

heirs. See also *Ryan v. Jones*, 15 Ill. 1; *Hoffman v. Wilding*, 85 Ill. 453. But in *People v. Brooks*, 123 Ill. 246, it was said that "the entire question of the liability of heirs and devisees for the debts of ancestors and devisors is covered by" the statutes noticed "and others hereafter referred to which relate to the method of procedure." See also *Dugger v. Oglesby*, 3 Ill. App. 94 [reversed on another point in 99 Ill. 405], an action of covenant on a warranty, where the court said that the administrator, who, it appears, had made a settlement and distribution of the estate, was properly and "necessarily" made a party defendant.

*In Kentucky.* — "The same actions which lie against the personal representatives may be brought jointly against him and the heir or devisee of the decedent, or both." Bullitt & Feland Gen. Stat. Ky., 1888, p. 669, § 6, a transcript of the second section of the Act of 1792, which first subjected lands to sale by executions upon judgments.

The act of 1792 above mentioned was construed so as to make it absolutely necessary to join the personal representative with the heir or devisee in an action upon a contract which did not bind the heir at common law, or where the declaration did not aver that the heirs were bound. *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 401; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 564; *Lawrence v. Hayden*, 4 Bibb (Ky.) 229; *Lawrence v. Buckman*, 3 Bibb (Ky.) 23, where the court said: "For wherever a statute creates a right and prescribes a remedy, that remedy and no other can be pursued;" *Conley v. Boyle*, 6 T. B. Mon. (Ky.) 637; *Monroe v. Winlock*, 4 Litt. (Ky.) 136; *Holder v. Com.*, 3 A. K. Marsh. (Ky.) 407; *Sneed v. Phillips*, 2 J. J. Marsh. (Ky.) 131; *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346, holding that if there is no personal representative the remedy is by bill in equity against the heirs. But a suit might still be brought against the heirs alone as at common law upon a contract under seal expressly binding them. *Lansdale v. Cox*, 7 T. B. Mon. (Ky.) 401; *Bedell v.*

and devisees is provisional only and depends upon the exhaustion of remedies by action or otherwise against the personal representatives.<sup>1</sup> In still others it seems that the heirs are not

Lewis, 4 J. J. Marsh. (Ky.) 564; Lawrence v. Buckman, 3 Bibb (Ky.) 23, where the court said: "In that case the remedy given by the act is cumulative, and does not derogate from the right to proceed as at common law;" Meek v. Ealy, 2 J. J. Marsh. (Ky.) 329, holding that the plaintiff might elect to sue either heirs or personal representative alone, or all of them jointly.

The act of 1819 authorized a separate action against the heirs or devisees upon any contract upon which a joint action against them and the personal representative could have been maintained under the act of 1792, where no person administered on the estate for the period of one year after the decedent's death; or where it appeared by a judgment of a court of record or by the return of a proper officer that there was no property of the deceased in the hands of the personal representative to satisfy the prior judgment against the latter. To maintain this separate action no prior suit for a devastavit or a bill of discovery against the personal representative was required, and no delay by the creditor in pursuing his remedy against the personal estate could defeat the action, unless such delay were fraudulent or at least injurious to the defendants. *Litsey v. Smith*, 10 B. Mon. (Ky.) 74. Compare, as to the effect of delay in defeating equitable remedies, *Buford v. McKee*, 3 B. Mon. (Ky.) 224.

The statutes now in force do not expressly provide for separate actions at law against heirs and devisees. And it has been held that "in order to proceed at law against the heir or devisee it is absolutely necessary that the personal representative shall be joined as a defendant." *Hagan v. Patterson*, 10 Bush (Ky.) 441, where the court said: "The heir or devisee has the right to demand that the debts of the decedent or testator shall be satisfied by the personal representative, if there be assets in his hands sufficient for that purpose; and when sued at law they cannot have the benefit of this right unless the personal representative be also sued, and the judgment so framed as to be first levied of the assets in his hands." *Hagan v. Patterson*, 10 Bush

(Ky.) 441. See also *Perry v. Seitz*, 2 Duv. (Ky.) 122.

1. In *Indiana* "a creditor of a decedent's estate must proceed to enforce his claim against it through an administration, and cannot, in the first instance, sue the heirs, devisees, or legatees, where there has been no administration." *King v. Snedeker*, 137 Ind. 503 [citing *Wilson v. Davis*, 37 Ind. 141; *Leonard v. Blair*, 59 Ind. 510; *Stevens v. Tucker*, 73 Ind. 73, where the court said: "If letters have not been issued, the issuing thereof should be procured under the provisions made therefor;" *Chandler v. Chandler*, 78 Ind. 417]. See also *Carr v. Huette*, 73 Ind. 378; *Rinard v. West*, 92 Ind. 359; *Cincinnati, etc., R. Co. v. Heaston*, 43 Ind. 172; *Nelson v. Hart*, 8 Ind. 293. And in no case are the heirs, devisees, or distributees of a debtor personally liable to the creditor except where the latter, six months prior to final settlement of the decedent's estate, was insane, an infant, or out of the state, and then only to the extent of the property received by them from such estate. *Burns's Annot. Stat. Ind.* 1894, § 2597; *Leonard v. Blair*, 59 Ind. 510.

"It has been held that if a non-resident files his claim against an estate, and afterwards dismisses it, he will not be entitled to maintain an action against the heirs of the decedent. *Busenbark v. Healey*, 93 Ind. 450; *Yeast v. Willis*, 9 Ind. 548; *Voris v. State*, 47 Ind. 345. The reason is that by filing his claim the court acquired jurisdiction of his person and of the subject-matter, and hence the creditor had the opportunity of establishing his demand in the usual course of administration, without proceeding against the heir, who, according to the common law, was not liable on the simple contract of his ancestor." *Silvers v. Canary*, 114 Ind. 132.

In *Maine*, where a right of action accrues before the expiration of the period of limitation, and might be maintained upon the demand against the executor or administrator by taking the proper legal steps, the heirs or devisees are not liable to an action. *Sampson v. Sampson*, 63 Me. 328; *Baker v. Bean*, 74 Me. 17; *Fowler v. True*, 76



liable to actions at law by creditors, and the remedy of the latter against the realty appears to be confined to the statutory proceed-

Me. 43. But where the right of action does not thus accrue, the creditor has the option either to file his demand in the probate office, or resort to a suit against the heir, to be brought within a year from the time when his claim becomes due and payable. *Sampson v. Sampson*, 63 Me. 328.

**In Massachusetts** "the liability of heirs for the debts of an ancestor depends wholly upon statute, and is provisional only. By the statute heirs, when bound at all, are liable whether heirs are named in the obligation or not; so they are liable, as well for debts by simple contract as for specialty debts; so devisees are liable, as well as heirs, to the extent of the property received by devise; so legatees or distributees of personal property are liable, as well as those who take a freehold by descent. \* \* \* The rule of the common law, making the specialty debt of the ancestor *de facto* that of the heir, and presuming that the heir has assets until he shows the contrary by plea, does not prevail in this commonwealth." *Hall v. Bumstead*, 20 Pick. (Mass.) 2.

The heirs are not liable to a personal action upon the covenants of the ancestor, even if they have received assets, unless administration has been taken out, and a breach occurs after the estate has been settled. *Russ v. Alpaugh*, 118 Mass. 369, *citing* *Royce v. Burrell*, 12 Mass. 395; *Hall v. Bumstead*, 20 Pick. (Mass.) 2.

"It is only 'after the settlement of an estate by an executor or administrator,' as well as after the expiration of the time limited for the commencement of actions against him, that debts which could neither have been sued against him, nor secured by application to the judge of probate \* \* \* to have assets retained or a bond given, can be the subject either of an action at law or of a suit in equity against the heirs or next of kin." *Grow v. Dobbins*, 124 Mass. 560, 128 Mass. 272; *Brooks v. Rayner*, 127 Mass. 268; *Hall v. Bumstead*, 20 Pick. (Mass.) 2; Mass. Pub. Stat. 1882, p. 775, §§ 26, 27.

**In Minnesota** heirs and devisees are liable to an action by a creditor of a deceased person to recover the debt to the extent of the value of all real property inherited by or devised to them, where

it appears that the personal assets are insufficient or that the creditor, after due proceedings in the probate court, has been unable to collect the debt from the personal representatives or next of kin or legatee; but these qualifications of liability do not apply where the land is expressly charged by will. 2 Kelly Stat. Minn. 1891, §§ 5589, 5590, 5591.

Failure to present a claim against the estate for allowance in the probate court or to appeal from a disallowance by commissioners precludes a recovery against the heir. *Hill v. Nichols*, 47 Minn. 382; *Bryant v. Livermore*, 20 Minn. 313. Unless the claim was a contingent one which could not be proved in the probate court. *Lake Phalen Land, etc., Co. v. Lindeke*, (Minn. 1896) 68 N. W. Rep. 974.

**In Missouri** "no creditor can be permitted to proceed against the real estate in the possession of the heirs till he has first exhausted his remedy against the personality, where it is shown that there were assets in the hands of the administrator. In all personal claims the proceeding must, in the first instance, be against the administrator, either in the probate or circuit court, as directed by statute." *Pearce v. Calhoun*, 59 Mo. 271. But where the right of action accrues after the estate has been administered, the liability of the heirs is then the same as at common law. See *supra*, I. 1. a. *Of Heirs*; *Sauer v. Griffin*, 67 Mo. 654, *construing* *Wag. Stat. Mo.*, p. 1352, § 7, now Rev. Stat. Mo. 1889, § 8839; *Walker v. Deaver*, 79 Mo. 664; *State v. Pohl*, 30 Mo. App. 321; *State v. Hoshaw*, 86 Mo. 193. See also *Metcalf v. Smith*, 40 Mo. 572. And in such a case the creditor is not driven to a new administration and a suit against the administrator *de bonis non*, but may maintain his action directly against the heirs. *Walker v. Deaver*, 79 Mo. 664.

**Liability of Devisees.**—The act of 3 and 4 Wm. and Mary, c. 14, is not a part of the common law of Missouri, and there is in that state no similar or equivalent enactment; hence, devisees are not liable to an action by a creditor, and the only way to subject assets in their hands to the payment of the testator's debts is by statutory proceedings in the probate court. *State v. Pohl*, 30 Mo. App. 327; *Sauer v. Griffin*,

ing for a sale in the court having jurisdiction of administrations.<sup>1</sup>

67 Mo. 654; *State v. Miller*, 18 Mo. App. 41; *Whittelsey v. Brohammer*, 31 Mo. 98.

In *New Hampshire* heirs, devisees, or distributees are not liable to an action by a creditor so long as he has a remedy against the executor or administrator. *Probate Judge v. Brooks*, 5 N. H. 82; *Hutchinson v. Stiles*, 3 N. H. 404, where the opinion contains an interesting discussion of the question. *E converso* creditors whose demands depend upon a contingency and could not have been proved while the estate was in the course of administration may maintain an action against the heirs or devisees or against the distributees of personalty. *Russ v. Perry*, 49 N. H. 547; *Hall v. Martin*, 46 N. H. 337, containing a critical review of *Ticknor v. Harris*, 14 N. H. 272.

In *North Carolina* all persons succeeding to the real or personal property of a decedent by inheritance, devise, bequest, or distribution are liable for the debt of such decedent, but not beyond the value of the property acquired, and only where no part of the debt could have been collected by action or other due proceeding from the executor, administrator, or collector. *North Carolina Code*, 1883, §§ 1528, 1529.

In *Texas*, "under the law as it was formerly the right to sue heirs and distributees was in express terms given creditors for the purpose of making them liable to the extent of the property belonging to the estate received by them. *Pas. Dig. art. 1375*; *Green v. Rugely*, 23 Tex. 539. But this statutory right is not continued in force in express terms in the Revised Statutes. It is only where administration has been taken and the estate is afterwards withdrawn from administration by the heirs or distributees, that our present statute provides that 'any creditor may sue any distributee, or he may sue all the distributees together, who have received any of the estate, but no one of such distributees shall be liable beyond his just proportion, according to the estate he may have received in the distribution.' *Rev. Stat. art. 1971*. But notwithstanding the right no longer exists by statute, and notwithstanding it is a general rule that 'there must be an executor or administrator representing an estate to enable a creditor to bring suit to subject the property of a deceased debtor to the payment of his

debt,' *Green v. Rugely*, 23 Tex. 539; *Webster v. Willis*, 56 Tex. 468, still there are exceptions to this rule. In *McC Campbell v. Henderson*, 50 Tex. 601, it was held that where there neither is, nor can be, administration, as from lapse of time or otherwise, and heirs are in possession of property of their ancestor, such heirs are his personal representatives, and an action may be revived against them, or a new suit be brought against them. In *State v. Lewellyn*, 25 Tex. 797, it was held that 'a suit by a creditor to enforce the payment of a debt against the estate of a deceased person, upon which there has been no administration, cannot be maintained against the heirs, unless it be averred and proved that the estate has descended to the heir against whom the suit was instituted.' Again, in *Patterson v. Allen*, 50 Tex. 23, it is held that where there is no administration on the estate of a deceased person, and but one debt against the estate, and the heirs of such deceased person, by an agreement among themselves, partition and distribute the estate without satisfying the debt, the party in whose favor such debt is due \* \* \* may sue for the debt, making the heirs defendants, without administration on the estate of their ancestor.' In all such cases as those mentioned in these authorities the right to sue is an equitable one, independent of the statute. In its main features the case we are considering is almost identical with the case of *Patterson v. Allen*, 50 Tex. 23. *Peters v. Hood*, 2 Tex. App. Civ. Cas., § 376. See also *Turman v. Robertson*, 3 Tex. App. Civ. Cas., §§ 216, 217; *Zuernerman v. Rosenberg*, (Tex. 1889) 11 S. W. Rep. 150; *Low v. Felton*, 84 Tex. 378; *Buchanan v. Thompson*, 4 Tex. Civ. App. 236; *Mayer v. Jones*, 62 Tex. 365; *Webster v. Willis*, 56 Tex. 468; *Finch v. State*, 71 Tex. 52; *Schmidtke v. Miller*, 71 Tex. 103; *Thomas v. Bonni*, 66 Tex. 635; *Wyatt v. McLane*, 37 Tex. 311; *Ansley v. Baker*, 14 Tex. 607.

"The responsibility of the heir for the debt or covenant of his ancestor is to be measured, not by the amount of the ancestor's estate which vested in him, but by the amount received." *Yancy v. Batte*, 48 Tex. 46.

1. In *Arkansas* no action at law upon the contract of the ancestor can be main-

**II. COMMON-LAW ACTIONS AGAINST HEIRS OR DEVISEES — 1. For Debts of Ancestor or Testator — a. FORM OF ACTION.** — The common-law remedy against the heirs is by an action of debt or covenant.<sup>1</sup>

**b. PARTIES AND JOINDER OF PARTIES — Joinder of All the Heirs.** — At common law in an action against heirs all of them must be joined as defendants,<sup>2</sup> and in an action against surviving heirs

tained against an heir to whom assets have descended, or who has received a distributive share of the estate. "As the statute makes real estate, as well as personal, assets in the hands of the executor or administrator for the payment of all debts, there is \* \* \* no privity of contract between the ancestors and the heir, as at common law, where the heir was specially named in the covenant or bond, and the remedy in such a case is alone in equity." *Hendricks v. Keesee*, 32 Ark. 714; *Williams v. Ewing*, 31 Ark. 229.

In Florida it seems that where no judgment has been obtained against the ancestor the only remedy of a creditor against the real estate is by a proceeding for a sale in the probate court, as provided by statute. *Gilchrist v. Filyau*, 2 Fla. 94.

**Iowa.** — In *Janes v. Brown*, 48 Iowa 568, the court said: "Whether an action may be brought in this state against an heir for the debt of his ancestor is a question not argued in this case; we will not pass upon it;" and it was held that after final settlement and distribution the administrator, who was also an heir, could not maintain an action against his co-heirs for services rendered by him to the ancestor.

In *Reynolds v. May*, 4 Greene (Iowa) 286, the court said: "The estate must be administered upon; the amount liquidated by a judgment against the executor. Then the creditor can proceed by petition against the land, and have it sold. The land can also be sold on the petition of the executor. But the law certainly does not authorize, in the first instance, a direct process and suit, and personal judgment against the heirs. When the debt is established against the executor, and the estate in his hands proves insufficient to pay, and the heirs have received a part of the estate, they can be called upon to surrender up a sufficient amount to pay the demand. This is the *ultimatum* of their liability. To allow direct proceedings against them, without any

reference to the executor for the debts of the ancestor, would certainly be novel, and subversive of the whole policy of the law in settling decedent's estates."

The only statutory provisions which relate to actions against the heirs and devisees for debts of the decedent are Miller's Rev. Code, § 2485, which provides for the apportionment of costs "in an action against the heirs and devisees where the judgment is to be against them in proportion to the respective amounts received by them from the estate," and § 2486, providing that either defendant may make an effective tender of the amount due from him.

In Kansas there appears to be no remedy by action against heirs or devisees except in equity. See *Rohrbaugh v. Hamblin*, 57 Kan. 393.

1. *Estill v. Hoy*, Hard. (Ky.) 94, where it was said that there is no precedent of an action on the case against the heir upon any contract made by the ancestor.

**Indebitatus Assumpsit** will not lie against the heir for goods sold and delivered to the ancestor. *Lodge v. Murray*, 1 Har. & J. (Md.) 499.

2. *Jefferson v. Morton*, 2 Saund. 9, note 10; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 565; *State v. Hoshaw*, 86 Mo. 193; *House v. Mitchell*, Meigs (Tenn.) 138; *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311, where the court said: "The principles which are to be found in the books satisfactorily evince the necessity of uniting all these heirs in one suit. If a man be seized of lands in gavelkind and hath issue three sons, and by obligation binds himself and his heirs, and dies, an action of debt shall be maintainable against all the three sons, for the heir is not chargeable unless he hath lands by descent. Co. Litt. 376b. If one binds himself and his heirs, and leave lands at common law and lands in gavelkind, the obligee must sue all the heirs. Hob. 25. When coparceners are in by one descent, if the one has

the heirs of a deceased heir, who inherit lands originally descended from the common ancestor, must likewise be joined.<sup>1</sup> Non-joinder in either of the foregoing cases may be pleaded in abatement.<sup>2</sup>

issue and dies, and these issue enter, yet they shall be in as parceners, and therefore he who brings *precipe quod reddat* shall have it against them by one joint *precipe*. 4 Viner, tit. Action, Joinder D, d. 4, in marg. Parceners should, before partition, be jointly sued though they be entitled to the estate by different descents. 1 Chit. Plead. 29. If there are several heirs to the property chargeable, one not being liable more than another, all must be sued jointly. Com. Dig., tit. Abatement, F. 9. In *Boyer v. Rivet*, 3 Bulst. 320, Jones, Justice, said: 'If one doth bind him and his heir in a warranty covenant, debt, or annuity, the heir shall be subject for the land; all the heirs to be equally charged; and if one heir be sued severally by himself, he shall have contribution against the others.' In the note of Sergeant Williams to *Jeffreson v. Morton*, 2 Saund. 7, he says: 'If there be several heirs, such as parceners, heirs in gavelkind or borough English, and one only be charged, he is entitled to contribution from the others, and therefore may plead' that the others are not joined. It is true the learned annotator is speaking of a *scire facias* against the heir; and in some respects there is a difference between a *scire facias* on a judgment or recognizance and an action of debt on a bond, as respects the heir; but not in this particular, where he is entitled to contribution, or in other words, that other persons should share the charge with him, and this duty of contribution gives, according to the annotator, the right to the plea. The case of *Hawtrie v. Auger*, 2 Dyer 239a, is in point. It was thus: Sir Anthony Auger being seized in fee of divers lands in gavelkind bound himself and his heirs in a bond, and had issue three sons, and died seized, and they entered, and the eldest had issue a daughter and died. And debt in the *debet* and *detinet* was brought against the two sons, and the daughter of the deceased son, as heirs. The same case is reported in *Moore* 74, pl. 203, where the reporter seems to have had some doubt whether the daughter was liable; for he sub-

joins a *quere* whether she, being heir of an heir, should be chargeable with the obligation; but he had no doubt, or at least he has expressed none, whether, if chargeable, she was rightly joined in the action. The case is also reported in *Bendloe*, 146, where the declaration is given." See also *Scott v. King*, 3 Dana (Ky.) 470; *McDowell v. Lawless*, 6 T. B. Mon. (Ky.) 139; *Crisfield v. Storr*, 36 Md. 129; *Walker v. Deaver*, 79 Mo. 664; *State v. Pohl*, 30 Mo. App. 326; and the dissenting opinion in *Spicer v. Giselman*, 15 Ohio 344.

**Discontinuance as to Part of the Defendants.**—If all the heirs are before the court by the service of process, it is erroneous to permit the plaintiff to discontinue as to one and take judgment against the rest, unless such proceeding is authorized by statute. *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 565.

1. *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311, where the court said: "It was insisted in argument, on the part of the plaintiff, that if the heirs of the heir are included, difficulties will arise in the apportionment of the recovery and the form of the judgment. But it is obvious that no more serious difficulties can occur than may arise in every case where several heirs are defendants. One may confess the action and show the certainty of the assets; another may plead alienation in good faith before action brought, and another, *riens per descent*, or some other plea which he knows to be false. In all these cases the form of the recovery will differ. In *Cary v. Pooley*, 2 Keb. 588, an action of debt was brought against four co-heirs, and on several issues on *riens per descent*, assets were found as to one, and as to the rest that they had nothing, having aliened before the writ; whereon judgment was given against her that had assets *quod recuperet debitum et damna*, generally *de bonis propriis*, and on error in K. B. that judgment of C. B. was affirmed." See also *Crocker v. Smith*, 10 Ill. App. 376.

2. *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 565.

**Joinder of Alienee of Heir.** — Where the heir has aliened the land the alienee is not a proper party defendant.<sup>1</sup>

**The Guardian of a Minor Heir** is not a proper party defendant.<sup>2</sup>

**Joinder of Devisees.** — A devisee, not being liable at common law,<sup>3</sup> was of course not a proper party defendant.<sup>4</sup>

**Joinder of Personal Representative of Ancestor.** — The remedy by action jointly against the personal representatives and heirs of a debtor is unknown to the common law.<sup>5</sup>

**c. DECLARATION** — In Debt or Covenant Generally. — The declaration in an action of debt or of covenant against heirs must conform to the ordinary rules of pleading governing those forms of action, in the respect of an assignment of breach, etc.<sup>6</sup>

**Names of Defendants.** — A general designation of the defendants as "the heirs," etc., without naming them, is insufficient.<sup>7</sup>

**Averment that Heir Was Bound.** — As the heir was not bound at common law by the obligation or covenant of his ancestor unless he were expressly named therein,<sup>8</sup> it was necessary in an action against him as heir to aver that he was bound.<sup>9</sup>

**Averment of Contractual Liability.** — There is no necessity for any allegation of a promise, undertaking, contract, agreement, obligation, or liability, express or implied, on the part of the heir to pay the debt.<sup>10</sup>

**Stating the Descent.** — Where the lands have descended from the obligor to another who has died seized, and from him to the

1. Soles v. Hickman, 29 Pa. St. 345.

2. Crocker v. Smith, 10 Ill. App. 379, sustaining a demurrer by the guardian.

3. See *supra*, I. 1. b. Of Devisees.

4. Spicer v. Giselman, 15 Ohio 339.

5. Lansdale v. Cox, 7 T. B. Mon. (Ky.) 401; Galphin v. M'Kinney, 1 McCord Eq. (S. Car.) 294.

**In Equity** the rule is otherwise. See *infra*, V. 2. Parties.

6. **Debt.** — For the form of a declaration in debt against heirs, see Waller v. Ellis, 2 Munf. (Va.) 88. See also generally articles BONDS, vol. 3, p. 635; and DEBT, vol. 5, p. 894.

**Covenant.** — As to the assignment of breaches, etc., in covenant, see Dugger v. Oglesby, 3 Ill. App. 94. See also article COVENANT, vol. 5, p. 342.

7. Reynolds v. May, 4 Greene (Iowa) 285, where, under a statute providing that "when the precise name of any defendant cannot be ascertained he may be described as accurately as practicable, and when the name is ascertained it shall be substituted in the proceedings," it was held that a suit commenced by attachment against "the heirs of" a named person, without

reference to their number or condition, was not properly brought. See also Kerlee v. Corpening, 97 N. Car. 330.

8. See *supra*, I. 1. a. Of Heirs.

9. McDonald v. McElroy, 60 Cal. 496; Lawrence v. Buckman, 3 Bibb (Ky.) 23.

Lawrence v. Hayden, 4 Bibb (Ky.) 229, where the court said: "This was an action brought by the defendant in error against the plaintiffs, as heirs of David Lawrence, deceased, upon a covenant of warranty contained in a deed of bargain and sale executed by him in his lifetime to the defendant. The declaration not having alleged that the heirs were named or bound in the deed, is fatally defective."

10. Lowry v. Jackson, 27 S. Car. 318, where the court said: "This conclusively appears from the fact that his liability only extends to the value of the property descended, even though it may be much less than the amount of the debt; whereas, if his liability arose from any promise or undertaking to pay the debt, it would extend to the whole amount of the debt, regardless of the value of the property which he took by descent."

defendant, the descent must be stated specially;<sup>1</sup> but if the intermediate heirs have not had actual seizin of the fee which descended from the obligor, it seems unnecessary to notice them in the declaration.<sup>2</sup> In all cases it is sufficient to describe the defendants generally as heirs of the obligor or of the heir last seized, as the case may be, without stating how they became such heirs.<sup>3</sup>

**Averment of Assets Descended.** — It is not necessary to aver that the defendant had assets by descent.<sup>4</sup>

**Insufficiency of Personal Assets.** — It is not necessary to allege that the personal representative has no assets, for even if he has a sufficiency of assets it is no defense for the heir.<sup>5</sup>

**d. PLEAS — Confession of Assets.** — The heir might confess the action and show the certainty of assets, in which case he was not liable beyond the assets descended.<sup>6</sup>

1. Protestant Episcopal Church v. Wallace, 10 N. J. L. 317; Jeffreson v. Morton, 2 Saund. 7, note 4, where the learned editor, after stating the rule as quoted in the text, continues as follows: "As that the defendant is the heir of A. (who died last seized), who was the heir of the obligor; and so it must be where there have been several intermediate descents; for if the declaration be against the defendant as heir of the obligor, and it appear in evidence on the plea of *riens per descent* from the obligor that the defendant is heir of the heir of the obligor, it is a fatal variance. Thus where the declaration was against the defendant as brother and heir of the obligor, and it being found on the issue of *riens per descent* from him that he died seized in fee, leaving a son, who entered and died seized without issue, leaving the defendant his uncle, the obligor's brother, his heir at law, the court gave judgment for the defendant, for he had nothing as immediate heir to his brother, but to his nephew. Jenk's Case, Cro. Car. 151. See Litt. Ent. 147. So where in debt against the defendant as heir of B. it appeared in evidence on the issue of *riens per descent* from B. that he died seized in fee, leaving the defendant his daughter, and his wife with child of a son, who was afterwards born and lived an hour after his birth, it was held that this evidence did not support the issue, for the defendant had nothing from the father, the obligor, but the lands came to her by descent as heir of her brother who was last seized. Duke v. Spring, 2 Roll. Abr. 709, pl. 62. S. C. cited in

Kellow v. Roden, 3 Mod. 256. And so is Dy. 68a."

2. Jeffreson v. Morton, 2 Saund. 7, note 4.

3. Waller v. Ellis, 2 Munf. (Va.) 88, containing the form of a declaration against the heirs of an heir which was held sufficient on demurrer. Morgan v. Morgan, 2 Bibb (Ky.) 390; Jeffreson v. Morton, 2 Saund. 7, note 4, where it is said: "Thus where in debt upon bond against the defendant as heir of his ancestor, it was objected on demurrer that it was not stated in the declaration how the defendant was heir; but the court overruled the objection and took a difference between an action by and against an heir; in the former case he must show his pedigree, and how heir, for it lies within his knowledge; but in the latter it is not necessary, for he is a stranger, and it would be hard to compel him to set forth another's pedigree. Denham v. Stephenson, 1 Salk. 355, 6 Mod. 241." See also Ryan v. Jones, 15 Ill. 6.

4. "It was not necessary for the plaintiff to allege in the declaration that the heir had lands by descent. If he had not, it lay on him to plead *riens per descent*." Gere v. Clarke, 6 Hill (N. Y.) 352; Crocker v. Smith, 10 Ill. App. 379. See also the approved form of a declaration against heirs, in Waller v. Ellis, 2 Munf. (Va.) 88.

5. Tessier v. Wyse, 3 Bland (Md.) 28, citing Davy v. Pepys, Plowd. 439. The specialty creditor has his election to sue the heir or the personal representative. See *supra*, I. 1. a. Of Heirs.

6. Bedell v. Lewis, 4 J. J. Marsh. (Ky.) 562. The lands should be par-

**Riens per Descent.**—When the heir intends to rely upon the fact that nothing has descended to him, or that he has insufficient assets, he must plead it, or give notice of this matter specially; he cannot show it upon the general issue.<sup>1</sup> If the heir had *bona fide* aliened the lands which he had by descent, before the action was commenced, he could plead that he had nothing by descent at the time of suing out the writ.<sup>2</sup>

**e. REPLICATION.**—Whenever the defendant pleaded *riens per descent* the plaintiff might take issue on the plea, and say that on the day of issuing the writ the defendant had sufficient lands by descent, and conclude to the country; and this was the form of the replication at common law.<sup>3</sup>

**f. VERDICT.**—Upon issues found for the plaintiff a general verdict was rendered without assessing the value of the lands descended.<sup>4</sup>

**g. JUDGMENT.**—At common law the judgment against an heir on the obligation of his ancestor is either general or special.<sup>5</sup>

**General Judgment.**—Where the heir pleads *riens per descent*, or any other plea which is false within his own knowledge, and it is found against him, the judgment is general to recover the debt, and not special to be levied of the lands descended.<sup>6</sup> So if

ticularly described in the plea, and it should be stated where the lands lie, so that the plaintiff may be informed how to take out execution against them. *Gott v. Atkinson*, Willes 521.

**In Joint Actions.**—One may confess the action and show the certainty of the assets; another may plead alienation in good faith before action brought, and another *riens per descent*; another may plead to the merits. *Protestant Episcopal Church v. Wallace*, 10 N. J. L. 311.

1, *Van Deusen v. Brower*, 6 Cow. (N. Y.) 50, where the court said that the rules of pleading are the same in this respect, in the case of heirs, as in the case of personal representatives. See also *Gere v. Clarke*, 6 Hill (N. Y.) 352.

2, *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 82; *Cox v. Strode*, 2 Bibb (Ky.) 273. If the plea were sustained, it constituted a complete defense. See *supra*, I. 1. *a. Of Heirs.*

3, *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 83.

4, *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 83.

5, *Tidd's Pr.* 937.

6, *Dyer*, 149a; *Bacon's Abr.*, tit. Heir and Ancestor (H.); *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Jackson v. Roosevelt*, 13 Johns. (N. Y.) 97; *Fisher v. Kay*, 2 Bibb (Ky.) 434; *Keizer v.*

*Adams*, 1 A. K. Marsh. (Ky.) 314; *Rece v. May*, 2 A. K. Marsh. (Ky.) 23; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562; *Phillips v. Munsell*, 5 J. J. Marsh. (Ky.) 253. See also *Smith v. Angel*, 1 Salk. 354; *Villers v. Handley*, 2 Wils. 49.

Where debt was brought against an heir, who pleaded in bar that another was jointly and severally bound with his ancestor, and had paid the money, upon this plea being found against the heir it was held that the judgment should be general on account of the false plea. *Brandlin v. Milbank*, Carth. 93.

**Judgment on General Issue.**—Where the heir pleads the general issue, and it is found against him, the plaintiff may take judgment either generally or of assets descended at his election. *Van Deusen v. Brower*, 6 Cow. (N. Y.) 50.

**No Special Judgment Without Plaintiff's Consent.**—“And it is said that in these cases the court cannot give a special judgment without the assent of the plaintiff, as where debt was brought against the heir, who pleaded *riens per descent*, which was found for the plaintiff; and there being judgment to recover the debt, damages, and costs of the lands descended; and it not being known what land descended, a writ was awarded to inquire what land descended; the court held this judgment

judgment be given against an heir by *nil dicit*, or *non sum informatus*, or by confession, without showing in certain what assets he has by descent, the judgment is general;<sup>1</sup> and if the profits of the land descended from the death of the ancestor to the time of bringing the action are sufficient to satisfy the demand, and the plaintiff will show it to the court, and the defendant cannot deny it, the plaintiff shall have a general judgment.<sup>2</sup>

**Special Judgment.** — But if the heir acknowledge the action, and show the certainty of the assets which he has by descent, the judgment is special to recover the debt, to be levied of the lands descended,<sup>3</sup> and if the defendant plead *non est factum*,<sup>4</sup> or any other plea which is not false within his own knowledge, there is a like judgment.<sup>5</sup>

**A Judgment Quando Acciderint** may be rendered against heirs.<sup>6</sup>

**h. COSTS.** — The liability of heirs for costs *de bonis propriis* is governed by the same rule that determines the personal liability of executors and administrators in suits against them.<sup>7</sup>

**i. EXECUTION.** — Upon a judgment obtained against an heir, on the obligation of his ancestor, the plaintiff was at common law entitled to execution out of the whole of the property which he had by descent.<sup>8</sup>

erroneous because by law the judgment ought to be general, which cannot be altered without the plaintiff's consent, and that did not appear here." Bacon's Abr., tit. Heir and Ancestor (H.), citing Roll. Abr. 71.

**Harmless Error.** — But the entering of a special judgment is for the heir's advantage, and he cannot assign it for error. *Clothworthy v. Clothworthy*, Cro. Car. 437. See also *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 85; *Morgan v. Morgan*, 2 Bibb (Ky.) 388.

1. Tidd's Pr. 737; Bacon's Abr., tit. Heir and Ancestor (H.); *Smith v. Angel*, 2 Ld. Raym. 783; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Leathers v. Meglason*, 2 T. B. Mon. (Ky.) 63; *Phillips v. Munsell*, 5 J. J. Marsh. (Ky.) 253.

2. *Dyer* 344 b.

3. Tidd's Pr. 938; 4 Bacon's Abr. (Bouvier Am. ed.), tit. Heir and Ancestor (H.), p. 626; *Plowd.* 440.

If the heir confessed the action and set forth the estate which had descended to him, judgment was rendered only against the estate so disclosed, unless it was shown by the plaintiff that other estate had also descended. *Ready v. Stephenson*, 7 J. J. Marsh. (Ky.) 351.

4. "The rule recognized in the books is that when the heir pleads a false plea the plaintiff is entitled to a general judgment, but that *non est factum* of the ancestor is not deemed such a plea, if even it be found on the trial that the ancestor had executed the deed. In *Jeffreson v. Morton*, 2 Saund. 7, note 4, it is expressly laid down that the plea of *non est factum* of the ancestor is an exception to the above rule; that if it be found false it does not alter the judgment, but the lands descended only are liable to execution." *The case of Clothworthy v. Clothworthy*, Cro. Car. 437, supports the same principle." *Jackson v. Roosevelt*, 13 Johns. (N. Y.) 101.

5. Tidd's Pr. 938.

6. *Bishop v. Hamilton*, 4 J. J. Marsh. (Ky.) 548; *Wells v. Bowling*, 2 Dana (Ky.) 43, *overruling Monroe v. Wilson*, 6 T. B. Mon. (Ky.) 124, and *South v. Hoy*, 7 T. B. Mon. (Ky.) 421.

7. *Van Patten v. Badger*, 1 Wend. (N. Y.) 69. See article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 730.

An heir is not liable to costs *de bonis propriis* where he pleads the general issue, and *riens per descent* where the last is admitted by the plaintiff, though the first is found against the defendant and judgment taken of assets *quando acciderint*. *Van Patten v. Badger*, 1 Wend. (N. Y.) 69.

8. Tidd's Pr. 736; *South v. Hoy*, 3 Bibb (Ky.) 522.



**2. For Liabilities Personally Incurred** — *a. DEVISE WITH DIRECTION TO PAY MONEY* — *The Liability.* — Where a person accepts a devise which is coupled with a direction in the will that he shall pay a sum of money to a third person, he becomes subject to a personal liability to pay the money <sup>1</sup> without an express promise.<sup>2</sup>

*Form of Action.* — If it be a sum certain, the devisee may be sued in an action of debt,<sup>3</sup> otherwise in assumpsit;<sup>4</sup> or under the code by the ordinary complaint or petition to recover the money.<sup>5</sup>

*The Declaration.* — The declaration should allege an acceptance of the devise<sup>6</sup> and a promise to pay by the defendant, in consideration of his acceptance, or at least allege a legal obligation to pay.<sup>7</sup>

*b. PROMISE BY HEIR TO PAY ANCESTOR'S DEBT.* — Where an heir is liable for the simple contract debt of the ancestor to the extent of the estate inherited, his promise to pay such debt in consideration of forbearance to sue is binding, and a declaration in an action thereon need not allege that the defendant had assets, nor set forth a specific period of forbearance.<sup>8</sup>

**III. ACTIONS AT LAW AGAINST HEIRS OR DEVISEES ON STATUTORY LIABILITIES** — **1. Form of Action** — *In England.* — By judicial exposition of the act of 3 and 4 Wm. and Mary, c. 14,<sup>9</sup> the remedy there given against heirs who had aliened, or against heirs and devisees jointly, was confined to those specialties on which an action of debt would lie.<sup>10</sup> The act of 1 Wm. IV., c. 47, enabled

**1. Direction to Pay Legacy.** — *Burch v. Burch*, 52 Ind. 136; *Miltenerberger v. Schlegel*, 7 Pa. St. 241; *Headley v. Renner*, 129 Pa. St. 542; *Etter v. Greenawalt*, 98 Pa. St. 422; *Eyres's Appeal*, 106 Pa. St. 184; *Evans v. Foster*, 80 Wis. 509; *Brown v. Knapp*, 79 N. Y. 143; *Kelsey v. Western*, 2 N. Y. 500; *Yearly v. Long*, 40 Ohio St. 32; *Swasey v. Little*, 7 Pick. (Mass.) 296; *Adams v. Adams*, 14 Allen (Mass.) 65; *Lofton v. Moore*, 83 Ind. 112; *Porter v. Jackson*, 95 Ind. 210. See also *Perry v. Hale*, 44 N. H. 363.

"He becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy." *Brown v. Knapp*, 79 N. Y. 143.

**Direction to Pay Debts.** — *Gridley v. Gridley*, 24 N. Y. 130, a leading case; *Fuller v. McEwen*, 17 Ohio St. 288. Compare *Hayes v. Sykes*, 120 Ind. 180.

**2. Gridley v. Gridley**, 24 N. Y. 130.

**Nature of Liability.** — The liability is contractual and based upon the promise implied by his acceptance of the devise. *Brown v. Knapp*, 79 N. Y. 143; *Adams v. Adams*, 14 Allen (Mass.) 65; *Evans v. Foster*, 80 Wis. 509. And the statute of limitations barring actions on implied contracts is applicable.

*Fuller v. McEwen*, 17 Ohio St. 288; *Yearly v. Long*, 40 Ohio St. 32.

**3. Headley v. Renner**, 129 Pa. St. 542; *Etter v. Greenawalt*, 98 Pa. St. 422; *Miltenerberger v. Schlegel*, 7 Pa. St. 241.

**4. Gridley v. Gridley**, 24 N. Y. 130; *Lord v. Lord*, 22 Conn. 602; *Olmstead v. Brush*, 27 Conn. 530; *Swasey v. Little*, 7 Pick. (Mass.) 296; *Kelsey v. Western*, 2 N. Y. 500.

**5. Brown v. Knapp**, 79 N. Y. 143; *Gridley v. Gridley*, 24 N. Y. 130; *Fuller v. McEwen*, 17 Ohio St. 288; *Evans v. Foster*, 80 Wis. 509; *Burch v. Burch*, 52 Ind. 136.

**6. See Perry v. Hale**, 44 N. H. 363, and the forms of the declaration or complaint in *Adams v. Adams*, 14 Allen (Mass.) 65; *Etter v. Greenawalt*, 98 Pa. St. 422; *Fuller v. McEwen*, 17 Ohio St. 288; *Gridley v. Gridley*, 24 N. Y. 130; *Burch v. Burch*, 52 Ind. 136.

**7. Miltenerberger v. Schlegel**, 7 Pa. St. 245, holding, however, that the omission of such an averment is cured by verdict.

**8. Elting v. Vanderlyn**, 4 Johns. (N. Y.) 237.

**9. See supra**, I. 2. *By English Statutes.*

**10. Wilson v. Knubley**, 7 East 128;

the creditor to recover by an action of debt or of covenant, as the case might be, and the act of 3 and 4 Wm. IV., c. 104, provided for the administration in equity of the real estate of a deceased person at the suit of creditors by simple contract or by specialty.<sup>1</sup>

**In the United States.** — Where the common-law forms of action are preserved, debt or covenant, according to the nature of the liability, may be brought upon the specialty contract of the ancestor or testator,<sup>2</sup> and if the liability of heirs and devisees to actions by creditors extends to simple contract debts, assumpsit may be maintained.<sup>3</sup> Where the code system prevails the action is of course by complaint or petition.<sup>4</sup>

**2. Parties and Joinder of Parties — Action Against Heir Without Joining Devisee.** — At common law the devisee was not a proper party.<sup>5</sup> He was not a necessary party under the act of 3 and 4 Wm. and Mary, c. 14,<sup>6</sup> and this is the general rule in the *United States*.<sup>7</sup>

**Action Against Devisee Without Joining Heir.** — The act of 3 and 4 Wm. and Mary, c. 14, provided for actions against heirs and devisees jointly,<sup>8</sup> and if there were no heir it was held that the devisee could not be sued.<sup>9</sup> This mischief was obviated by a subsequent statute in *England*,<sup>10</sup> and in the *United States* either the difficulty has been removed by statute or the question has not been raised.<sup>11</sup>

Farley v. Briant, 3 Ad. & El. 839, 30 E. C. L. 239. See also New Jersey Ins. Co. v. Meeker, 37 N. J. L. 282; Ticknor v. Harris, 14 N. H. 272.

1. 3 Williams on Executors (7th Am. ed.) 142, 144.

2. See Ticknor v. Harris, 14 N. H. 272; Hall v. Martin, 46 N. H. 337; Probate Judge v. Brooks, 5 N. H. 82; Dugger v. Oglesby, 99 Ill. 405; People v. Brooks, 123 Ill. 246.

**Not Confined to Action of Debt.** — The act of 3 and 4 Wm. and Mary, c. 14, confined the creditor to his action of debt, where it was sought to charge a devisee; but the statutes in the United States, where they provide a remedy, give the creditor his "action or actions," etc. Hence, an action of covenant will lie against a devisee for breach of a covenant against incumbrances in a conveyance of the devisor, although under the statute of Wm. and Mary, which gave to creditors their "actions of debt," there could be no recovery against the devisee for breaches of covenant for unliquidated damages. New Jersey Ins. Co. v. Meeker, 37 N. J. L. 282.

3. Branger v. Lucy, 82 Ill. 91. See also Sampson v. Sampson, 63 Me. 328; Fowler v. True, 76 Me. 43; Hopkins v. Ladd, 12 R. I. 279.

4. See article COMPLAINTS, vol. 4, p. 587.

5. See *supra*, II. 1. b. Parties and Joinder of Parties.

6. See act of 3 and 4 Wm. and Mary, c. 14, § 5; Bacon's Abr., tit. Heir and Ancestor (F.).

7. See, for illustration, 2 Starr & Curt. Ill. Stat. 1896, c. 59, § 11 *et seq.*

8. See *supra*, I. 2. By English Statutes.

9. Hunting v. Sheldrake, 9 M. & W. 256.

10. Act of 11 Geo. IV. and 1 Wm. IV., c. 47, whereby a remedy was given against the devisee alone if there were no heir.

11. **Where the Heir Receives Nothing.** — It was held in Ticknor v. Harris, 14 N. H. 272, that an heir who has received nothing by descent need not be joined with the devisee in an action against the latter. The court said: "The statute [3 and 4 Wm. and Mary, c. 14] says the creditor may maintain his action against the heirs and devisees jointly. \* \* \* By heirs must have been intended those who actually inherited; for, being an action *ex contractu*, if not maintained against all those sued, the plaintiff could not have had judgment against any of the defendants until the passage of a statute within a few years

**Joinder of All the Heirs.** — If any of the heirs are sued, all of them should be joined in the same action.<sup>1</sup>

**Joinder of Heirs of Heirs or Devisees.** — The heir of a deceased heir may be joined with surviving heirs.<sup>2</sup> Whether the heir of a deceased devisee can be sued at law seems not to have been determined.<sup>3</sup>

**Joinder of Devisee of Heir or Devisee.** — But the devisee of an heir or devisee cannot be joined unless the statute in express terms extends the liability to remote devisees,<sup>4</sup> which is the case in some of the states.<sup>5</sup>

**Joinder of Personal Representatives.** — We have seen that the act of 3 and 4 Wm. and Mary, c. 14, authorized actions on specialties against the heirs and devisees jointly without uniting the personal representative.<sup>6</sup> In the *United States* the statutes conferring the right to sue heirs and devisees frequently require that the per-

past: *Livingston v. Tremper*, 11 Johns. (N. Y.) 102.

1. *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562, holding that if any heir is omitted it is good ground for a plea in abatement. See also *McDowell v. Lawless*, 6 T. B. Mon. (Ky.) 139.

**Ohio.** — In *Spicer v. Giselman*, 15 Ohio 339, it was held (one judge dissenting) that a joint action under the act of 1831 could not be sustained against several heirs or devisees where there had been no joint reception of assets, because such a joinder would authorize a joint judgment whereby each defendant would become subject to payment of the entire amount which might exceed the value of the assets received. But see now *Newton v. Hammond*, 38 Ohio St. 430.

2. *Scott v. King*, 3 Dana (Ky.) 470; *Rinard v. West*, 48 Ind. 159.

3. *Buford v. Pawling*, 5 Dana (Ky.) 283.

4. *Scott v. King*, 3 Dana (Ky.) 470, where the court said: "It is contended, however, that as by the common law the action of debt might be brought as well against the remote as against the immediate heir, the statute giving the action against the immediate devisee should, by analogy, be extended to embrace the remote devisee also, and to substitute him in the place of the immediate devisee. If the liability of the remote heir to be sued was a consequence of the liability of his immediate ancestor, or could be regarded as a mere extension of the principle by which the immediate heir is held liable, the analogy, though not then perfect, would give considerable force to the

argument. But the analogy does not hold even to this extent. At common law the heirs were liable to the action only when the obligation of their ancestor purported to bind them expressly, and they were liable to the extent of assets descended, because they were bound *nominatim*. The word 'heirs,' being *nomen collectivum*, embraced within its literal signification the remote as well as the immediate heir. And the remote heir was held liable to the extent of the assets descended to him, not because his immediate ancestor was liable, but because his remote ancestor had made *him* liable. But the word 'devisee' has no such comprehensive signification. It embraces a single individual, and not a succession of individuals. The statute gives a joint action against the heirs and devisees of the obligor. According to the distinction which we have stated, any remote heir or heirs are not embraced by this provision, but only the immediate devisee; and the consequence is, that although a joint action may be maintained under the statute against the immediate devisee and the remote heir, it cannot be maintained against the immediate heir and the remote devisee." See also *Nelson v. George*, 1 B. Mon. (Ky.) 281.

5. Thus, in *Kentucky*, "to the extent of assets received, the representative, heir, and devisee of an heir or devisee, shall be chargeable for the liabilities of their decedent or testator, respectively, to the creditors of the original decedent or testator." Bullitt & Feland Gen. Stat. Ky. 1888, p. 670, § 9.

6. See *supra*, I. 2. *By English Statutes.*

sonal representatives of the ancestor or testator shall be joined as defendants except under certain specified conditions,<sup>1</sup> and an unauthorized omission to join the personal representative is a substantial defect which may be taken advantage of upon demurrer, and is not cured by the statute of jeofails.<sup>2</sup>

The Guardian of an Infant Heir is not a proper defendant, and no judgment can be rendered against him.<sup>3</sup>

**3. Declaration or Complaint — Description of Defendants.**— The capacity in which the defendants are sought to be charged should be averred.<sup>4</sup>

**Showing Pedigree or Devise.**— It is sufficient to charge the defendants as heirs or devisees, as the case may be, without setting forth how they claim as heirs or how as devisees.<sup>5</sup>

**Averment of Assets Received.**— It has been held that the declaration or complaint against heirs or devisees should aver that the defendants have received estate by descent or devise,<sup>6</sup> but it is not necessary that the property received shall be particularly described.<sup>7</sup>

**Conditions Precedent to Right to Sue.**— In declaring against heirs or devisees upon their statutory liability, the cardinal rule is that the declaration or complaint must aver the special facts upon which the plaintiff's right to recover depends.<sup>8</sup> This is essential

1. See *supra*, I. 3. In the United States.

2. *Lawrence v. Buckman*, 3 Bibb (Ky.) 23.

**Proceeding Erroneous, but Not Void.**— If a separate action be brought against heirs without any alleged reason for omitting to join the personal representative, a judgment against the heirs, though it may be erroneous, is not void, and will uphold a sale on execution thereunder. *Bustard v. Gates*, 4 Dana (Ky.) 429.

3. *Dugger v. Oglesby*, 3 Ill. App. 106 [reversed on another point, 99 Ill. 405]; *Crocker v. Smith*, 10 Ill. App. 376.

4. Thus in an action against personal representatives and heirs, respectively, neither can be charged as devisees. *Monroe v. Wilson*, 6 T. B. Mon. (Ky.) 122.

**General Description of "Heirs and Devisees."**— But in declaring against heirs and devisees, if it is not stated who are heirs and who are devisees it will be intended that all are heirs and devisees. "As they may combine both characters, we may well suppose that to be the fact." *Morgan v. Morgan*, 2 Bibb (Ky.) 388.

5. *Ryan v. Jones*, 15 Ill. 1; *Morgan v. Morgan*, 2 Bibb (Ky.) 390.

6. *State v. Lewellyn*, 25 Tex. 797;

*Mayes v. Jones*, 62 Tex. 365. See also *Dickison v. Garland*, 49 Ill. App. 578; *Guy v. Gericks*, 85 Ill. 428; *Laughlin v. Heer*, 89 Ill. 122; *Massil v. Hiatt*, 82 Ky. 314; *Kentucky Female Orphan School v. Fleming*, 10 Bush (Ky.) 234.

7. *Low v. Felton*, 84 Tex. 378; *Blinn v. McDonald*, (Tex. Civ. App. 1896) 38 S. W. Rep. 384.

8. *Turman v. Robertson*, 3 Tex. App. Civ. Cas., § 216; *Zwerner v. Rosenberg*, (Tex. 1889) 11 S. W. Rep. 150; *Schmidtke v. Miller*, 71 Tex. 103; *Bowmans v. Mize*, 3 B. Mon. (Ky.) 320; *Monroe v. Winlock*, 4 Litt. (Ky.) 135. See also *Baker v. Bean*, 74 Me. 17, and cases cited in this note, *infra*.

**In Illinois** the statute provides that in all actions brought separately against heirs or devisees, *i. e.*, without joining the personal representatives, the facts authorizing the suit so to be brought—namely, that judgment has been obtained against the personal representative, who has not sufficient assets to pay the same, or that there was no administration on the estate within one year from the death of the testator or devisor—must be distinctly set forth in the declaration. 2 Starr & Curt. Annot. Ill. Stat. 1896, p. 2032, § 16; *Ryan v. Jones*, 15 Ill. 1; *McLean v. McBean*, 74 Ill. 134, holding that no

by the general principle of pleading where recovery is sought upon a statute which creates a liability and prescribes a remedy,<sup>1</sup> and is sometimes made necessary by the express requisition of the statute.<sup>2</sup>

**4. Plea.**—The act of 3 and 4 Wm. and Mary, c. 14, § 6, provided that in an action against the heir he might plead *riens per*

recovery can be had on a declaration containing only the common counts; *Hoffman v. Wilding*, 85 Ill. 453, holding that it is not sufficient as against a general demurrer merely to aver that there is an insufficiency of personal estate. Compare with the foregoing cases *Crocker v. Smith*, 10 Ill. App. 376, a case seemingly in conflict with the views expressed in *People v. Brooks*, 123 Ill. 246.

In **Indiana** the statute provides that "the heirs, devisees, and distributees of a decedent shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid who six months prior to such final settlement was insane, an infant, or out of the state, but such suit must be brought within one year after the disability is removed." *Burns's Annot. Stat. Ind.* 1894, § 2597.

A complaint which does not show that the estate of the deceased has been finally settled is fatal on demurrer for want of sufficient facts. *Carriger v. Sicks*, 73 Ind. 76.

And an allegation that the administrator has fully administered the estate, etc., is not the equivalent of an allegation that a final settlement of the estate has been made. *Rinard v. West*, 48 Ind. 159.

A complaint which does not allege that the defendants have received assets from the estate, and that the plaintiff's claim remains unpaid, and which does not contain such averments as would make a good cause of action against the deceased debtor, is bad on demurrer. *Rinard v. West*, 92 Ind. 359.

"The date of the final settlement should be stated, and then it should be alleged that during the six months prior to such final settlement the plaintiff 'was insane, an infant, or out of the state,' according as he may rely on one or another of the disabilities as saving his right to sue." *Rinard v. West*, 48 Ind. 160. See also *Blair v. Allen*, 55 Ind. 413.

For a complaint held sufficient on demurrer, see *McCurdy v. Bowes*, 88 Ind.

584. The complaint in that case alleged, among other averments, that the defendant had received as assets from the estate a sum named.

**Kentucky.**—In *Bowmans v. Mize*, 3 B. Mon. (Ky.) 320, the declaration was defective for omitting an averment that twelve months had elapsed without administration on the estate.

In *Mills v. Sale*, 7 J. J. Marsh. (Ky.) 254, it was held that an allegation that the judgment against the administrator which was the basis of the action remained "unpaid and unsatisfied," did not fulfill the statutory condition essential to the maintenance of the action, namely, that there was not property in the hands of the administrator sufficient to satisfy the judgment.

In **Massachusetts** an action cannot be maintained against the heirs if there is neither allegation nor proof that the estate of the deceased had been settled when the plaintiff's right of action accrued. *Grow v. Dobbins*, 124 Mass. 560.

"It is not enough to aver that the defendant's ancestor did make a bond, and that the defendant is his heir, because upon these facts the law finds no liability. It is only in case there has been an administration, that administration closed by lapse of time, and a cause of action accrued after such lapse of time, that the law imposes any liability. These facts are therefore conditions precedent and must be averred affirmatively by the plaintiff before the defendant can be called upon to answer." *Hall v. Bumstead*, 20 Pick. (Mass.) 2. See also *Valentine v. Farnsworth*, 21 Pick. (Mass.) 176.

1. *Bowmans v. Mize*, 3 B. Mon. (Ky.) 320.

2. *Gere v. Clarke*, 6 Hill (N. Y.) 350, holding that the declaration was bad, inasmuch as it did not allege the statutory conditions precedent to liability, namely, that the personal assets of the deceased were not sufficient to pay and discharge the plaintiff's debt, or that the plaintiff had exhausted his remedy against the personal representative and next of kin of the deceased.

*descent* at the time of the original writ brought, and this provision was re-enacted in several of the United States.<sup>1</sup> A devisee may also plead in like manner as the heir.<sup>2</sup> The defendant may also, of course, plead any defense to the plaintiff's claim that the ancestor or deviser might himself have relied on.

**5. Replication.**—The act of 3 and 4 Wm. and Mary, c. 14, altered the common law by declaring that the heir should be answerable to the value of the land sold or aliened,<sup>3</sup> and that to the plea of *riens per descent* the plaintiff might reply that the defendant had lands, etc., before the original writ brought.<sup>4</sup> The plaintiff might ignore the statute and join issue on the plea as at common law<sup>5</sup> without replying as he was empowered by the statute.<sup>6</sup> The scheme of pleading introduced by the act was adopted in some of the United States.<sup>7</sup>

1. A plea that the defendants had not at the commencement of the suit, or before or since, any lands, etc., by descent was held to be a sufficient plea within the statute. *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71.

2. The act of 3 and 4 Wm. and Mary, c. 14, did not expressly provide for such a plea by the devisee, but section 7 of the act declared that "all and every devisee made liable by this act shall be liable and chargeable in the same manner as the heir at law, by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised, shall be aliened before action brought." Construing this section, it was held in *Matthews v. Jones*, 2 Anstr. 506, that lands aliened by a devisee before suit brought are equally protected in the hands of the alienee as if they had been so aliened by the heir, though there is no express provision in the act to protect the alienee of the devisee as there is the alienee of the heir.

In Illinois the statute clearly contemplates the same plea and proceedings thereon, *mutatis mutandis*, in case of a devisee as in that of an heir. See Starr & Curt. Rev. Stat. Ill. 1896, p. 2031, § 13. In an action against heirs where the declaration also charges that there were lands devised to them by the deceased, the plea of *riens per descent*, without negating the allegation of lands devised, is not a good plea. *Dickison v. Garland*, 49 Ill. App. 578.

**New Jersey.**—See Gen. Stat. N. J., p. 1680, § 4.

3. See *supra*, I. 2. By English Statutes.

4. Act of 3 and 4 Wm. and Mary, c. 14, § 6, quoted in Bacon's Abr., tit. Heir and Ancestor (F.).

"Under this issue the allegation of the plaintiff is made out either by proving that lands descended which the defendant aliened, or merely that lands descended which had not been aliened. In either case the defendant necessarily had the land before suit brought." *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 83.

Where the defendant pleaded that he had not, at the commencement of the suit, nor at any time before or since, any lands, etc., by descent, it was held that although the plea was more extensive than the plea mentioned in the statute, a replication that the defendant had, and before and at and after the commencement of the suit had, sufficient lands, etc., was held to be a sufficient compliance with the direction of the statute. *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71.

**Value of Lands Not to Be Put in Issue.**

—To a plea of *riens per descent* at the time of the original writ brought, the plaintiff replied that the defendant had sufficient lands before the time of the original purchase, and on issue thereon a verdict was given for the plaintiff, without inquiry of the value of the land; the court awarded a repplier, for issue ought not to have been joined on the sufficiency of the land descended. *Jeffry v. Barrow*, 10 Mod. 18.

5. See *supra*, II. 1. d. Pleas.

6. *Matthews v. Lee*, Barnes 444; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 83.

7. Starr & Curt. Annot. Illinois Stat. c. 59, § 13; Gen. Stat. New Jersey, pp. 1679, 1680.

**6. Verdict and Inquiry.** — When the defendant pleads *riens per descent* and the plaintiff replies as directed by the act of 3 and 4 Wm. and Mary, c. 14,<sup>1</sup> and upon issue joined thereupon it is found for the plaintiff, the jury must inquire and find the value of the lands descended.<sup>2</sup> In every other case there is no inquiry as to the value.<sup>3</sup>

**7. Judgment** — Under Act of 3 and 4 Wm. and Mary. — Upon a plea of *riens per descent* and replication as provided by the act of 3 and 4 Wm. and Mary, c. 14, and verdict for the plaintiff finding the value of the lands descended,<sup>4</sup> judgment is given that the plaintiff recover the value so assessed by the jury;<sup>5</sup> and if judgment be given against the heir by confession of the action without confessing the assets descended, or upon demurrer or *nihil dicit*, it is a general judgment for the debt and damages.<sup>6</sup> The judgment against a devisee, upon the statute, is the same as against an heir.<sup>7</sup>

**In the United States Generally.** — In some of the United States the provisions of the statute of William and Mary, just mentioned, have been substantially re-enacted so far as they relate to pleadings and judgments.<sup>8</sup> But generally, where there has been no alienation by the defendant, the judgment is rendered to be levied of the assets descended or devised.<sup>9</sup> And so, where

1. See *supra*, III. 5. *Replication*.

2. Act of 3 and 4 Wm. and Mary, c. 14, § 6, quoted in 4 Bacon's Abr. (Bouvier Am. ed.), p. 618; Starr & Curt. Annot. Illinois Stat. 1896, c. 59, § 13; Gen. Stat. New Jersey, p. 1679, § 3; Roosevelt v. Fulton, 7 Cow. (N. Y.) 71, holding, however, that if the jury omit to assess the value, and the plaintiff does not complain, the court would not be inclined to grant the defendant a new trial.

In *Jeffrey v. Barrow*, 10 Mod. 18, Powys and Eyre, JJ., were of opinion that by "the jury" in the clause of the act must be understood the jury who tried the cause; and, consequently, if that jury omitted to inquire of the value of the lands, such omission could not be supplied by another jury.

3. *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71.

4. See *supra*, III. 6. *Verdict and Inquiry*.

5. Act of 3 and 4 Wm. and Mary, § 6; *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 71; *Ready v. Stephenson*, 7 J. J. Marsh. (Ky.) 351.

The recovery will only be for the value of the lands in the condition in which they were at the time of the descent cast. *Fredericks v. Isenman*, 41 N. J. L. 212.

"If the assessment is equal in amount to the plaintiff's debt, he is entitled to a general judgment against the heirs or devisees; if less, he is entitled to a judgment to the extent of the assessment. But if this issue is found for the heirs or devisees, the plaintiff may, notwithstanding, take judgment of assets *quando acciderint*, and he may have a *scire facias* thereon if assets afterwards come to the hands of the heirs or devisees. *Shipley's Case*, 8 Coke 134; *Noell v. Nelson*, 2 Saund. 214; *Dyer* 273, pl. 14; *Noell v. Nelson*, 1 Vent. 94." *Ryan v. Jones*, 15 Ill. 1.

6. Act of 3 and 4 Wm. and Mary, c. 14, § 6, quoted in *Tidd's Pr.* 938.

**Special Judgment Not Assignable as Error.** — Judgment on default of heirs and devisees may be taken against them in their own right, but if it is taken against the estate descended or devised, they cannot assign it for error. *Morgan v. Morgan*, 2 Bibb (Ky.) 388.

7. *Tidd's Pr.* 938. See also *Hammond v. Gaither*, 3 Har. & M. (Md.) 218.

8. **Illinois.** — See 2 Starr & Curt. Annot. Ill. Stat. 1896, c. 59, §§ 12, 13; *Ryan v. Jones*, 15 Ill. 1; *Dickison v. Garland*, 49 Ill. App. 578.

**New Jersey.** — Gen. Stat. N. J., p. 1679, §§ 2, 4.

9. *Ryan v. Jones*, 15 Ill. 1; *Branger*

several heirs or devisees are defendants there should not be a general joint judgment against them, but a judgment against each to the extent of assets received by him.<sup>1</sup>

*v. Lucy*, 82 Ill. 91; *People v. Brooks*, 123 Ill. 246; *Hefferman v. Forward*, 6 B. Mon. (Ky.) 567; *Bishop v. Hamilton*, 4 J. J. Marsh. (Ky.) 548; *Phillips v. Munsell*, 5 J. J. Marsh. (Ky.) 253; *Ready v. Stephenson*, 7 J. J. Marsh. (Ky.) 351; *Anderson v. Bellis*, 2 Duv. (Ky.) 388; *Leathers v. Meglasson*, 2 T. B. Mon. (Ky.) 63, 3 T. B. Mon. (Ky.) 224; *Warfield v. Blue*, 3 Dana (Ky.) 485; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 567, where the court said: "If alienations have not been made, and the heir fails to plead, or pleads and his pleas are not sustained, or confesses the action, \* \* \* judgment should then be rendered charging the assets."

In Texas the suit is *in personam*, and to such extent as assets are proved to have come into possession of the heir a general judgment is rendered against him for the amount of the debt. *Mayer v. Jones*, 62 Tex. 365.

The judgment must never exceed in amount the value of the property received by the heir. *Webster v. Willis*, 56 Tex. 468; *State v. Lewellyn*, 25 Tex. 797.

In New Jersey, however, that feature of common-law pleading which subjected the heir to a general judgment for false pleading or for not confessing the assets is preserved by statute and extended to actions against devisees. Gen. Stat. N. J., p. 1679, § 1.

**Where Personal Representatives of Decedent Are Joined.** — In an action against the heirs or devisees jointly with the personal representatives the judgment should be so framed as to be first levied of the assets in the hands of the latter. *Hagan v. Patterson*, 10 Bush (Ky.) 441; *Ryan v. Jones*, 15 Ill. 1. See also *Jameson v. Martin*, 3 J. J. Marsh. (Ky.) 330. Compare *Morgan v. Morgan*, 2 Bibb (Ky.) 388.

**Amendment of General Judgment.** — If a judgment is erroneously entered without being restricted to the estate descended or devised, the omission will be deemed a mere clerical misprision, which may be amended at the same or any subsequent term, so long as the judgment remains in force. *Roman v. Caldwell*, 2 Dana (Ky.) 20, where a judgment rendered in 1824 was amended *nunc pro tunc* in 1831, upon

motion of the defendants. The court said: "If the power of the court to make such a correction at another term were to be tested alone by the earlier English decisions, or by whatever of consistent principle is to be extracted from the multifarious cases on the subject of amendments, we should have much difficulty in sustaining such power. But it was determined, *Short v. Coffin*, 5 Burr. 2730, that a judgment *de bonis propriis*, where it should have been *de bonis testatoris*, was a mere clerical misprision, amendable at a subsequent term, and that decision has been adopted and followed by this court. *Speed v. Hann*, 1 T. B. Mon. (Ky.) 19; *Smith v. Todd*, 3 J. J. Marsh. (Ky.) 298. The case of a judgment against heirs is so perfectly analogous in every particular that there is no room for a legal distinction, and it must be governed by the same principle." See also article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 692.

1. *Dugger v. Oglesby*, 99 Ill. 405; *Turman v. Robertson*, 3 Tex. App. Civ. Cas., § 217; *Thomas v. Bonnie*, 66 Tex. 635; *Low v. Felton*, 84 Tex. 378. See also *Badger v. Daniel*, 79 N. Car. 372.

In Massachusetts "the liability of each of the defendants is not restricted to his equal proportion, but is so adjusted as to secure to the creditor his entire debt. It is suggested in *Wood v. Leland*, 22 Pick. (Mass.) 503, and again in *Hayward v. Hapgood*, 4 Gray (Mass.) 437, that in an action at law only an aliquot part of the debt can be recovered from each one of the heirs, without regard to the means of enforcing the claim against the others. 'This may have been so under the Stat. of 1788, c. 66, § 5. See *Howes v. Bigelow*, 13 Mass. 384. But the Revised Statutes and the General Statutes declare that each of the heirs 'shall be liable to the creditor to an amount not exceeding the value of real and personal estate that he has received from the deceased.' Gen. Stat., c. 101, § 32. This is clearly a several liability, having no limit as between the creditor and the heir except that which is prescribed by the terms of the statute imposing the liability." *Bell v. Boston*, 101 Mass. 506.

In Missouri the heirs are not liable



8. **Execution.** — Where the judgment is special to be levied of the assets descended,<sup>1</sup> execution issues accordingly.<sup>2</sup> If the judgment is general against the defendant, execution issues against him as for his own proper debt.<sup>3</sup>

**IV. SCIRE FACIAS ON JUDGMENTS AGAINST ANCESTOR OR PERSONAL REPRESENTATIVE.** — At common law no part of the lands descended to the heir were liable to be taken in execution upon a judgment against the ancestor,<sup>4</sup> but by the statute of Westminster 2, 13 Edw. I., c. 18, the lands of a debtor were bound from the time when judgment was rendered against him, and a moiety thereof was liable to be extended into whosoever hands they should thereafter come. If, therefore, judgment was obtained against a man who afterwards died, a scire facias to have execution for a moiety of the lands would lie against the heir, not as heir, but as tenant of the land; for it would equally lie against any other person who was tenant of the land.<sup>5</sup> In most of the United States the proceedings in the Probate Court, or the ordinary action at law against heirs and devisees which is authorized by statute, have supplanted the remedy by scire facias. But in *Pennsylvania* it is customary to proceed by scire facias against heirs and devisees upon judgments against the personal representatives of the decedent.<sup>6</sup> And in *Tennessee*, where a plaintiff obtains judg-

*in solido*, but only *pro rata* on account of assets descended, and the judgment must declare the liability of each separately. *State v. Pohl*, 30 Mo. App. 321; *Walker v. Deaver*, 79 Mo. 664; *Pearce v. Calhoun*, 59 Mo. 271.

1. See *supra*, III. 7. *Judgment*.

2. See the following note.

3. See, for instance, Gen. Stat. *Minnesota* 1894, §§ 5938, 5939.

**In Kentucky.** — An execution issued jointly against a personal representative and heirs or devisees must be executed by first selling the estate in the hands of the personal representative, next the estate descended to the heir, and lastly the estate devised, and the same order is to be observed when the execution issues against only two of the classes named. But the defendants may, by writing, direct the sale to take place in any order they may desire. *Bullitt & Feland* Gen. Stat. Ky. 1888, p. 585, § 2.

**In New Jersey,** prior to the enactment of a statute in 1797 it had long been settled that lands were assets in the hands of an executor or administrator for the payment of debts, and that upon an action brought against either the lands of the testator or intestate were chattels, and might be taken in execu-

tion, and sold for the payment of debts, and this without making the heir a party to the suit. *Den v. Jones*, 1 N. J. L. 156.

Now, by statute, as at common law, where lands descended are *bona fide* aliened by the heir before suit brought they cannot be taken in execution on a judgment against the heir for a debt of his ancestor. 2 Gen. Stat. N. J., p. 1679, § 2. It is a point of no difference to whom the alienation, if *bona fide*, is made, whether to a stranger or to a co-heir. *Den v. Jaques*, 10 N. J. L. 265.

**In Texas** the judgment, when recovered, is conclusive of the fact that the heir has received assets to the amount for which it is rendered, and an execution issues upon it as in case of any other judgment *in personam*. *Mayes v. Jones*, 62 Tex. 365.

4. *South v. Hoy*, 3 Bibb (Ky.) 522; *Holder v. Com.*, 3 A. K. Marsh. (Ky.) 407; *Neal v. M'Combs*, 2 Yerg. (Tenn.) 10.

5. *South v. Hoy*, 3 Bibb (Ky.) 522.

6. The act of Feb. 24, 1834, P. L. 70, § 34, now *Pepper & Lewis's Dig. Laws Pa.*, p. 1495, § 145, provides that "in all actions against the executors or administrators of a decedent who shall have left real estate, where the plaintiff

ment against a personal representative upon a plea of "fully administered," or "no assets," or "not sufficient assets," found in favor of the defendant, he must, before taking out execution against the real estate, summon the heirs or devisees by scire facias to show cause.<sup>1</sup> Since these statutes are in derogation of

intends to charge such real estate with the payment of his debt, the widow and heirs, or devisees, and the guardians of such as are minors, shall be made parties thereto," and that judgment obtained in such action shall not be levied upon the real estate of such as are not served with notice of the writ as directed by the act.

It appears to be the practice first to obtain judgment against the personal representative, and then bring in the widow and heirs or devisees by scire facias against them and the personal representative. *Phillips v. Allegheny Valley R. Co.*, 107 Pa. St. 472; *Atherton v. Atherton*, 2 Pa. St. 112; *Morton v. Weaver*, 99 Pa. St. 47; *Emerick v. White*, 12 Phila. (Pa.) 189; *Murphy's Appeal*, 8 W. & S. (Pa.) 165. But the joining of the widow and heirs or devisees with the personal representative in one action is also conformable to the act. *Levan v. Millholland*, 114 Pa. St. 49.

**When Notice Not Necessary.** — The requirement of notice to the heirs, etc., has no application where the decedent in his lifetime has charged his real estate with the payment of the debt. *Rushton v. Lippincott*, 119 Pa. St. 12.

**Notice to Alienee of Devisee.** — In a proceeding under the statute the alienee of a devisee must be made a party and is entitled to notice. *Soles v. Hickman*, 29 Pa. St. 342.

**Defenses to Scire Facias.** — The parties to the scire facias have a right to make any defense that could or ought to have been made by the personal representative in the original action against him. *Atherton v. Atherton*, 2 Pa. St. 112; *Morton v. Weaver*, 99 Pa. St. 47; *Murphy's Appeal*, 8 W. & S. (Pa.) 165. But a prior judgment against the personal representative is conclusive upon him when he is made a party to the scire facias as devisee. *Com. v. Cochran*, 146 Pa. St. 223.

1. Act of 1784, c. 11, now Code Tenn. 1896, § 3991 *et seq.*

If the plea of fully administered is found against the executor the lands are not liable, although the assets were subsequently wasted by him and his

securities have become insolvent. *Peck v. Wheaton*, Mart. & Y. (Tenn.) 353. See also *Gray v. Darby*, Mart. & Y. (Tenn.) 396; *Johnston v. Dew*, 5 Hayw. (Tenn.) 224; *Elliot v. Patton*, 4 Yerg. (Tenn.) 10.

**Naming the Heirs.** — "A scire facias against heirs generally, without naming them, would not be good; at all events, they would not be bound by the judgment upon it, unless the sheriff were to return scire feci, and name them; a return of two *nilis* would not answer." *Bush v. Williams*, Cooke (Tenn.) 360. But in *Seawell v. Williams*, 5 Hayw. (Tenn.) 280, 2 Overt. (Tenn.) 273, it was held that a judgment upon scire facias against heirs' without naming them was not void on collateral attack. "In nineteen out of twenty instances," said the court, "the practice hath heretofore been to proceed in sci. fa. by description and not by name."

**Notice Indispensable.** — A judgment upon scire facias against heirs ordering a sale of the lands descended is absolutely void unless notice to the heirs was given; and the evidence of service must appear from the return made upon the scire facias by the officer serving it. *Simmons v. Wood*, 6 Yerg. (Tenn.) 518.

**Service upon Minor Heirs.** — By construction of other sections of the act it was held that personal service must be made upon minor heirs as well as upon their guardians, if the heirs are residents and have regular guardians. *Crutchfield v. Stewart*, 10 Yerg. (Tenn.) 237; *Pope v. Harrison*, 6 Lea (Tenn.) 88; *Combs v. Young*, 4 Yerg. (Tenn.) 218; *Carmichael v. Carmichael*, 5 Humph. (Tenn.) 96; *Planter's Bank v. Chester*, 11 Humph. (Tenn.) 578.

But want of personal service upon infants will not render a judgment void as to adults joined with them. As to these it is merely irregular and will stand until reversed; and a sale will pass title to their interest in the land. *Valentine v. Cooley*, Meigs (Tenn.) 613.

**Defenses.** — A judgment against the executor is no evidence against the

the common law by which lands descended were not liable to discharge the simple contract debts of the ancestor,<sup>1</sup> they must be strictly pursued, and the court has no jurisdiction to proceed against the realty until all the statutory requirements have been fulfilled.<sup>2</sup>

**V. REMEDIES IN EQUITY AGAINST HEIRS AND DEVISEES — 1. Equitable Jurisdiction Generally — a. CREDITORS' BILLS.** — The jurisdiction of equity in respect of creditors' bills for the general administration of a decedent's estate is discussed under other titles in this work.<sup>3</sup>

**b. DEVISE CHARGED WITH LEGACY.** — When a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with its payment, which may be enforced by a suit in equity to declare a lien on the land and establish the personal liability of the devisee.<sup>4</sup>

**c. BILL FOR SOLE BENEFIT OF SINGLE CREDITOR.** — Formerly it seems to have been a common practice to afford bond creditors a remedy in equity against heirs, on the ground that in equity such creditors were entitled to an account of the rents and profits received by the heir since the descent cast, which could not be recovered in an action at law;<sup>5</sup> likewise where the heir had

heirs and devisees, and upon scire facias against them they may contest the existence of the original demand. *Neal v. M'Combs*, 2 Yerg. (Tenn.) 10; *Gilman v. Tisdale*, 1 Yerg. (Tenn.) 285; *Sneed v. Mayfield*, *Cooke* (Tenn.) 60. And they may, upon a collateral issue with the personal representative, contest the plea of fully administered. This the act expressly authorizes. *Gilman v. Tisdale*, 1 Yerg. (Tenn.) 285; *Anderson v. Clark*, 2 Swan (Tenn.) 156.

The Judgment on Scire Facias may be general, to be levied of the lands descended in the hands of the heir without designating any particular tract. *Butterworth v. Brown*, 7 Yerg. (Tenn.) 467.

1. See *supra*, I. 1. a. *Of Heirs*.

2. *Elliott v. Patton*, 4 Yerg. (Tenn.) 10; *Planter's Bank v. Chester*, 11 Humph. (Tenn.) 578; *Gray v. Darby*, Mart. & Y. (Tenn.) 396, citing *Stephenson v. Yandle*, 3 Hayw. (Tenn.) 117; *Roberts v. Busby*, 3 Hayw. (Tenn.) 303.

3. See articles CREDITORS' BILLS, vol. 5, pp. 388, 419, 479; PROBATE AND ADMINISTRATION.

4. *Brown v. Knapp*, 79 N. Y. 143; *Lockwood v. Stockholm*, 11 Paige (N. Y.) 87; *Wieting v. Bellinger*, 50 Hun (N. Y.) 324; *Bushnell v. Carpenter*, 28 Hun (N. Y.) 19; *Johnson v. Cornwall*, 26 Hun (N. Y.) 499; *Dickson v.*

*Field*, 77 Wis. 439; *Dunne v. Dunne*, 66 Cal. 157; *Yearly v. Long*, 40 Ohio St. 32; *Perry v. Hale*, 44 N. H. 363; *Lofton v. Moore*, 83 Ind. 112; *Porter v. Jackson*, 95 Ind. 210.

**Concurrent Remedies at Law and in Equity.** — The legatee may enforce the personal liability of the devisee by action at law against him, and still look to the land if necessary. *Porter v. Jackson*, 95 Ind. 216.

5. Story Eq. Jur., § 1216, c, where the author says: "Where there is a specialty debt binding the heirs, and the debtor dies, whereby a lien attaches upon all the lands descended in the hands of his heirs, courts of equity will interfere in aid of the creditor, and in proper cases accelerate the payment of the debt. At law the creditor can only take out execution against the whole lands and hold them as he would under an *elegit* until the debt is fully paid. But in equity the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast." The foregoing section was quoted with approval in *Payson v. Hadduck*, 8 Biss. (U. S.) 293. Compare *Blow v. Maynard*, 2 Leigh (Va.) 29.

"Suits against the heir or devisee seem to have been more common in equity than at law." *Vernon v. Ehrlich*, 2 Hill Eq. (S. Car.) 260.

aliened the land before suit brought he was responsible for its value to a bond creditor in a suit in equity,<sup>1</sup> and this alone was sufficient to give the chancellor jurisdiction.<sup>2</sup> And it has been declared that these principles apply to the enforcement of simple contract debts against either heirs or devisees where the statute has abolished the distinction between specialty and simple contract debts, and made both heirs and devisees legally liable therefor to the extent of assets received.<sup>3</sup> The later authorities incline to limit the creditor to his statutory action at law<sup>4</sup> or his remedy

1. *Cox v. Strode*, 2 Bibb (Ky.) 273; *Buford v. Pawling*, 5 Dana (Ky.) 283; *Gibson v. Mitchell*, 16 Fla. 519; *Winfield v. Burton*, 79 N. Car. 388.

2. *Buford v. Pawling*, 5 Dana (Ky.) 283.

3. *Payson v. Haddock*, 8 Biss. (U. S.) 293, decided in the United States Circuit Court for the District of Illinois, which was a case, however, where the claim did not accrue until the close of the administration of the estate. *Washington v. Sasser*, 6 Ired. Eq. (N. Car.) 336; *Moore v. Shields*, 68 N. Car. 327; *Buford v. Pawling*, 5 Dana (Ky.) 283; *Gibson v. Mitchell*, 16 Fla. 519. Compare with *Payson v. Haddock*, 8 Biss. (U. S.) 293, above cited, *People v. Brooks*, 123 Ill. 246, and the Illinois cases cited in the following note.

4. In Illinois a claim for a debt due from or for damages arising out of breach of a special contract by the ancestor or devisor can be enforced against an heir or devisee only by a common-law action, not by a bill in equity to declare an alien on the land in favor of the debt or damages where none of the real property was pledged as security. *Campbell v. Potter*, 147 Ill. 576. See also *Schopper v. Hildebrandt*, 14 Ill. App. 353; *Dugger v. Oglesby*, 3 Ill. App. 106.

In Kentucky a suit in equity was brought against the heirs of a deceased obligor upon a bond not binding the heirs. The bill alleged that the heirs were insolvent and their names unknown. A statute provided that "the same actions which will lie against executors or administrators may be brought jointly against them and the heirs and devisees of the dead person, or both." The court said: "As the personal representative and heirs are joined, it would be difficult to assign any reason for not bringing the suit at law except the single circumstance that the heirs were unknown and insolvent. We cannot conceive that such a sug-

gestion would be sufficient to translate the case from a court of law to a court of chancery. If this statutory remedy could be thus transferred, but few cases could be found where these or similar reasons could not apply, and thus the statute would produce a large crop of chancery litigation, which was never intended." *Dawson v. Trimble*, 3 Litt. (Ky.) 253. Compare *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346.

New Jersey. — In *Edwards v. McClave*, (N. J. 1896) 35 Atl. Rep. 829, the court said that the obligation of the heirs for the payment of the ancestor's simple contract debts "is a purely statutory liability, \* \* \* and it has always been held that under this statute the liability of heirs is purely legal, and enforceable only by action at law," citing *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 299; *Mutual L. Ins. Co. v. Hopper*, 43 N. J. Eq. 387, affirmed in 44 N. J. Eq. 604.

Ohio. — In *Haynes v. Colvin*, 19 Ohio 392, the court said: "The case made in the bill is simply this: the complainant recovered a judgment against the administrator of Samuel Colvin, in Indiana, and now seeks by bill in equity to recover the amount of that judgment from the heirs of Samuel Colvin, in Ohio. There is no charge of any fraud or mistake, nor is any trust pretended in order to give the court jurisdiction, nor are there any circumstances connected with the case rendering it necessary to resort to a court of chancery. The case of *Piatt v. St. Clair*, 6 Ohio 227, has been cited as an authority to sustain this proceeding, but the two cases are as much unlike as it is possible for two cases to be. In that case lands had been conveyed to defraud creditors—trusts had been created with the same view. All the circumstances were such as to render it utterly impossible for a court of law to do justice to the parties. Resort to equity was indispensably necessary. The

by statutory proceedings to subject the land in the court exercising probate jurisdiction,<sup>1</sup> and allow a resort to equity only where there is an impediment to the enforcement at law or in administration proceedings of a liability recognized by law.<sup>2</sup>

naked question in this case is whether heirs can be compelled in equity to satisfy a judgment recovered, not against their ancestor, but against the administrator of that ancestor. After the recovery of that judgment, the administrator might have procured an order for the sale of the land descended to the heir, for its satisfaction, provided there were no assets in his hands with which to make satisfaction. At least, this course might have been pursued if the land descended still remained with the heir, and there is nothing in this bill to show that such was not the fact." The court then quoted two sections of the statutes, one of which provided that "any suit which could be brought and sustained against such ancestor or deviser, were he alive, may be brought and sustained against such heirs and devisees after the executor or administrator of the ancestor or deviser shall have made final settlement with the court, until the assets, so received by such heirs or devisees, shall be exhausted." "These two sections," said the court, "seem principally to refer to claims not liquidated in the course of administration. So far as claims are liquidated by the executor or administrator, or by judgment against them, the same act makes ample provision for their payment, if the property of the estate is sufficient for that purpose. The personal property failing, real estate may be sold. And should an executor or administrator neglect to take the proper steps for the sale of real estate for the payment of debts, upon application to the court having jurisdiction of the subject, the proper remedy would be applied. In all cases where the law has prescribed an appropriate remedy, that remedy should be resorted to unless it be merely cumulative. \* \* \* The consideration of the judgment was of that character that an action might have been sustained for it against Colvin, and had it not been reduced to judgment in an action against his administrator, an action might have been sustained against these heirs, but it would have to be an action at law, not a bill in chancery."

1. *Titterington v. Hooker*, 58 Mo. 593; *Edwards v. McClave*, (N. J. 1896) 35 Atl. Rep. 829, where the court, after stating that in *Rutherford v. Alyea*, 54 N. J. Eq. 411, it was decided that on a bill by a creditor for his sole benefit the court of equity will not, except for a special cause, interfere with the jurisdiction of the Orphans' Court for the settlement of accounts of executors and administrators, proceeded as follows: "This settlement in the Orphans' Court includes the application of real estate of the deceased for the payment of his debts, which application may, if necessary, be made by the creditor after establishing his claim by judgment against the executor or administrator. Orphans' Court Act (Revision, 769), § 79. In the absence, therefore, of any facts alleged in the bill showing the equity of complainants to require a general settlement of the estate in this court, and a sale by the court of the lands of the deceased, including complainant's claim, if it be eventually established, I conclude that no decree can be granted against the heirs at law on this bill charging the debt on the lands, or directing the sale thereof for the purpose of payment." See also *Scott v. Ware*, 64 Ala. 174; *Board of Public Works v. Columbia College*, 17 Wall. (U. S.) 521.

In *Connecticut* a claim against the estate of a deceased person, represented insolvent, founded on a contingent liability which does not become absolute until after the expiration of the time limited for presenting claims to the commissioners on the estate, is not barred by nonpresentation, but may be enforced against any estate remaining after payment of the claims allowed by the commissioners. A petition in equity against the heirs in such a case, to compel them to pay the debt, will not be sustained, though the administration account has been settled, and the surplus estate consists wholly of land which has passed into the hands of the heirs, there being adequate remedy at law. To the same effect see *Davis v. Weed*, 44 Conn. 570; *Hawley v. Botsford*, 27 Conn. 80.

2. See *Bedell v. Keethley*, 5 T. B.

*d. FEDERAL JURISDICTION NOT AFFECTED BY STATE LAW.* — The equitable jurisdiction of the federal courts in respect to suits against heirs is not ousted or impaired by a state law requiring creditors to appear before a state court and present their claims.<sup>1</sup>

**2. Parties — Joinder of Personal Representative.** — Where heirs or devisees are sued in equity the personal representative of the decedent should be joined as a defendant.<sup>2</sup> If there be no personal representative,<sup>3</sup> or the administration has been closed,<sup>4</sup> the suit may be instituted against the heirs and devisees alone.<sup>5</sup>

Mon. (Ky.) 602; *Ansley v. Baker*, 14 Tex. 607.

**Defect of Parties Making Legal Remedy Unavailable.** — Where the statute provides only for joint actions at law against personal representatives and heirs or devisees, it has been held that it there is no personal representative it is proper to sue a devisee in equity. *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346; *Buford v. Pawling*, 5 Dana (Ky.) 283, cited with approval in *Gibson v. Mitchell*, 16 Fla. 519.

Where an administrator has died, and no administrator *de bonis non* has been appointed, a bill in chancery against the heirs to whom estate has descended is an appropriate remedy to recover the amount of a note given by the intestate. *Shannon v. Dillon*, 8 B. Mon. (Ky.) 389.

**Lost Instrument.** — In *M'Dowell v. Lawless*, 6 T. B. Mon. (Ky.) 140, the court said: "The complainant's bill in equity is a substitute for an action at law, under the Act of Assembly which allows heir and devisees to be sued jointly with executors or administrators in actions which would theretofore lie against executors and administrators alone; and were it not for the loss of his bond, which gives a court of equity jurisdiction over it, to relieve against the accident, his exclusive remedy would be an action at law."

**Cause of Action Maturing After Administration.** — Where the cause of action, whether by simple contract or specialty, accrues after the close of administration of the estate of the ancestor or testator, the creditor may maintain a bill against the heir or devisee who has received assets. *Hendricks v. Keese*, 32 Ark. 774; *Williams v. Ewing*, 31 Ark. 229; *Rohrbaugh v. Hamblin*, 57 Kan. 393; *Gibson v. Mitchell*, 16 Fla. 519; *Hecht v. Skaggs*, 53 Ark. 291; *Allen v. Conklin*, (Mich. 1897) 70 N. W. Rep. 339; *Payson v. Haddock*, 8 Biss. (U. S.) 293. See also *Johnson v. Cain*, 15 Kan. 532.

1. *Chewett v. Moran*, 17 Fed. Rep.

820. And see generally article UNITED STATES COURTS.

2. *Cox v. Strobe*, 2 Bibb (Ky.) 273; *Buford v. Pawling*, 5 Dana (Ky.) 283; *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257; *Massie v. Donaldson*, 8 Ohio 377.

**Under the Code.** — In *Lowry v. Jackson*, 27 S. Car. 318, the court said: "We do not desire to be regarded as conceding that the administrator was not a proper party. It is true that under the former system of pleading the administrator was not a proper party to an action at law against the heir for the debt of the ancestor, on account of real estate descended; but it was otherwise in a proceeding in equity, where the administrator was not only a proper but a necessary party. Story Eq. Pl., §§ 173, 176, 180; *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257; *Goodhue v. Barnwell*, Rice Eq. (S. Car.) 239, recognized in *Mobley v. Cureton*, 2 S. Car. 148. Now since the code has substituted a totally different system of pleading, and abolished the distinction between actions at law and proceedings in equity, whereby a defendant may plead equitable as well as legal defenses to the same action, we do not see why the administrator may not be regarded at least as a proper party to an action against the heir, for the debt of the ancestor, on account of real estate descended; or why the heir, when sued alone in such an action, may not require that the administrator shall be made a party, *Cleveland v. Mills*, 9 S. Car. 436, in order to prevent circuitry of action by furnishing the heir with an opportunity of requiring from the administrator, if he desires it, an account of the assets primarily appropriated to the payment of debts."

3. *Buford v. Pawling*, 5 Dana (Ky.) 283; *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257. But see *Postlewait v. Howes*, 3 Iowa 365.

4. *Williams v. Ewing*, 31 Ark. 229.

5. In *Vernon v. Ehrich*, 2 Hill Eq. (S.

**Joinder of All the Heirs and Devisees.**—All the heirs and devisees should be made defendants where a decree is sought against any of them.<sup>1</sup>

**3. The Bill.**—The bill should allege the descent or devise of real estate to the defendant,<sup>2</sup> and that there was no personal estate, or that it was insufficient to pay the just demands against the estate.<sup>3</sup>

**4. Decree.**—Where the personal representative is joined the decree is that he account for the personal assets, and that they shall be applied as far as they will go, and that the heirs or devisees make good the deficiency to the full amount of the real estate received by them.<sup>4</sup> A decree against several heirs and devisees should, when the amount descended or devised to them exceeds the debt, be against them jointly for the whole amount of the debt, and not against them severally according to their respective shares.<sup>5</sup> But the decree should provide that neither of them be subjected to a greater liability than to the extent of the estate which came to him.<sup>6</sup>

**5. Suits in Equity by Express Statute.**—In some jurisdictions the statute expressly permits or requires the creditor to sue the

Car.) 257, the court said that "if it were shown by the bill, however, that there were no assets in the hands of the executor, or that he had been called to account, and the remedy against him was exhausted, the reason would cease, and it would be unnecessary to make him a party. \* \* \* It would be mere mockery that a formal administration should be taken out here where there are no assets in order that such formal administrator might be made a party."

1. *M'Dowell v. Lawless*, 6 T. B. Mon. (Ky.) 139; *Blackerby v. Holton*, 5 Dana (Ky.) 520. See also *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257.

2. *Laughlin v. Heer*, 89 Ill. 122.

**Description of Land.**—In *Williams v. Ewing*, 31 Ark. 229, it was held that the land should be described in the complaint so as to enable the court to identify it in the decree, but that a defective description in the pleadings may be aided by the evidence and finding in the decree.

3. *Laughlin v. Heer*, 89 Ill. 122; *McFarlane v. Golling*, 76 Fed. Rep. 23; *Dawson v. Trimble*, 3 Litt. (Ky.) 253.

4. *Vernon v. Ehrich*, 2 Hill Eq. (S. Car.) 257; *Fisher v. Kay*, 2 Bibb (Ky.) 434; *Stroud v. Barnett*, 3 Dana (Ky.) 391.

5. *Cutright v. Stanford*, 81 Ill. 240; *Vanmeter v. Love*, 33 Ill. 260; *Cogwell v. Lyon*, 3 J. J. Marsh. (Ky.) 38.

See also *Lewis v. Overby*, 31 Gratt. (Va.) 601.

**Contribution Between Defendants.**— "Each devisee or heir is liable for the debt of the devisor or ancestor to the value of the land devised or inherited, and in proportion to their respective values. The whole debt to an amount not exceeding that value may be made out of any one of them, and one who pays beyond his due proportion is entitled to contribution from the others. \* \* \* As all the devisees are parties to this action, contribution between them will be provided for in the decree. Those, if any, who sold their land, \* \* \* and have become and are now insolvent, are liable to judgments in favor of all devisees who by consequence of such insolvency shall be compelled to pay more than what would otherwise have been their ratable portions." *Badger v. Daniel*, 79 N. Car. 372.

"If one of the heirs or devisees has aliened or wasted his part of the estate and is insolvent, the others must contribute ratably to make up the deficiency, according to the value of the lands descended." *Ryan v. McLeod*, 32 Gratt. (Va.) 367. See also *Hopkirk v. Dennis*, 2 Munf. (Va.) 326.

6. *Vanmeter v. Love*, 33 Ill. 260; *South v. Hoy*, 3 T. B. Mon. (Ky.) 88; *Carneal v. Day*, 2 Litt. (Ky.) 397.

heirs or devisees of his deceased debtor in equity. Thus in *Virginia* and in *West Virginia* the statutes provide that an heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, and that "he shall not be liable to an action at law for any matter for which there may be any redress by such suit in equity."<sup>1</sup>

In *Massachusetts*, if there is more than one person liable for the debt, the creditor may recover by suit in equity against all persons so liable after the settlement of the estate by the executor or administrator.<sup>2</sup>

In *New York* the statute authorizes a creditor to maintain a suit in equity<sup>3</sup> against heirs or devisees,<sup>4</sup> upon certain prescribed conditions,<sup>5</sup> and to recover judgment, to be collected out of the real property descended or devised, or, in case of its alienation, to take judgment for its value.<sup>6</sup> The complaint must show the facts and circumstances entitling the plaintiff to maintain the action,<sup>7</sup> and describe with common certainty the real property descended or devised to the defendant, and must specify its value.<sup>8</sup> Heirs or devisees and personal representatives of a

1. Code West Va. 1887, p. 668, § 6; Code Va. 1887, § 2668. See *Rex v. Creel*, 22 W. Va. 373.

2. Mass. Pub. Stat. 1882, p. 775, § 29. No suit at law or in equity can be brought until after the settlement of the estate by the personal representative. Mass. Pub. Stat. 1882, p. 775, § 26; *Grow v. Dobbins*, 128 Mass. 272; *Brooks v. Rayner*, 127 Mass. 268, holding that the bill is demurrable if it shows that the estate has not been settled.

For a bill containing sufficient recitals to show the right of the plaintiff to relief in equity under the statute, see *Fairfield v. Fairfield*, 15 Gray (Mass.) 596.

#### Adequate Remedy at Law Immaterial.

— Under the statute the creditor may maintain a bill in equity, notwithstanding he might have a remedy at law. "It was not the intention of the legislature to confine this remedy, as in common cases of equity jurisdiction, to the case where there is no plain and complete remedy at law; but they meant, in this specific class of cases, to give a concurrent jurisdiction in equity." *Wood v. Leland*, 22 Pick. (Mass.) 503.

**Decree.** — The liability is apportioned and judgment rendered distributively. *Bell v. Boston*, 101 Mass. 506.

3. "The proper proceeding \* \* \* is, since the Revised Statutes, by bill in equity. The statute in effect so pro-

vides." *Hentz v. Phillips*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 15. See also *Hauselt v. Patterson*, 124 N. Y. 349; *Butts v. Genung*, 5 Paige (N. Y.) 259; *Parsons v. Bowne*, 7 Paige (N. Y.) 354.

4. The remedy "is not given as against the heir at law of a devisee, nor as against the devisee of an heir at law. \* \* \* The only remedy afforded by the statute, where the property has been aliened before the commencement of the action, is a personal judgment against the heir for the value of the property so aliened," whether it be aliened in good faith or bad faith. *Rogers v. Patterson*, 79 Hun (N. Y.) 483.

5. N. Y. Code Civ. Pro., §§ 1843 *et seq.* In *Read v. Patterson*, 134 N. Y. 130, the history of the legislation leading up to the enactment of section 1843 of the Code is given.

6. N. Y. Code Civ. Pro., §§ 1852, 1854.

7. *Hentz v. Phillips*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 15, where the court said: "In the State of New York there is no other way to charge an heir at law with the debt of his ancestor than that pointed out by the statute, *Platt v. Platt*, 105 N. Y. 497; *Selover v. Coe*, 63 N. Y. 438; which must be strictly conformed to and pursued. *Stillwell v. Swarthout*, 81 N. Y. 109." *Wambaugh v. Gates*, 11 Paige (N. Y.) 505; *Hollister v. Hollister*, 10 How. Pr. (N. Y. Supreme Ct.) 532.

8. N. Y. Code Civ. Pro., § 1851; *Clift v. Moses*, 116 N. Y. 144.



deceased person cannot be joined as defendants.<sup>1</sup> But the action must be brought jointly against all the heirs to whom any real property has descended, or against all the devisees, as the case may be.<sup>2</sup>

#### VI. ACTIONS AT LAW BY HEIRS OR DEVISEES — Capacity to Sue. —

At common law the executor or administrator has nothing whatever to do with the real estate of which the testator or intestate died seized.<sup>3</sup> Hence actions relating to the title or right to possession of such real estate can be prosecuted only by the heirs or devisees, unless the statute provides otherwise.<sup>4</sup> On the other hand, the heir or next of kin cannot ordinarily<sup>5</sup> maintain an action in respect to the personalty until after distribution of the same to him.<sup>6</sup>

**Heirs Should Sue in Their Proper Names**, not by the mere general description of "heirs."<sup>7</sup>

**Averment of Heirship.** — When a person sues as heir the declaration must show how he is heir by setting forth his pedigree.<sup>8</sup>

If the plaintiff is unable to ascertain and specify the lands which have come to the defendants from the deceased, he may state that fact in his bill and call upon the heirs and devisees to discover the lands devised or descended to them respectively, and the incumbrances thereon, to enable him to reach such lands. *Parsons v. Bowne*, 7 Paige (N. Y.) 354.

**The Remedy for the Omission to Describe the Lands** is by motion to make the complaint more definite and certain, and not by demurrer. *Littell v. Sayre*, 7 Hun (N. Y.) 485. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 274 *et seq.*

1. *Mersereau v. Ryerss*, 3 N. Y. 261; *Butts v. Genung*, 5 Paige (N. Y.) 254; *Stuart v. Kissam*, 11 Barb. (N. Y.) 271; *Greene v. Martine*, 27 Hun (N. Y.) 246; *Littell v. Sayre*, 7 Hun (N. Y.) 485, holding, however, that the rule does not apply where the creditor has established his demand before the surrogate and the personal estate left by the deceased has been concealed or wasted.

2. N. Y. Code Civ. Pro., § 1846; *Kellogg v. Olmsted*, 6 How. Pr. (N. Y. Supreme Ct.) 487; *Cassidy v. Cassidy*, 1 Barb. Ch. (N. Y.) 467; *Stuart v. Kissam*, 11 Barb. (N. Y.) 271; *Dodge v. Stevens*, 94 N. Y. 209; *Wambaugh v. Gates*, 11 Paige (N. Y.) 513; *Parsons v. Bowne*, 7 Paige (N. Y.) 354.

3. *Flood v. Pilgrim*, 32 Wis. 376; *Jones v. Billstein*, 28 Wis. 221.

4. *Flood v. Pilgrim*, 32 Wis. 376.

5. For the rule and exceptions to the rule, see article LEGATEES AND DISTRIBUTUTES.

6. *Cullen v. O'Hara*, 4 Mich. 132.

"Heirs at law cannot sue on contract, except where they have a cause of action on covenants running with the land. Personal actions do not descend to heirs." *Bourget v. Monroe*, 58 Mich. 566.

7. *Kerlee v. Corpening*, 97 N. Car. 330.

8. *Denham v. Stephenson*, 1 Salk. 355; *Jeffreson v. Morton*, 2 Saund. 7, note 4; *Treasurer v. Hall*, 3 Ohio 225. See also *Waller v. Ellis*, 2 Munf. (Va.) 95. Compare *Philipps v. Philipps*, 4 Q. B. Div. 134, where Brett, L. J., said: "Where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out, but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out." But the case was to some extent governed by the new form of pleading introduced by rules. See the opinion of Cotton, L. J., in the same case, at pp. 137, 139.

**Plaintiff Suing as a Son.** — In *Castro v. Armesti*, 14 Cal. 39, it was held that an allegation in the complaint that the plaintiffs were the sons of J. C., and had been in possession of the rancho since his decease, was a sufficient averment of heirship in the absence of a special demurrer.

**Averment of Devise.** — A devisee suing on a cause of action relating to the title to land devised should aver that he is devisee of the particular tract of land.<sup>1</sup>

**VII. SUITS IN EQUITY BY HEIRS OR DEVISEES** — Bills for Construction of Wills. — See article WILLS.

**Suits Relating to Administration of Estates.** — See article PROBATE AND ADMINISTRATION.

**Averment of Heirship.** — In pleading title by descent the rule in equity follows the rule of pleading at law.<sup>2</sup> The defendant is entitled to be apprised of all the links which constitute the chain of descent,<sup>3</sup> and an averment merely that the plaintiff is an heir is only a legal conclusion.<sup>4</sup>

**VIII. PROCEEDINGS AGAINST UNKNOWN HEIRS.** — See article PUBLICATION.

1. *Coleman v. Croysdale*, 3 J. J. Marsh. (Ky.) 541, an action for breach of covenant warranting to the plaintiff's testator the title to a tract of land. See also *Crisfield v. Storr*, 36 Md. 129.

2. *Baker v. Harwood*, 7 Sim. 375. See *supra*, p. 53.

3. *Baker v. Harwood*, 7 Sim. 375, holding that a description of the plaintiff merely as cousin and heir of the ancestor was insufficient.

4. *Larue v. Hays*, 7 Bush (Ky.) 50, holding that the facts establishing heirship should be set forth. *Hubbard v. Urton*, 67 Fed. Rep. 419.

## HIGHWAYS.

See article *STREETS AND HIGHWAYS*.

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## HOLIDAYS.

See article *SUNDAYS AND HOLIDAYS*.

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## HOMESTEADS AND EXEMPTIONS.

BY ROBERT GRATTAN.

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## HOMESTEADS

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## CROSS-REFERENCES.

As to *Form of Writ of Execution*, see article *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 396.

*Form of Foreclosure Decree where Mortgage Premises Include Homestead*, see article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 422.

*Wife as Party to Foreclosure Proceeding*, see article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 317.

**I. JURISDICTION OVER HOMESTEADS — 1. Generally.** — The question of homestead exemptions being entirely a subject of constitutional and statutory enactment, the courts possessing jurisdiction in such matters must be determined under the provisions of the various enactments creating the law upon the subject.<sup>1</sup> Whatever may be the practice under the various statutes, no unreasonable rule in regard to jurisdiction in such cases can be found,<sup>2</sup> and such courts take jurisdiction in cases involving rights subsequent to the assignment of homestead, as would ordinarily take jurisdiction in cases involving the trial of rights to real property.<sup>3</sup>

**2. Probate Courts.** — In many states jurisdiction has been conferred upon courts of probate in the matter of setting out homesteads and passing upon petitions for the assignment of the same;<sup>4</sup>

1. *Cox v. Bridges*, 84 Ala. 553; *Coffey v. Joseph*, 74 Ala. 271; *Sherry v. Brown*, 66 Ala. 52; *Myers v. Ham*, 20 S. Car. 527; *Scruggs v. Foot*, 19 S. Car. 279; *Ex p. Lewie*, 17 S. Car. 153; *Munro v. Jeter*, 24 S. Car. 29; *Bradley v. Kodelsperger*, 17 S. Car. 9.

2. In order to confer jurisdiction on the court of chancery to grant relief to the owners of a homestead left by a deceased person, it is not necessary that the probate court should first decide that such homestead exists. *Chaplin v. Sawyer*, 35 Vt. 286.

In *Massachusetts*. — Gen. Stat., c. 104, § 9, gives full authority to a party entitled to a homestead to have the same set off to her upon her petition for partition filed in the common-law courts as in the case of tenants in common. *Woodward v. Lincoln*, 9 Allen (Mass.) 241; *Silloway v. Brown*, 12 Allen (Mass.) 35.

3. **Trial in Summary Proceedings.** — In *Riggs v. Sterling*, 51 Mich. 157, it was held that although a homestead right was not strictly an estate, yet it fell within the rule that questions of title could not be tried in summary proceed-

ings before a Circuit Court commissioner.

**Trial upon Motion.** — The question of homestead is too grave a matter to be tried on motion, and where the property was sold under a foreclosure of a mortgage and it was sought to set aside such sale on motion, it was held that the homesteader and his wife should have filed a cross-bill in the foreclosure suit or have brought ejectment. *Cook v. Klink*, 8 Cal. 347.

**Justice of the Peace.** — In *Irwin v. Taylor*, 48 Ark. 226, it was held that a justice of the peace had no jurisdiction to determine the right of homestead. See also *Sherry v. Brown*, 66 Ala. 52.

**County Court.** — Under the constitution and laws of *Texas* the County Court cannot try title to land. The homestead right has been held to be a title to land within the meaning of this inhibition. *Cross v. Peterson*, 1 Tex. App. Civ. Cas., § 1061; *C. B. Carter Lumber Co. v. De Grazier*, 3 Tex. App. Civ. Cas., § 177.

4. See *infra*, V. *Assignment of Homestead*.

but, as a general rule, unless otherwise authorized by statute, it acquires jurisdiction only for such purpose.<sup>1</sup>

**3. In Equity.** — When a homestead exemption has been legally claimed and allotted, the title to it is legal, and should be asserted in a court of law; consequently the owner cannot come into a court of equity to assert or protect it, without showing special circumstances for the interposition of equity.<sup>2</sup>

**II. PARTIES IN CASES AFFECTING HOMESTEADS — 1. Parties Plaintiff**—*a. GENERALLY.* — Since the statutory right of homestead exemption is a provision relating entirely to, and enacted for, the benefit of heads of families, it follows that such head of a family is the proper party to sue in all questions affecting such right. The question whether the right of action is in the husband or the wife is one which has given rise to much contrariety of opinion and upon which no definite rule can be laid down applicable to all cases.

*b. RIGHT OF HUSBAND TO SUE.* — Thus it has been held that the husband, during his lifetime, being naturally the head of the family, should institute all suits for the recovery and protection of the homestead, and that such right does not exist in the wife.<sup>3</sup>

**1. Alabama.**—Baker *v.* Keith, 72 Ala. 121; Keel *v.* Larkin, 72 Ala. 493; Kelly *v.* Garrett, 67 Ala. 304; Cochran *v.* Sorrell, 74 Ala. 310.

*California.* — Schadt *v.* Heppe, 45 Cal. 433; Tompkins's Estate, 12 Cal. 114; Matter of James's Estate, 23 Cal. 417; *In re* Gilmore, 81 Cal. 240; Hardwick's Estate, 59 Cal. 292; Rich *v.* Tubbs, 41 Cal. 34; Watson *v.* His Creditors, 58 Cal. 556; Burton's Estate, 63 Cal. 36; Moore's Estate, 57 Cal. 437.

*Massachusetts.* — Lazell *v.* Lazell, 8 Allen (Mass.) 575; Woodward *v.* Lincoln, 9 Allen (Mass.) 239; Mercier *v.* Chace, 9 Allen (Mass.) 242.

"The Probate Court, in setting apart property which has been dedicated as a homestead under the Homestead Act, does not change nor transmit the title; nor, indeed, does it adjudicate the question of title as between the parties who assert a claim to it. The purpose and effect of the order \* \* \* is merely that the property be relieved from administration. \* \* \* The question of title, as between the claimants, is to be determined in another forum." Rich *v.* Tubbs, 41 Cal. 34; Watson *v.* His Creditors, 58 Cal. 556; Burton's Estate, 63 Cal. 36; Moore's Estate, 57 Cal. 437.

**Prejudicial Order Set Aside.** — Although an order made by a probate court, re-

lating to property previously set apart as a homestead, for the benefit of a surviving wife, can in no way affect her rights in said property, yet it was held that such an order would be set aside as erroneous, where it might operate to the prejudice of the widow by raising a doubt as to her title. Hardwick's Estate, 59 Cal. 292.

**2. Jones *v.* De Graffenreid**, 60 Ala. 145.

It is not unusual, however, to invoke the jurisdiction of equity in this class of cases, and wherever the claimant's rights are endangered and no adequate relief is at hand equity will interpose upon proper application. Roth *v.* Insley, 86 Cal. 134; Corey *v.* Schuster, 44 Neb. 269; Fink *v.* O'Neil, 106 U. S. 272. See also *infra*, X. 3. *Injunctions*.

**Cloud upon the Title.** — Equity will take jurisdiction to remove a cloud from the title of the homestead property. Harrington *v.* Utterback, 57 Mo. 519; Vogler *v.* Montgomery, 54 Mo. 577; Conklin *v.* Foster, 57 Ill. 104, holding that the exercise of such jurisdiction was especially proper where a purchaser at execution sale was in possession of the property and threatened to commit waste by removing the house. See in general article **QUIETING TITLE — REMOVAL OF CLOUD**.

**3. Vancleave *v.* Wilson**, 73 Ala. 388; Guiod *v.* Guiod, 14 Cal. 506; Poole *v.*

c. RIGHT OF WIFE TO SUE. — On the other hand, cases are not lacking to support such right of action on the part of the wife in her own name.<sup>1</sup>

This Conflict of Cases may be explained in a measure by the opinion once prevailing which regarded the homestead as a joint estate of husband and wife with right of survivorship.<sup>2</sup>

d. JOINDER OF HUSBAND AND WIFE. — In order to avoid all question it would seem prudent to join both husband and wife as parties complainant in such actions.<sup>3</sup>

Gerrard, 6 Cal. 72; Getzler v. Saroni, 18 Ill. 518.

In Mallon v. Gates, 26 La. Ann. 610, where a wife filed a bill praying for an injunction to stop the sale of a homestead, the court held that the husband alone could assert the right, and since he was not before the court, nothing could be decided affecting his rights; that since the wife had asserted no right personal to herself, and had no right to represent her husband in the matter, she could not bind him by her acts.

1. In Georgia a wife may maintain, without joining her husband, a statutory action to recover for herself and children premises which have been set apart as a homestead to him, and of which the defendant is in wrongful possession. Eve v. Cross, 76 Ga. 693, holding that even if the action was erroneously brought it was error to refuse leave to amend by adding the husband as a party.

Trespass for an unlawful levy of execution upon a homestead must be brought by the wife or family, and the husband cannot be joined either originally or by amendment. McWilliams v. Anderson, 68 Ga. 772, citing Georgia Code, § 2027.

Interposition of Claim. — In Connally v. Hardwick, 61 Ga. 501, the court said: "The wife and family are the chief beneficiaries contemplated by the homestead and exemption laws. Grant that the legal estate does not vest in the wife, still she has such an interest in the use and enjoyment of the property as will entitle her to protect it from levy and sale by the interposition of a claim, in her own name, when it is under levy and about to be sold away from her by a creditor of the husband. Of course she cannot do this until after the legal steps to set it apart and secure it as exempt property have been taken."

In Texas a wife may maintain an action to protect a homestead, where a

husband is absent or refuses to join in the suit. Kelley v. Whitmore, 41 Tex. 647, modifying Murphy v. Coffey, 33 Tex. 509.

In California, the Code Civ. Pro., § 370, provides that "when a married woman is a party, her husband must be joined with her, except (1) when the action concerns her separate property, or her right or claim to the homestead property, she may sue alone." Mauldin v. Cox, 67 Cal. 390; Prey v. Stanley, 110 Cal. 423.

2. Dunn v. Tozer, 10 Cal. 167; Poole v. Gerrard, 6 Cal. 71, 65 Am. Dec. 481, an action to recover a homestead, where the court said: "On the other hand, the wife has no right to sue alone. In Taylor v. Hargous, 4 Cal. 268, 60. Am. Dec. 606, we decided that the homestead was a joint estate in husband and wife, with the right of survivorship. It results from that decision that it is neither common property, which would enable the husband to sue alone, nor is it the separate estate of the wife, in which case only she would be enabled to sue alone. She should have joined her husband in the action, and he would not have been stopped by a void deed." See also Thompson, Homestead and Exemption, § 693. This doctrine seems to have been exploded in later decisions, and the right of the wife to sue in her own name has been allowed in numerous cases. See *infra*, IX. Actions to Recover Homestead, and X. Actions to Protect Homestead.

3. Where a mortgage was executed by husband and wife, purporting to release, on the part of both, the right to a homestead in the mortgaged premises, and it is sought by bill in chancery to avoid such release in the right of the wife, on the ground that the purport of the instrument in that regard was not made known to her at the time she executed and acknowledged the same, and that she was ignorant of the

c. **MINOR CHILDREN.** — Minor children may properly be joined in an action to protect the homestead,<sup>1</sup> and it has been held that after the death of the head of the family they are necessary parties.<sup>2</sup>

2. **Parties Defendant — Wife.** — In actions brought by creditors seeking to subject the homestead to their claims, the wife is a necessary party defendant and should be joined with her husband,<sup>3</sup>

fact that thereby she was releasing all her right to homestead in such premises, the wife should join in the bill as a party complainant. It cannot be filed by the husband alone. *Eyster v. Hatheway*, 50 Ill. 521. See also *Cassell v. Ross*, 33 Ill. 258.

**Objection Waived by Failure to Demur.** — *Dunn v. Tozer*, 10 Cal. 167, was a bill to set aside a certificate of sale and to restrain the sheriff from executing a deed of property claimed to be a homestead. It was objected in the appellate court for the first time that the wife of the homesteader was not joined with him in the suit. That court held, however, that such defect, being apparent on the face of the complaint, was waived by failure to demur.

1. *Abell v. Lothrop*, 47 Vt. 375; *Miles v. Miles*, 46 N. H. 261; *Wilson v. Fridenburg*, 19 Fla. 461. See also *Eve v. Cross*, 76 Ga. 695.

**In a Bill in Equity** to recover a homestead, the children are proper, if not necessary, parties. *Miles v. Miles*, 46 N. H. 261.

**Guardian.** — But minor children cannot assert their homestead rights except through a duly appointed guardian. *Hall v. Fields*, 81 Tex. 553.

**Widow's Allowance in Lieu of Homestead.** — Where, by an order of the Probate Court, the administrator of an insolvent estate was ordered to pay the widow of the decedent two thousand dollars in lieu of a homestead, and a guardian of the decedent's minor child sued the administrator to recover half of the allowance, it was held that the mother was the only person entitled to sue for the allowance, but that she might join with her child as party to an action, if such child had any interest. *Burt v. Box*, 36 Tex. 114.

**Ejectment Against Mortgagee of Husband.** — Where the mortgage of a homestead given by a married man without his wife's signature is void absolutely, and not merely as to the homestead interest, an heir at law of the mortgagor, after his death, may maintain

ejectment against one holding under a foreclosure of it, and this whether the heir is or is not a minor. *Sherrid v. Southwick*, 43 Mich. 515.

2. *Wilson v. Fridenburg*, 19 Fla. 461.

3. **California.** — *Sargent v. Wilson*, 5 Cal. 504; *Revalk v. Kraemer*, 8 Cal. 66; *Kraemer v. Revalk*, 8 Cal. 75; *Cook v. Klink*, 8 Cal. 347; *Marks v. Marsh*, 9 Cal. 96; *Moss v. Warner*, 10 Cal. 296; *Mabury v. Ruiz*, 58 Cal. 11; *Hefner v. Urton*, 71 Cal. 479; *Fitzgerald v. Fernandez*, 71 Cal. 508; *Stockton Bldg., etc., Assoc. v. Chalmers*, 75 Cal. 332; *Watts v. Gallagher*, 97 Cal. 51.

**Illinois.** — *Cassell v. Ross*, 33 Ill. 245.

**Iowa.** — *Larson v. Reynolds*, 13 Iowa 584; *Burnap v. Cook*, 16 Iowa 149; *Chase v. Abbott*, 20 Iowa 159.

**Kansas.** — *Morris v. Ward*, 5 Kan. 239; *Gapen v. Stephenson*, 17 Kan. 617.

**Michigan.** — *Shoemaker v. Gardner*, 19 Mich. 96; *Hodson v. Van Fossen*, 26 Mich. 68; *Bunce v. Bidwell*, 43 Mich. 545; *Shoemaker v. Collins*, 49 Mich. 595; *Cleaver v. Bigelow*, 61 Mich. 47; *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518.

**Minnesota.** — *Spalti v. Blumer*, 56 Minn. 523.

**Wisconsin.** — *Weston v. Weston*, 46 Wis. 130.

In *Bunce v. Bidwell*, 43 Mich. 545, *Cooley, J.*, said: "It would be prudent, perhaps, to join her [the wife] in all cases in which a homestead right may be asserted with any show of reason."

In *Chase v. Abbott*, 20 Iowa 159, in discussing the question whether a wife is a necessary party to actions affecting her homestead, the court said: "The question as to the necessity of making the wife a party to a suit involving the homestead right under our present homestead law has not been directly determined by this court. In *Helfenstein v. Cave*, 3 Iowa 287, which arose under the Homestead Act, approved January 15, 1849 (*vide* Laws of regular session of 2d General Assembly, c. 124, p. 152), it was held that the wife was not a proper party; but the court, *per*



except in cases where her right to set up her homestead exemption would constitute no defense to the action.<sup>1</sup>

**Intervention of Wife.** — Where the right of the wife is actual and existing, she can protect it by intervening in a suit brought against her husband touching the homestead property.<sup>2</sup>

**All Persons Interested** in the homestead estate are proper parties, and where all the proper parties are not before the court, a judgment or decree against the homestead property will not bind those omitted.<sup>3</sup>

Woodward, J., expressly say that they "are not inclined to settle the question definitely as to her becoming a party under" circumstances where it would be necessary in order to protect her rights. In *Sloan v. Coolbaugh*, 10 Iowa 31, the court held, in a brief opinion also by Woodward, J., that under the facts in the case the wife was not so necessary a party as to justify the District Court in sustaining a demurrer to the petition because of the failure to join her as a party plaintiff. The question is, then, to a certain extent at least, an open one in this state, and under our present statute, and so regarding it, we proceed to state briefly our views of the correct practice. The right of the wife in the homestead being, as before stated, a vested right, she cannot be fully and completely barred or divested of that right by judicial proceedings, except upon making her a party thereto. *Burnap v. Cook*, 16 Iowa 149. It would, therefore, be the safer practice, in all controversies affecting the homestead, to make her a party, and generally she should be a party. Where the husband seeks to enjoin a sale of the homestead, or other like proceedings, because it is a homestead; and therefore exempt to him in his own right, we would not now say that the wife was a necessary party. *Larson v. Reynolds*, 13 Iowa 579. And yet, if he should fail in his action, and judgment pass against him, it is reasonably clear that such judgment would not include the wife. The absolute safety of the defendant in such case, and the conclusiveness of the judgment as against the wife, could only be effectuated by causing her to be made a party, which he would doubtless have a right to do."

**1. Foreclosure of Purchase-money Mortgage.** — In *Amphlett v. Hibbard*, 29 Mich. 302, the question arose whether in case of a purchase-money mortgage

given by the husband alone the wife was a necessary party to a bill to foreclose the same, and the court said: "As to this question, we see no substantial ground for requiring her to be made a party, nor can we see any such substantial benefit to arise from such a requirement as would counterbalance the embarrassments which would arise from such a rule." And in this case the foreclosure and sale was held as valid and effectual as if the wife had been joined. See also article FORECLOSURE OF MORTGAGES, vol. 9, p. 317.

**Foreclosure of Vendor's Lien.** — And so a wife is not a necessary party to an action to foreclose a vendor's lien against premises occupied as a homestead. *Porter v. Teate*, 17 Fla. 813.

**2.** *Perry v. Dillrance*, 86 Iowa 425; *Moss v. Warner*, 10 Cal. 296; *Sargent v. Wilson*, 5 Cal. 504; *McClure v. Braniff*, 75 Iowa 43. See also *Connally v. Hardwick*, 61 Ga. 501; *Zellers v. Beckman*, 64 Ga. 748.

In *Perry v. Dillrance*, 86 Iowa 425, the court said: "We see no reason why she should not be permitted to intervene for the protection of her homestead right, even though her husband may also assert her right in her behalf. Having a direct interest in the matter in litigation, and in the success of the husband therein, her right to intervene is clearly given by the statute. Code, §§ 2683-2685."

In *Texas*, where real estate had been attached and the defendant's wife intervened, claiming part of the same as her homestead, it was held that she had a right so to do for the protection of her homestead, and that the court below erred in sustaining the plaintiff's demurrer to her plea of intervention. *Stoddart v. McMahan*, 35 Tex. 299.

**3. California.** — *Watts v. Gallagher*, 97 Cal. 51; *Hefner v. Urton*, 71 Cal. 479; *Stockton Bldg., etc., Assoc. v. Chalmers*, 75 Cal. 332; *Fitzgerald*

**Administrators.**—Since administrators have control of the realty only for the purpose of paying debts, and the homestead is

*v. Fernandez*, 71 Cal. 504; *Mabury v. Ruiz*, 58 Cal. 11; *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Revalk v. Kraemer*, 8 Cal. 66; *Marks v. Marsh*, 9 Cal. 97.

*Iowa*.—*Burnap v. Cook*, 16 Iowa 149; *Larson v. Reynolds*, 13 Iowa 584.

*Kansas*.—*Gapen v. Stephenson*, 17 Kan. 617; *Morris v. Ward*, 5 Kan. 239.

*Michigan*.—*Cleaver v. Bigelow*, 61 Mich. 53; *Hodson v. Van Fossen*, 26 Mich. 68; *Bunce v. Bidwell*, 43 Mich. 542.

*Minnesota*.—*Spalti v. Blumer*, 56 Minn. 523.

**Joint Owners.**—When the holder of a mortgage desires to subject to the payment of his debt the interest of the debtor in land, in excess of the homestead right, and there are other joint owners of the land, the better practice is to make them parties for purposes of partition before sale. *Jenkins v. Volz*, 54 Tex. 636.

**Joinder of Wife.**—Where both parties in interest are not represented the right of homestead cannot be determined, and the husband alone has not even the right of appeal, since the judgment could not affect the question of homestead. *Kraemer v. Revalk*, 8 Cal. 75.

A judgment against the husband alone is not a lien on the homestead. *Gapen v. Stephenson*, 17 Kan. 617; *Morris v. Ward*, 5 Kan. 239. And the fact that the wife joins her husband in a motion to set aside a sale does not make her a party to the suit, and her appearance therein will be disregarded as if the motion had been made by her husband alone. *Gapen v. Stephenson*, 17 Kan. 617.

**In Ejectment.**—Where husband and wife occupy together, as a homestead, lands claimed to belong to the wife, an action of ejectment against the husband alone, to test the validity of a conveyance to the wife, is a fruitless proceeding; the wife not being a party no judgment respecting the title could affect her rights, and a judgment against the husband could not be the basis for disturbing her possession, or warrant his expulsion from her. The action should be brought against both. *Hodson v. Van Fossen*, 26 Mich. 68.

So in all actions of ejectment where

the title to the homestead property is in issue, the wife is a necessary party defendant. *Davis Sewing Mach. Co. v. Whitney*, 61 Mich. 518; *Cleaver v. Bigelow*, 61 Mich. 53. See also *Bunce v. Bidwell*, 43 Mich. 542.

**Foreclosure of Mortgages.**—In order to be concluded by a judgment of foreclosure, the wife is a necessary party to an action to foreclose a mortgage executed upon the homestead property by the husband alone. *Watts v. Gallagher*, 97 Cal. 51; *Revalk v. Kraemer*, 8 Cal. 72; *Hefner v. Urton*, 71 Cal. 479; *Stockton Bldg., etc., Assoc. v. Chalmers*, 75 Cal. 332; *Fitzgerald v. Fernandez*, 71 Cal. 508; *Mabury v. Ruiz*, 58 Cal. 11; *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Burnap v. Cook*, 16 Iowa 149; *Spalti v. Blumer*, 56 Minn. 523. See also *infra*, XI. **Foreclosure of Homestead Mortgage.** And where she is not made a party a judgment directing a sale of the premises is void as against her. *Watts v. Gallagher*, 97 Cal. 51. She may protect and redeem the homestead from such mortgage. *Spalti v. Blumer*, 56 Minn. 523.

In *Sargent v. Wilson*, 5 Cal. 504, it was held that the wife was a necessary party to a foreclosure proceeding, and that it was not error to allow her to intervene and assert her claim to the premises as a homestead. And in *Revalk v. Kraemer*, 8 Cal. 66, it was held that in a case affecting the homestead title to which the husband alone was a party, and where a judgment was rendered against him, even he was not concluded by the judgment, and might join the wife in a bill to restrain the execution of the decree or judgment. This decision was placed upon the ground that since the husband alone could not voluntarily do anything whereby he would be divested of the title, he could not be required by judgment of a court to do what he could not do voluntarily. And in *Marks v. Marsh*, 9 Cal. 96, where the husband, being sued alone, set up a homestead right, the court held that the wife should be brought in as a party. See also *Tadlock v. Eccles*, 20 Tex. 782; *Wisner v. Farnham*, 2 Mich. 472; *Chase v. Abbott*, 20 Iowa 160; and article FORECLOSURE OF MORTGAGES, vol. 9, p. 317.

expressly exempt therefrom, they are not necessary parties to an action affecting the homestead premises.<sup>1</sup>

**III. APPLICATION FOR HOMESTEAD — 1. Claim to Officer Levying Execution.** — One mode of asserting a claim of homestead is to make application to the officer levying on property out of which a homestead is to be carved, although no declaration and claim has been filed.<sup>2</sup> Upon such claim being made it is the duty of the officer to return the execution and claim to the proper court (usually the court out of which the process issued), where a contest of the claim may be originated and tried.<sup>3</sup>

**2. Application to Court — a. GENERALLY.** — Application to court is the more frequent and usual mode of procedure in such cases, and certain courts are distinctly authorized by statute to take jurisdiction in such matters.<sup>4</sup>

**b. HOW MADE.** — Applications for the assignment of a homestead must be made in the manner provided by statute;<sup>5</sup> and where a proper application is made the court has no discretion

1. Thus where the family residence has been mortgaged during the lifetime of the husband, and after his death has been set apart as a homestead to the widow and family, the administrator of the estate is not a necessary or proper party to a suit to foreclose the mortgage. *Schadt v. Heppe*, 45 Cal. 433.

So where the purchaser at a sheriff's sale sued the husband and wife to recover the homestead, and pending an appeal the husband died, it was held that inasmuch as the homestead was not the subject of administration, the administrator was not a necessary party to the suit. *Bassett v. Messner*, 30 Tex. 611.

2. *Mitchell v. Corbin*, 91 Ala. 599; *Schuer v. King*, 100 Ala. 241; *Block v. George*, 83 Ala. 178; *Sears v. Hanks*, 14 Ohio St. 298; *Rector v. Rotton*, 3 Neb. 177. See also *infra*, V. *Assignment of Homestead*.

3. *Keel v. Larkin*, 72 Ala. 494, holding that where an execution issued on a judgment in the Circuit Court was received by the sheriff during the lifetime of the defendant, but was not levied until after his death, and a homestead was claimed by the widow, the execution and claim should be returned to the Circuit Court; and it was not proper that the contest should be originated in the Probate Court and then certified to the Circuit Court for trial.

"It is Not the Province of the Officer to pass upon the sufficiency of the claim of exemption or of the affidavit

of contest. If insufficient, they would be amendable in the court from which the process issued, and to that tribunal their sufficiency must be referred." *Block v. Bragg*, 68 Ala. 291; *McLaren v. Anderson*, 81 Ala. 106.

**Perjury in Affidavit.** — Where the claim for exemption is substantially in accordance with the statute, and is sworn to as the statute requires, the sheriff cannot refuse to appraise and set apart the property on the ground of perjury in the affidavit. *Over v. Shannon*, 91 Ind. 99.

**Liability Growing Out of Tort.** — In *Alabama* no exemption can be claimed against a liability growing out of a tort; and if the judgment or execution discloses on its face that the liability grew out of a tort, the sheriff may disregard a claim of exemption, and proceed to sell under the process; but he cannot look beyond the face of the judgment and execution to ascertain that fact. *McLaren v. Anderson*, 81 Ala. 106.

**Time When Liability Accrued.** — The failure to set forth in the claim for exemption the time when the liability accrued against which the claim is asserted is an amendable defect which cannot be raised for the first time in the appellate court. *McLaren v. Anderson*, 81 Ala. 106.

4. See *supra*, I. *Jurisdiction over Homesteads*.

5. *Myers v. Ham*, 20 S. Car. 527; *Ex p. Lewie*, 17 S. Car. 156. See also *Howze v. Howze*, 2 S. Car. 232.

to refuse the same.<sup>1</sup> The usual application is a petition or complaint in the nature of a bill in equity, setting up the right of homestead and praying that the same be set aside to the petitioner,<sup>2</sup> and no demand is necessary to enable the claimant to maintain a proceeding seeking an assignment of homestead interests.<sup>3</sup>

**c. CONTENTS OF APPLICATION — Statement of Essential Facts.** — The application should contain all the essential requirements of the statute entitling one to a homestead.<sup>4</sup> Thus the petition should

1. *Demartin v. Demartin*, 85 Cal. 74; *Ballentine's Estate*, 45 Cal. 696; *Tyrell v. Baldwin*, 78 Cal. 476.

The expression in section 123 of the *Nevada Homestead Act*, "may set apart for the use of the family of the deceased," has been held imperative, as if it read "shall" set apart. *Walley's Estate*, 11 Nev. 260.

**Continuance of Hearing.** — The Superior Court appointing appraisers to set off a homestead has discretion to continue the hearing of an application for a reasonable time, and the continuance of five days at the request of the homestead claimant is not such an abuse of discretion as will warrant the issuance of a writ of mandamus. *Stone v. McCann*, 79 Cal. 461.

2. *Barco v. Fennell*, 24 Fla. 378; *Atkinson v. Atkinson*, 40 N. H. 249; *Ring v. Burt*, 17 Mich. 465; *Beecher v. Baldy*, 7 Mich. 488; *Atkinson v. Atkinson*, 37 N. H. 434; *Horn v. Tufts*, 39 N. H. 485.

**Application by Grantee of Husband.** — Where the husband conveys property including a homestead, and afterwards deserts his wife, the grantee may apply to a court of equity to have the homestead set off, or, where this cannot be done, to have the amount allowed by law awarded to the wife in lieu of her homestead. *Hotchkiss v. Brooks*, 93 Ill. 386. See also *Mix v. King*, 55 Ill. 434.

**Bill in Equity by Children.** — In *Barco v. Fennell*, 24 Fla. 378, it was held that where the father had died in possession of the homestead property without having filed any declaration in regard thereto, ejectment was not the proper remedy on the part of the heirs, but that under Acts of 1881, c. 3446, § 2, the proper remedy was by bill in equity to have the homestead set apart.

In *Georgia*, under the Act of 1868, the applicant for homestead should present a petition to the ordinary of the county in which the applicant resides and ap-

ply for an order to the county surveyor to lay off his homestead and make a plat of it, which order the ordinary must issue at once to the applicant. *Deyton v. Bell*, 81 Ga. 376; *Blacker v. Dunlop*, 93 Ga. 819.

In *New Hampshire* it was held that the deed of the husband alone will convey the estate subject to the inchoate right of the wife and minor children, if any, after his decease; and that she may have her remedy to obtain an assignment by bill in equity, or, by the statutory proceeding, by petition for partition, under Rev. Stat., c. 206. *Atkinson v. Atkinson*, 37 N. H. 434; *Horn v. Tufts*, 39 N. H. 485.

3. *Atkinson v. Atkinson*, 40 N. H. 249. Where a person having a right to a homestead exemption sells the property, upon which there are judgment liens, he and his grantee may maintain a joint action to have the latter's title to such real estate quieted and freed from the lien of such judgment, and the property of the former, owned at the time of such conveyance, set off to him as exempt from execution; and no demand is necessary to maintain such action. *Barnard v. Brown*, 112 Ind. 53.

4. *Torrance v. Boyd*, 63 Ga. 26.

**Remedy for Indefiniteness.** — Where the complaint makes a general claim of homestead with a prayer for general relief, and the grounds of the claim are shown in a vague and inferential way, but nevertheless so stated as to advise defendants generally of its nature and to show that if sustained by proof it would be valid, it is too late for the defendants to object for the want of certainty and precision after going to a hearing upon a denial of the facts alleged. They should have moved that the complaint be made more definite and certain. *Gainus v. Cannon*, 42 Ark. 514. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, pp. 276, 279.

set out the residence of the applicant <sup>1</sup> and allege that the premises claimed were occupied as a homestead,<sup>2</sup> that the applicant is the head of a family,<sup>3</sup> and that the property claimed to be exempt as a homestead does not exceed the statutory value,<sup>4</sup> in order that the court may be informed that the claimant and the property claimed to be exempt are embraced in and covered by

1. "In residence the question of jurisdiction is involved." *Torrance v. Boyd*, 63 Ga. 27.

**Sufficiency of Statement.**—Where it was objected that the petition did not state the residence sufficiently, it was held that the following: "Georgia, Houston County: To the ordinary of said county. The petition of Josiah M. Frederick, of said county, respectfully sheweth," etc., was a sufficient statement to show beyond all question the residence of the applicant. *Wilder v. Frederick*, 67 Ga. 671.

**Estoppel to Set Up Defect.**—Claiming homestead and causing it to be allowed by the ordinary is in the nature of a recovery by the applicant for the benefit of his family, and after the fruits of the proceeding having been enjoyed for many years, the allowance will not be held void, at the instance of him or his privies, because the application did not disclose expressly that he was the head of a family, or that he was a resident of the county in which the proceeding took place. *Torrance v. Boyd*, 63 Ga. 23.

2. To constitute a valid claim of homestead there must be an occupancy, or a clearly defined intention of present residence; accordingly, an affidavit which did not state that the premises were occupied as a homestead when the lien of the execution attached, or show a state of facts bringing it within the rule laid down, was held defective. *Blum v. Carter*, 63 Ala. 240.

**Time of Use as Homestead.**—Upon a proceeding to have part of land sold under execution set off as a homestead, the petition need not state that the land was used as a homestead before the debt under which it was sold was created. *Holcomb v. Hood*, (Ky. 1886) 1 S. W. Rep. 401.

**Defect Cured by Answer.**—In *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, it was held that although the claimant's petition did not allege that at the time of the levy of the execution he was "occupying" the property as a homestead, the fact that the answer denied such occupancy on the

part of the claimant cured any defect that might arise.

3. *Sheriff v. Welborn*, 14 S. Car. 482; *Walle's Estate*, 11 Nev. 260; *Wilson v. Brown*, 58 Ala. 62; *Cowart v. Page*, 59 Ga. 235; *Wilder v. Frederick*, 67 Ga. 671. "And of what class or classes of children with respect to age his family in part consisted." *Torrance v. Boyd*, 63 Ga. 26.

In *Lynch v. Pace*, 40 Ga. 173, it was held that inasmuch as the applicant for a homestead did not allege in his application therefor that he was "the head of a family, or guardian, or trustee of a family of minor children," the demurrer thereto should have been sustained.

**Reasonable Certainty.**—Where it appears on the face of the application with reasonable certainty that the applicant is the head of a family, it is enough to give the ordinary jurisdiction so far as that element of jurisdiction is concerned. *Cowart v. Page*, 59 Ga. 235.

4. Thus, in *Nebraska*, to lay the proper foundation for the reception of evidence to establish the claimant's right to hold premises as a homestead, the premises must be claimed in the pleadings and shown in the proofs as "not exceeding in value two thousand dollars," and "not exceeding two lots" in quantity of the contiguous lands, it being within an incorporated city. *Union Nat. Bank v. Harrison*, 16 Neb. 639.

In *California*, when a surviving wife petitions to have the homestead set off to her, she must show to the Probate Court what was the homestead at the time of the husband's death, and what was its value at that time, and the court should restrict the quantity of land set off to her to an amount worth five thousand dollars, or less, regardless of the quantity described in the declaration of homestead. *Delaney's Estate*, 37 Cal. 177.

**Sufficiency of Allegation.**—In *Boesker v. Pickett*, 81 Ind. 555, it was held that an allegation that "said property does

the terms of the statute.<sup>1</sup> But it seems that the pleader is not required to negative the exceptions of the statute in any case.<sup>2</sup>

In Georgia, where application is made by the wife, the petition should show whether the homestead is to be set out of her own or her husband's property.<sup>3</sup>

**IV. WAIVER OF HOMESTEAD EXEMPTION.** — While the right to claim property as exempt is a personal privilege of the debtor, the law presumes that he will make such claim,<sup>4</sup> and if he fails to

not exceed in value the sum of \$600'' sufficiently showed the value of the property exempt.

**1. Date When Debt Was Contracted.** — A claim of exemption to lands on which an execution has been levied is insufficient if it fail to aver when the debt on which the judgment was rendered was contracted, so that the law governing the exemption can be ascertained. *Block v. Bragg*, 68 Ala. 291.

**Evidence of Debts.** — In Georgia the law does not require the applicant for homestead to allege in the petition or show by proof whether there are any debts against him or not, and so in a case of the petition of a widow, she is not required to allege or prove that her husband owed debts. *Deyton v. Bell*, 81 Ga. 377.

**Amendment of Petition.** — Where the petitioner had applied to have his homestead set off in the court of ordinary, and upon appeal a verdict was found against him in the Superior Court, on the ground that he was not the head of a family, and he afterwards made a second application to the court of ordinary, which was allowed, it was held that the Superior Court on a second appeal erred in refusing to allow the petition to be amended by asserting a new right of homestead which had accrued since the former verdict, and in dismissing the petitioner's application and order. *Young v. Brown*, 45 Ga. 552.

**2. Starnes v. Webb**, (Ky. 1889) 11 S. W. Rep. 508. See also *Mitchell v. Milhoan*, 11 Kan. 629, where it was held that although the exceptions in the statute were stated inferentially, and as mere conclusions of law from facts stated, still the petition was sufficient; and it was questioned without being decided whether it was necessary to state such facts at all.

**3. Linch v. McIntyre**, 78 Ga. 209; *Blacker v. Dunlop*, 93 Ga. 819; *Bowen v. Bowen*, 55 Ga. 182; *Jones v. Crumley*,

61 Ga. 105; *Wilder v. Frederick*, 67 Ga. 671; *Mapp v. Long*, 62 Ga. 568.

It is sufficient if the allegations taken together indicate from whose property the homestead is sought. *Blacker v. Dunlop*, 93 Ga. 821.

**Presumption upon Husband's Application.** — The rule that when a wife makes application for homestead she should show whether it is to be set out of her own or her husband's property does not apply to an application on the part of the husband, for it is presumed that the land out of which he claims a homestead belongs to himself. *Wilder v. Frederick*, 67 Ga. 669.

**Objection by Husband.** — Where there is no evidence that the husband appeared before the ordinary and objected to an application on the part of his wife, by plea or otherwise, his assent to the application will be presumed. *Blacker v. Dunlop*, 93 Ga. 819; *Bowen v. Bowen*, 55 Ga. 182; *Linch v. McIntyre*, 78 Ga. 209.

Where, however, he does object by plea his objection must prevail against the application. *Bowen v. Bowen*, 55 Ga. 182.

**4. Williams v. Osborne**, 95 Ind. 347; *Dick v. Hitt*, 82 Ind. 92; *Campbell v. Gould*, 17 Ind. 133; *State v. Harper*, 120 Ind. 23; *Kestler v. Kern*, 2 Ind. App. 491; *State v. Melogue*, 9 Ind. 196; *Sherry v. Brown*, 66 Ala. 51; *Martin v. Lile*, 63 Ala. 406. See also *Norris v. Kidd*, 28 Ark. 487.

In *Dick v. Hitt*, 82 Ind. 94, the court said: "*Prima facie*, property exempt from execution will be claimed by the debtor. Everywhere the law acts upon the presumption that a man will do that which is for his own interest, and this presumption extends to the case of a debtor having a right to exempt property from sale upon execution."

In *Campbell v. Gould*, 17 Ind. 133, quoted in *Williams v. Osborne*, 95 Ind. 347, the general rule is thus stated: "Although it may be said, perhaps,

set up his claim at the time and in the manner provided by law, he will be deemed to have waived the same.<sup>1</sup> Whatever may be the time for claiming exemption under the practice of the several states, it may be laid down as a general rule that the same should be claimed before sale or the right will be deemed to have been waived.<sup>2</sup> So where actions have been instituted affecting the

that the debtor must claim the exemption, avail himself of this right, and that he may by express acts, or even implication, waive it, yet we cannot perceive but that the property, when within the exemption, should be *prima facie*, for the purposes of a suit of this character, considered as beyond the reach of the regular process of the court. In other words, keeping in view the fundamental law and the statute, the legal presumption would be that there was a necessity for such laws, and that the citizen would avail himself of the privilege thereby extended to him, to reserve the amount of property indicated, for the purpose named."

**Right Not Assignable.** — The right of the debtor to claim exemption is personal, and he cannot convey such right to another so as to enable the latter to hold the property and defend the same as against a judgment creditor. *Allen v. Cook*, 26 Barb. (N. Y.) 374.

1. *Martin v. Lile*, 63 Ala. 409; *Sherry v. Brown*, 66 Ala. 51; *Irwin v. Taylor*, 48 Ark. 224; *Chambers v. Perry*, 47 Ark. 400; *Matter of Reed's Estate*, 23 Cal. 410; *Graves v. Hinkle*, 120 Ind. 159; *Boesker v. Pickett*, 81 Ind. 555; *Sheriff v. Welborn*, 14 S. Car. 482; *Scofield v. Hopkins*, 61 Wis. 370. See also *Mitchell v. Corbin*, 91 Ala. 599; *Schuer v. King*, 100 Ala. 241; *Block v. George*, 83 Ala. 178.

In *Norris v. Kidd*, 28 Ark. 488, the court said: "Our present constitution says the homestead is to be 'selected by the owner,' but how, when, and to whom he shall make application to select it is not therein provided. The legislature, as it has the unquestioned power to do, has pointed out how, when, and to whom the application to select shall be made." And it was decided that a failure or neglect to select the homestead in the manner pointed out by the schedule acts was a waiver of the right; and having been neglected, a debtor could not set it up in an action of ejectment; that the exemption, if intended to be claimed, must be asserted by scheduling before the

sale under execution. See *Healy v. Conner*, 40 Ark. 357.

In *Tumlinson v. Swinney*, 22 Ark. 400, a judgment in favor of a homestead was affirmed where the debtor claimed his exemption on the day of sale; but at that time the law did not provide how the homestead should be selected nor to whom notice should be given.

**Setting Up Claim After Judgment of Sale.**

— In *Arkansas*, when a homestead is attached in a suit before a justice of the peace, and the final judgment of the justice is appealed to the Circuit Court, the failure of the defendant to claim his exemption before the final judgment in the Circuit Court condemning the land for sale will not estop him to assert his claim by filing his schedule and obtaining a supersedeas after judgment and before the sale; since he could not assert his exemption before the judgment in the Circuit Court, because, the justice having no jurisdiction of the question, the Circuit Court would acquire none by appeal. *Irwin v. Taylor*, 48 Ark. 224.

**Notice Not Necessary.** — Where the judgment creditors are the purchasers at an execution sale of land, they are presumed to know what the debtor has done and is doing on the land indicating an intention to make it his homestead, and, if such intention is manifest, no notice to them that he claims the premises as a homestead is necessary to prevent a waiver of the exemption. *Scofield v. Hopkins*, 61 Wis. 370.

2. *Jarrell v. Payne*, 75 Ala. 577; *Schuer v. King*, 100 Ala. 241; *Martin v. Lile*, 63 Ala. 406; *Sherry v. Brown*, 66 Ala. 52; *Mitchell v. Corbin*, 91 Ala. 599; *Norris v. Kidd*, 28 Ark. 485; *Irwin v. Taylor*, 48 Ark. 224; *Brown v. Peters*, 53 Ark. 184; *Kuntz v. Baehr*, 28 La. Ann. 90; *Williston v. Schmidt*, 28 La. Ann. 416; *Hawthorne v. Smith*, 3 Nev. 182. See also *Maddox v. Epler*, 48 Ill. App. 265; *Manning v. Dove*, 10 Rich. L. (S. Car.) 395.

In *Arkansas*, as the law stood prior to the Act of March 18, 1887, a debtor lost his right of homestead if he failed to

homestead property it is the duty of the claimant to present his claim for adjudication at the first opportunity,<sup>1</sup> and a failure to do so will constitute an abandonment of the right.<sup>2</sup> Nor can

claim it and procure a supersedeas staying its sale. That Act provides that in certain enumerated cases the right shall not be lost by such failure; but it does not provide that any supersedeas shall issue to stay a sale, and leaves the debtor's right to a supersedeas as it existed before. If, in any of the cases enumerated in the Act, the homestead is sold, the debtor may subsequently claim it, and set up his right of homestead in a suit brought against him for its possession; but if he permits it to go to sale, he takes the chances of defeat in a trial upon that issue. If he would avoid these chances and protect the homestead from sale, he may procure a supersedeas to stay it, but to do that he must follow the law which gives that right. There is no right to a supersedeas except that contained in the earlier statute, and it prescribes the terms upon which the right may be enjoyed. *Brown v. Peters*, 53 Ark. 184.

In *Irwin v. Taylor*, 48 Ark. 224, it was held that where an attachment had been levied upon real estate it was sufficient to claim exemption at any time before sale, and that a decision of the lower court that the same should have been claimed before final judgment in the attachment suit was erroneous. See also *Robinson v. Swearingen*, 55 Ark. 55, where the same rule was laid down.

**Injunction.**—Where property has been seized upon by the sheriff and sold, an injunction will not issue to prevent the purchaser from being put into possession, where the claimant of the homestead has asserted his right in no other way than by personal notice to the sheriff, and the sale of the property vested all of the claimant's right. *Kuntz v. Baehr*, 28 La. Ann. 90; *Williston v. Schmidt*, 28 La. Ann. 416.

1. *Turner v. Vaughan*, 33 Ark. 454; *Hemenway v. Wood*, 53 Iowa 23; *Larson v. Reynolds*, 13 Iowa 579; *Cook v. Klink*, 8 Cal. 347.

**Asserting Claim After Judgment.**—Where the claimant of homestead is party to an action wherein a judgment is rendered against his property, his defense should be made in that action; and where he fails to assert such de-

fense, he cannot resist the enforcement of the judgment upon the ground that the property is exempt. *Collins v. Chantland*, 48 Iowa 243; *Randolph v. Little*, 62 Ala. 396.

And so, where a right of homestead has not been asserted in an action brought against the same, a court of equity will not go behind the judgment in such suit and make a decree that would restrain the execution of the judgment in the first cause. *Baxter v. Dear*, 24 Tex. 22.

Where parties sued to foreclose a mortgage and purchased the property at a sheriff's sale under the judgment of foreclosure, and afterwards brought a suit of ejectment to recover the property, it was held too late for the defendant to plead that the property was his homestead, and that such defense should be set up in the original suit. *Chilson v. Reeves*, 29 Tex. 281.

2. *Randolph v. Little*, 62 Ala. 396.

**Surplus on Sheriff's Sale.**—Where on special execution the sheriff (defendant) sold a quarter-section of land belonging to plaintiffs, forty acres of which was their homestead, and, after satisfying the special execution, he in good faith, without notice, claim, objection, or direction by plaintiffs to the contrary, applied the surplus on other executions in his hands, it was held that by thus standing by and allowing the sheriff so to appropriate and pay over the surplus, plaintiffs must be regarded as having abandoned all claim to their homestead rights, if any they had, in the surplus, and could not recover such surplus from the sheriff. *Brumbaugh v. Zollinger*, 59 Iowa 384.

**Action to Recover Possession under Foreclosure Decree.**—A husband against whom a decree of foreclosure of a mortgage on real estate has been duly obtained cannot, in an action of forcible entry and detainer against him to recover possession after the period of redemption, set up the defense that his wife, who was not a party to the former suit, has a homestead interest in the mortgaged premises; such fact, if a defense at all, being available in the former suit, must be deemed to have been adjudicated or waived. *Dodd v. Scott*, 81 Iowa 319.



the wife or heirs at law, after having slept on their rights, set up the claim of homestead after the question has been passed upon in a former action.<sup>1</sup>

**V. ASSIGNMENT OF HOMESTEAD — 1. Assignment by Officer — Duty of Levying Officer.** — It is the duty of an officer levying an execution to see that a homestead is set apart to the debtor if he is entitled to the same,<sup>2</sup> and a failure to demand from the officer performance of his duty in this regard will not thereby deprive the debtor of his right.<sup>3</sup>

**Appointment of Commissioners.** — As a general rule, it is the duty of the officer levying execution to appoint commissioners or

1. *Baxter v. Dear*, 24 Tex. 17; *Collins v. Chantland*, 48 Iowa 242.

**Failure to Appear.** — In an action by a wife to set aside a decree of foreclosure of the homestead property in which action she had been served, but failed to appear, the complaint should show cause or excuse for her failure to appear or apply to the court in which the action for foreclosure was pending, for leave to defend, otherwise she is not entitled to relief. *Fitzgerald v. Fernandez*, 71 Cal. 508.

2. *Webb v. Cowley*, 5 Lea (Tenn.) 724; *Gray v. Baird*, 4 Lea (Tenn.) 215; *Arnold v. Estis*, 92 N. Car. 162; *Myers v. Ham*, 20 S. Car. 527; *Bull v. Rowe*, 13 S. Car. 363; *Bradford v. Buchanan*, 39 S. Car. 237; *Rhyne v. Guevara*, 67 Miss. 139; *Letchford v. Cary*, 52 Miss. 791; *Crisp v. Crisp*, 86 Mo. 630; *Nichols v. Spremont*, 111 Ill. 631.

In *Tucker v. Kenniston*, 47 N. H. 267, it was held that a creditor cannot lawfully seize and sell on execution his debtor's right of redeeming the family homestead, or any interest therein, where its value does not exceed five hundred dollars; and if it exceeds that sum, the officer upon due application must set out the homestead before he can make a sale of any interest therein and then can proceed only against the surplus.

**North Carolina.** — Gen. Stat., § 1998, makes it the duty of a sheriff before selling the real estate of any head of a family to cause a homestead to be set off. *Bradford v. Buchanan*, 39 S. Car. 237.

The Code of North Carolina, § 516, further provides a remedy against the sheriff where he has failed to set aside a homestead to the debtor, but it has been held that such debtor may maintain an action for costs and damages only, and not for the value of the home-

stead, since the sale of the homestead right was void. *McCracken v. Adler*, 98 N. Car. 400.

3. *Webb v. Cowley*, 5 Lea (Tenn.) 724; *Gray v. Baird*, 4 Lea (Tenn.) 215.

The law will not suffer the refusal or neglect of a homesteader to choose his homestead property to affect his right or the right of his family to a homestead, but if he does not exercise the right of choice which the law gives him either at the time the levy is made or within a reasonable time thereafter, then the sheriff must resort to the other prescribed modes by appointing appraisers. *Meyer v. Nickerson*, 100 Mo. 604.

**South Carolina.** — In *Myers v. Ham*, 20 S. Car. 527, the court said: "Nor do we think that the conduct of the appellant in not forbidding the sale by the sheriff estops him from still claiming his homestead, if he is otherwise entitled thereto. Section 1994, General Statutes, while declaring that a homestead shall be exempt, further provides that it shall be the duty of the sheriff, before selling, to have it set off, and if the debtor neglects to nominate an appraiser, the sheriff shall appoint. And in section 1998 is found the following: 'No waiver, however solemn, shall defeat the right.' Here the appellant was in possession when the land was sold, he was simply silent, and remained in possession until he was ejected by a trial justice. The purchaser was his creditor, and has not been injured. This is no place for the doctrine of estoppel." See also *Bull v. Rowe*, 13 S. Car. 363; *Douglass v. Craig*, 13 S. Car. 371.

In *Nance v. Hill*, 26 S. Car. 227, it was held that the judgment debtor is not required to wait until the execution is levied, and an actual levy is not a condition precedent to his right to

appraisers for the purpose of setting aside the homestead;<sup>1</sup> and this he should always do where the homesteader has neglected or refused to choose his exemption.<sup>2</sup> This is not the only method, however, of appointing commissioners for such purpose, and when necessary for the purposes of justice the courts possess such power of appointment,<sup>3</sup> either upon petition<sup>4</sup> or in an action where the right of homestead exemption is involved.<sup>5</sup>

notify the sheriff that he desires his homestead set off.

1. *Rhyne v. Guevara*, 67 Miss. 139; *Dillman v. Will County Nat. Bank*, 138 Ill. 284; *Littlejohn v. Egerton*, 77 N. Car. 379; *Swift v. Dewey*, 20 Neb. 110; *Bull v. Rowe*, 13 S. Car. 363.

In North Carolina the Homestead Act, Bat. Rev., c. 55, provides two modes of laying off the homestead; one, by the officer who levies an execution or other final process obtained on any debt, where the officer is required to summon three appraisers who are to lay off the homestead by metes and bounds; the other, upon the application of any resident of the state to a justice of the peace, who shall appoint three assessors whose duty it shall be to lay off a homestead by metes and bounds. *Littlejohn v. Egerton*, 77 N. Car. 379.

In Nebraska section 14 of the act of 1877 provides as follows: "When a disagreement takes place between the owner and any person adversely interested as to whether any land or buildings are properly a part of the homestead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualifications of jurors; the parties then, commencing with the owner of the homestead, shall in turn strike off one juror each, and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all of the facts of the case, and shall report the same, with their opinion thereon, to the next term of the court from which the execution or other process may have issued." See *Swift v. Dewey*, 20 Neb. 110.

2. *Meyer v. Nickerson*, 100 Mo. 604; *Crisp v. Crisp*, 86 Mo. 630; *Letchford v. Cary*, 52 Miss. 791.

3. *Baker v. Keith*, 72 Ala. 121; *Dillman v. Will County Nat. Bank*, 139 Ill. 269, 138 Ill. 284; *Stone v. McCann*, 79 Cal. 461; *Howell v. Bush*, 54 Miss. 437; *Exp. Ellis*, 20 S. Car. 344; *Littlejohn v. Egerton*, 77 N. Car. 379; *Weatherford v. King*, 119 Mo. 51.

**Construction of Illinois Statute.**—In *Cummings v. Burleson*, 78 Ill. 281, the question arose whether the party claiming a homestead had a right to participate in the selection of the commissioners, and appear before them and introduce evidence in regard to the value of the premises out of which the homestead was to be assigned. The court held that he had not such right, and in discussing the question said that inasmuch as *Starr and Curt. Ill. Stat.*, c. 52, § 8, was silent as to the mode of procedure of the court of equity in enforcing the lien on homestead premises, and as section 10 of the same chapter was specific, by legislative direction, to the sheriff holding an execution, it was but fair to presume that the legislative intent was that the same course should be pursued so far as it was practicable by the equity court, through its master in chancery, as was required by the sheriff under section 10.

In South Carolina, under the statute providing that upon re-appraisement the appraisers shall be appointed by the court, it was held no error of law for the circuit judge to appoint appraisers suggested by one of the parties in interest without notice to the other parties. *Exp. Ellis*, 20 S. Car. 344.

4. See *Baker v. Keith*, 72 Ala. 121; *supra*, III. 2. *Application to Court.*

**Demurrer or Answer to Petition.**—Under the provisions of the California Civil Code for the appraisal of a homestead, no demurrer or answer to the petition is authorized. If the petition sets forth the facts required by the provisions of section 1246, and a copy thereof and notice of the time and place of the hearing have been served upon the homestead claimant at least two days before the hearing, it is the duty of the judge upon proof thereof to appoint three disinterested residents of the county to appraise the value of the homestead. *Stone v. McCann*, 79 Cal. 461.

5. *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Burnett v. Austin*, 10 Lea (Tenn.) 566.

**2. Assignment by Court — By What Court.**—The duty or authority to set aside homesteads has been vested in various courts under the statutes of the several states, and in determining the question of jurisdiction reference should be had to the statute under which exemption is claimed.<sup>1</sup>

In *Howell v. Bush*, 54 Miss. 437, it was held that upon a bill to enforce a trust against property in which a homestead exemption was claimed, the court of chancery should appoint a commissioner and allot the homestead in analogy to *Mississippi Code of 1871*, §§ 2136, 2137, as far as the same was conformable to chancery procedure.

And upon a bill in equity to redeem land from a mortgage, the homestead property may be set off. *Pittsfield Bank v. Howk*, 4 Allen (Mass.) 347.

1. See *supra*, I. *Jurisdiction over Homesteads*, and III. 2. *Application to Court*.

**Supreme Court — New Hampshire.**— In the case of *Gunnison v. Twitchel*, 38 N. H. 62, the jurisdiction of the Supreme Court to set off the homestead of a widow was distinctly asserted.

**Superior Court — North Carolina.**— In *Formeyduval v. Rockwell*, 117 N. Car. 325, the court said: "The homestead right is a vested right, and cannot be destroyed by any irregularity in the proceeding or want of procedure in the manner prescribed in the code; therefore, when a failure in those methods occurs, it can, 'in order to enforce the right,' be accomplished by other methods by the proper tribunal. This has been done by the Superior Court under the direction of this court, in a case where the conditions were such that neither the sheriff nor a justice of the peace could have the allotment made. *Littlejohn v. Egerton*, 77 N. Car. 379."

In *California* it was held that the Superior Court would be justified in refusing to set apart land as a homestead unless it was made to appear that there was thereon an edifice which could be used as a dwelling-house. *Noah's Estate*, 73 Cal. 593.

**Court of Ordinary.**—The *Georgia Act of 1868* confers jurisdiction upon the ordinaries of the several counties to set out homestead and exemption to the heads of families. See *Deyton v. Bell*, 81 Ga. 376; *Hardin v. McCord*, 72 Ga. 240.

**In Insolvent Proceedings.**—The *California Insolvent Act* makes it the duty of the court having jurisdiction of the

insolvency proceedings to exempt and set apart for the use and benefit of the insolvent a homestead in the manner provided in section 1465 of the Code of Civil Procedure, and it has been held that the word "may" in the statute is to be construed "must," and the court has no discretion where application is properly made. *Demartin v. Demartin*, 85 Cal. 74; *Gaylord v. Place*, 98 Cal. 480. In *Matzen v. Shaeffer*, 65 Cal. 83, it was held that where the declaration of homestead filed was not such as the law required in order to constitute a homestead, an order of court in insolvency proceedings setting one aside was a nullity. An order setting apart a homestead to an insolvent under section 60 of the California Insolvent Act is not invalid because made *ex parte* and without notice. *Gaylord v. Place*, 98 Cal. 480. See also *Kearney v. Kearney*, 72 Cal. 591.

Under the *Tennessee Code*, §§ 4201-4204, the County Court, in cases of insolvency properly brought, has jurisdiction to assign and set apart a homestead. *Rhea v. Meridith*, 6 Lea (Tenn.) 605.

In *Massachusetts* the homestead estate to which an insolvent debtor is entitled cannot be set off to him by the court of insolvency under Gen. Stat., c. 104, § 10, after his assignee in insolvency has conveyed away all his interest in the premises. *Silloway v. Brown*, 12 Allen (Mass.) 30.

**County and Circuit Courts.**—In *Tennessee*, where an action was brought in the County Court for the purpose of allotting a homestead only, and the power to allot the same did not depend upon or arise out of the jurisdiction already rightfully acquired on other grounds, it was held that it had not jurisdiction to allot a homestead, but such power would rest upon the general jurisdiction of chancery courts, where the property sought to be assigned was subject to trusts and incumbrances. *Galyon v. Gilmore*, 93 Tenn. 676. In *Rhea v. Meridith*, 6 Lea (Tenn.) 605, it was held that the County Court had jurisdiction under Tenn. Code, §§ 4980-4984, to assign and set apart homestead as well as dower, when an insolvent estate is

**Probate Court.** — Usually upon the death of either head of a family, where no declaration of homestead has been filed, it is the duty of the Probate Court to set aside a homestead for the benefit of the surviving husband or wife and his or her legitimate children;<sup>1</sup> and this the court or probate judge may do of his own motion or upon application,<sup>2</sup> and in such manner as to him may seem reasonable or just.<sup>3</sup>

Under the California Practice, where no homestead has been designated, the court must select and set apart a homestead for the use of the surviving husband or wife out of the common property;<sup>4</sup> but where a widow seeks to have set apart to her a homestead out of the separate property of her deceased husband, the court, in such case, can only set apart a homestead for a limited period,

being wound up in that court, and that such assignment cannot be attacked in chancery by creditors dissatisfied with their allotment, unless allegations sufficient to impeach the decree are made. And so cases are not lacking where assignments of homestead have been made by the Circuit Court. *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Burnett v. Austin*, 10 Lea (Tenn.) 566. But in all of these cases the power to allot homestead was a necessary incident to the proper exercise of a jurisdiction acquired on other grounds. *Galyon v. Gilmore*, 93 Tenn. 676.

1. *Levins v. Rovegno*, 71 Cal. 273; *Rich v. Tubbs*, 41 Cal. 36; *Headen's Estate*, 52 Cal. 294; *Gee v. Moore*, 14 Cal. 472; *McCauley's Estate*, 50 Cal. 544; *Ballentine's Estate*, 45 Cal. 696; *Mawson v. Mawson*, 50 Cal. 539; *Burton's Estate*, 63 Cal. 37; *Schadt v. Heppe*, 45 Cal. 433; *In re Schmidt*, 94 Cal. 334; *Wixom's Estate*, 35 Cal. 320; *Herrold v. Reen*, 58 Cal. 443; *Hardwick's Estate*, 59 Cal. 292; *In re Gilmore*, 81 Cal. 240; *Watson v. His Creditors*, 58 Cal. 556; *Busse's Estate*, 35 Cal. 310; *Walley's Estate*, 11 Nev. 260; *Smith v. Shrieves*, 13 Nev. 308.

**In Massachusetts** the Probate Court can set off a homestead only when the widow's right is not disputed by the heirs or devisees. *Woodward v. Lincoln*, 9 Allen (Mass.) 241.

**In Missouri** a judgment of the Probate Court setting aside a homestead without notice to the parties in interest is *coram non judice* and void. *Miller v. Schnebly*, 103 Mo. 368.

**In New Hampshire** it was held that a widow who continues after the decease of her husband to occupy the dwelling which constituted the family home at

the time of his death may have the homestead assigned to her by the judge of probate, under the authority given by the N. H. Rev. Stat. to cause the dower and share of the widow in the real estate of any person deceased to be assigned to her. *Norris v. Moulton*, 34 N. H. 392. But the authority of the judge of probate in such case extends only to the estate of which the husband died seized. *Horn v. Tufts*, 39 N. H. 485.

**In Texas** the Probate Court has power to set aside a homestead out of a large tract, even before the purchase money has been paid, and such order will protect the family even against a vendor's lien until it has been set aside in a direct proceeding for that purpose, with all parties interested before the court. *Harrison v. Oberthier*, 40 Tex. 385. See *Mathis v. Oberthier*, 50 Tex. 329.

2. *Busse's Estate*, 35 Cal. 310.

3. *Mawson v. Mawson*, 50 Cal. 539; *In re Schmidt*, 94 Cal. 334; *McCauley's Estate*, 50 Cal. 544; *In re Lamb*, 95 Cal. 397.

**Matter of Discretion.** — In *In re Walk-erly*, 81 Cal. 583, where a homestead of great value had been set apart to the widow, it was insisted that, considering the liberal provisions for the wife and children under the will, so valuable a homestead should not have been allowed; but it was held that this was a matter within the discretion of the court, and unless it appeared that such discretion had been abused the appellate court would not interfere. Nor is it an abuse of discretion to refuse to set aside the exact property applied for. *In re Schmidt*, 94 Cal. 334.

4. Cal. Code Civ. Pro., § 1465; *Lord v. Lord*, 65 Cal. 86.

to be designated in the order, and the title vests in the heirs of the deceased subject to such order.<sup>1</sup>

**3. Nature, Form, and Validity of Assignment — Analogous to Assignment of Dower.** — The assignment of a homestead and the proceedings instituted for such purpose are analogous to the course pursued in assigning dower.<sup>2</sup>

**By What Law Governed.** — The homestead should be assigned according to or in pursuance of the statute in force at the time when the order was made.<sup>3</sup>

**Form of Assignment.** — The assignment should specify what property is set aside as exempt,<sup>4</sup> and should be made from land on which the dwelling house stands.<sup>5</sup>

**The Value of the Homestead** should be ascertained and determined at the time when it is set apart,<sup>6</sup> and in determining such value any existing incumbrances should be taken into account.<sup>7</sup>

1. Noah's Estate, 73 Cal. 590; *In re Schmidt*, 94 Cal. 334; *Lord v. Lord*, 65 Cal. 84; *In re Lahiff*, 86 Cal. 151; *Phelan v. Smith*, 100 Cal. 169; Cal. Code Civ. Pro., § 1468.

In *Gruwell v. Seybolt*, 82 Cal. 7, quoted in *Hutchinson v. McNally*, (Cal. 1890) 23 Pac. Rep. 132, it was held that while it was erroneous to set off a homestead selected out of the separate property of a decedent to the widow "absolutely, as her sole and separate estate," yet the error was to be corrected by appeal, and that if the order was not appealed from it was conclusive.

2. *Burton v. Spiers*, 87 N. Car. 87; *Silloway v. Brown*, 12 Allen (Mass.) 33; *Woodward v. Lincoln*, 9 Allen (Mass.) 241.

3. *Sulzberger v. Sulzberger*, 50 Cal. 388; *Sheehy v. Miles*, 93 Cal. 294.

4. In *Indiana*, after a debtor has filed his declaration in a manner provided by statute, it is the duty of the appraisers to set off to him such articles of personal property, or so much of the real estate mentioned in the inventory, as he may select, so that the same shall not exceed six hundred dollars, and to specify what articles of personal property and the value thereof, or what part of the real estate and its value, they have set apart. *Graves v. Hinkle*, 120 Ind. 159.

**Laying Off by Metes and Bounds.** — In *North Carolina* it is necessary that the assignment of a homestead should lay the same off by metes and bounds; but such requirement of the statute does

not mean that the same shall be laid off according to course and distance, and a description by which the premises can be located will be held a sufficient compliance with the statute. *Ray v. Thornton*, 95 N. Car. 571.

5. *Burton v. Spiers*, 87 N. Car. 91; *Louden v. Yager*, 91 Ky. 59.

In *California* the law does not authorize the Probate Court to set apart five thousand dollars' worth of property, or five thousand dollars' worth of land upon which a dwelling house may be subsequently erected. *Noah's Estate*, 73 Cal. 593.

6. *Hardy v. Lane*, 6 Lea (Tenn.) 379.

**Appraisal.** — Where the debtor takes the necessary initiative steps after the writ is levied upon his property, and makes a selection of property within the limit as to quantity allowed by the statute, any excess the property selected may have in value above the limit allowed by the law does not make any other proceedings necessary on the part of the debtor. It then becomes the duty of the creditor to make application, as provided by law, for appraisal of the premises, and no valid sale of the premises levied upon can be made by the sheriff until the creditor has procured the appraisal to be made as provided by statute. *Quigley v. McEvony*, 41 Neb. 83.

That the return of the appraisers does not fix any value on a large tract of land set off as a homestead, is a sufficient cause for a new assignment. *Kerchner v. Singletary*, 15 S. Car. 539.

7. *State v. Mason*, 88 Mo. 222.

If Void in Part an assignment of homestead is void *ab initio*.<sup>1</sup>

**Collateral Attack.** — Where the assignment is void and without jurisdiction it may be collaterally attacked by interested parties.<sup>2</sup>

**Dower and Homestead in Same Tract.** — Where both dower and homestead are to be assigned out of the same tract, the former should be set out first, and the amount diminished by the amount of the widow's interest in the homestead.<sup>3</sup>

**4. Reassignment.** — For good cause shown, the court out of which the process issued may order a reappraisement and reassignment of homestead, either by the same appraisers or by others appointed by the court.<sup>4</sup> The number of times that a reassignment may be ordered is not limited, the power of the judge in this regard being analogous to the right to grant a new

1. Littlejohn v. Egerton, 77 N. Car. 380.

It was held in *South Carolina* that an assignment of homestead was absolutely void as to a debt contracted before the adoption of the constitution of 1868, but not in judgment at the time of such assignment. Bull v. Rowe, 13 S. Car. 355; Douglass v. Craig, 13 S. Car. 371.

Where a homestead has been allotted, the return of appraisers registered, and time for filing objections passed, a second allotment, though under a judgment docketed since the first allotment, will be treated as void. Thornton v. Vanstort, 107 N. Car. 331.

2. Williams v. Whitaker, 110 N. Car. 393; Formeyduval v. Rockwell, 117 N. Car. 325, holding, however, that an allotment of homestead cannot be collaterally attacked by the judgment debtor or any one claiming under him, the remedy by such a party being prescribed in section 519 of the N. Car. Code.

3. Graves v. Cochran, 68 Mo. 76; Bryan v. Rhoades, 96 Mo. 485; Doane v. Doane, 33 Vt. 650, where the court said: "Although the Act of 1855 provides that dower shall first be set out, and then the homestead, we do not regard the statute as so imperative on this subject as to make the omission to observe this order of setting them out vitiate either; although it is imperative as to the limitation of the dower to the extent of the widow's share of the homestead. The direction of the statute as to the order of time in which they shall be set out is only directory."

"If the widow's interest in the homestead equals or exceeds, in amount, dower in the entire estate, then she can

have no dower. If her interest in the homestead is less than dower in the entire estate, then she is to have the difference set off to her in dower." Bryan v. Rhoades, 96 Mo. 489.

4. Bull v. Rowe, 13 S. Car. 364; Kerchner v. Singletary, 15 S. Car. 539; Chambers v. Penland, 74 N. Car. 341.

**Prior Assignment Out of Undivided Interest.** — The court has no power to assign a homestead out of an undivided interest in the real estate, and where such assignment had been made, and afterwards a partition suit instituted, it was held that there should be a new assignment of the homestead. Mellichamp v. Mellichamp, 28 S. Car. 125.

**Prior Assignment Without Valuation.** — Where an assignment of a homestead had been set aside as excessive, and new appraisers appointed who assigned the same land and fifty-four acres more without affixing any valuation, it was held sufficient cause to order a reassignment. Kerchner v. Singletary, 15 S. Car. 538.

**Discretion of Judge.** — It is for the judge to determine, in the exercise of discretion, whether good cause has been shown, and if he makes a mistake as to what constitutes good cause his decision cannot be corrected on appeal as error of law. Kerchner v. Singletary, 15 S. Car. 539.

**Before Sale under Execution of Excess.** — Under the *North Carolina* Act of 1868 (Bat. Rev., c. 55, § 20), it was held that an application for reassignment and allotment of homestead must be made before the sale of the excess by the sheriff. Hepstinstall v. Perry, 76 N. Car. 190. And the same construction was given to the Act of 1883. Hartman v. Spiers, 94 N. Car. 156.

trial.<sup>1</sup> Whether the fact that the homestead as originally assigned has so increased or diminished in value as to exceed or fall short of the statutory limit is a sufficient ground for a new assignment, is a question upon which the courts are not agreed.<sup>2</sup>

**5. Exceptions to Proceedings for Assignment** — *a. TO WHAT TRIBUNAL.* — Exceptions to the report of commissioners assigning homestead should be made to the court from which process issued and to which the assignment is to be returned;<sup>3</sup> and such report cannot be impeached in a collateral proceeding.<sup>4</sup>

*b. AT WHAT TIME.* — **Objection to the Qualification of Appraisers** should be taken before they enter upon the discharge of their duty.<sup>5</sup>

**The Time for Filing Exceptions to the Report** of appraisers is usually designated by statute,<sup>6</sup> but a motion to set aside their report

1. *Kerchner v. Singletary*, 15 S. Car. 539.

2. In *Missouri and Illinois* it has been held that a debtor must take and hold his homestead subject to the fluctuations in value; and if, in course of time, it shall have increased in value, so as to be worth more than the statutory limit, it may be assigned again. *Beckner v. Rule*, 91 Mo. 62; *Stubblefield v. Graves*, 50 Ill. 103; *Mooney v. Moriarty*, 36 Ill. App. 175. And if the assigned homestead shall depreciate in value, he may add to it and claim a revaluation. *Beckner v. Rule*, 91 Mo. 62.

**Contra in Tennessee and North Carolina.** — In *Hardy v. Lane*, 6 Lea (Tenn.) 379, it was held that the value and boundaries of a homestead being ascertained when set apart, it was not subject to future valuations by reason of its increase in value.

In *Gulley v. Cole*, 96 N. Car. 447, it was held that the *North Carolina* statute made no provisions for laying off the homestead a second time, where no irregularity or fraud was alleged in connection with the assignment, and the question whether a creditor might have an equitable remedy in case the homestead property had greatly increased in value was mentioned, but not decided.

**Notice.** — Where an application is made to supplement a homestead, notice should be given that it is for such purpose. *Chattanooga First Nat. Bank v. Massengill*, 80 Ga. 333.

3. *Lallement v. Detert*, 96 Mo. 182; *Burton v. Spiers*, 87 N. Car. 87.

**Trial of Issues.** — Under the *Alabama* statute, the issue formed upon exceptions to a report of commissioners assigning a homestead is to be certified

to the Circuit Court for trial, the Probate Court being prohibited from exercising such jurisdiction. *Kelly v. Garrett*, 67 Ala. 304.

The questions of fact which arise in the progress of the allotment by the commissioners are not such issues of fact as entitle parties to a trial by jury. *Beavans v. Goodrich*, 98 N. Car. 217.

**Notice of Exceptions.** — In *South Carolina*, where exceptions to an appraisal of homestead have been filed by creditors, it is not necessary to serve notice of such exceptions upon the judgment debtor. *Exp. Ellis*, 20 S. Car. 344.

4. *Lallement v. Detert*, 96 Mo. 182. *Burton v. Spiers*, 87 N. Car. 94, holds that in the absence of any vitiating illegality appearing upon the face of the proceedings of the appraisers, it ought not to be disturbed by evidence of matter *in pais*, except upon a direct impeachment of the complaining party.

5. *Burton v. Spiers*, 87 N. Car. 91; *Chambers v. Penland*, 74 N. Car. 341, holding that the debtor will not be allowed to stop the creditor's execution against the excess on the ground that one of the appraisers was related to the plaintiff where no fraud or irregularity is alleged.

6. In *Alabama* "the code prescribes the only manner in which such a contest can be originated in the Probate Court. This can be done by the personal representative of the decedent, or any person in adverse interest, and must be by the filing of written exceptions to the allowance of the claim, or to the allotment of the homestead, as the case may be. Code, § 2841. The time is also prescribed within which these exceptions shall be filed and the contest thus initiated. When the claim is made

should in all cases be made within a reasonable time.<sup>1</sup>

c. UPON WHAT GROUNDS. — The court will not lightly set aside the report of sworn commissioners,<sup>2</sup> and in order to authorize it

through the appointment of sworn commissioners, it becomes their duty to make the selection and valuation, and report the same to the Probate Court within sixty days after their appointment; and the exceptions are required to be filed 'within *thirty days* after the expiration of said sixty days.' Code, § 2841; Acts 1876-77, § 24, p. 42. This method of contest is made applicable to all cases 'when homestead or exemption is claimed by the widow, or guardian of the minors' (Code, § 2841); and a natural and reasonable construction of the statute is, where no report of commissioners is required, the facts being all presented by the pleadings, the administrator is allowed *thirty days* within which to file his exceptions to the allowance of the claim made in the petition. The clause having reference to the 'sixty days' seems to have no field for operation, except in those cases where commissioners are appointed, and it becomes their duty to make a report." *Farley v. Riordon*, 72 Ala. 130. See also *Kelly v. Garrett*, 67 Ala. 304.

In North Carolina, under the Act of 1883, c. 357, § 1, it is provided that if the judgment creditor, at whose instance the personal property exemption or homestead of his judgment debtor shall have been allotted, or the said judgment debtor, shall be dissatisfied with the valuation and allotment of the appraisers or assessors, as the case may be, either of them may, within ten days thereafter, or any other creditor, if dissatisfied, within six months thereafter, and before sale under execution of the excess, notify the adverse party and the sheriff having the execution in hand thereof, and file with the clerk of the Superior Court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors, as the case may be, which they, or the sheriff, shall allow to be made upon demand, together with his objections, in writing, to said return, and thereupon the said clerk shall enter the same on the civil issue docket of the said Superior Court, for trial, to be had at the next term thereof, as other civil actions, and the sheriff shall not thereupon sell the excess until after the determination of said proceeding. *Hartman v. Spiers*, 94 N. Car. 150.

In South Carolina, under the statute, all that is required is that the exceptions shall be filed within thirty days after the filing of the return of the appraisers. *Ex p. Ellis*, 20 S. Car. 344.

1. *Hartman v. Spiers*, 94 N. Car. 154; *Burton v. Spiers*, 87 N. Car. 87.

In Texas it has been held that objection should be made upon the coming in of the report. *Cummins v. Denton*, 1 Tex. Unrep. Cas. 185.

2. *Vermillion v. Mattison*, 14 S. Car. 625; *Mooney v. Moriarty*, 36 Ill. App. 175.

**Papers Not Holographs.** — The fact that the summons directed to the commissioners, and all the papers and proceedings before them, were drawn up by some one other than the master in chancery whose signature appeared upon them, was held not to invalidate an assignment made by such commissioners, or the sale under such assignment. *Dillman v. Will County Nat. Bank*, 36 Ill. App. 272.

**Conflicting Evidence of Value.** — Where there was much conflict in the testimony as to the value of the property out of which a homestead was to be set off, it was held that the report of commissioners setting off property at the average value as shown by the testimony was not objectionable. *Riley v. Smith*, (Ky. 1887) 5 S. W. Rep. 869.

**Blank Date of Allotment.** — Where the report of commissioners left blank the date of the allotment, but the actual date was found as a fact by the court, and the defendant knew when the allotment was made, and was urged to be present and give information and assistance in locating the property, it was held that the omission to state the exact time in the report worked him no injury, and that an objection for such defect could not be sustained. *Beavans v. Goodrich*, 98 N. Car. 217.

**Objection as to Oath.** — In *Dillman v. Will County Nat. Bank*, 36 Ill. App. 277, it was held that the oath might be administered to commissioners appointed for the purpose of assigning a homestead, by a notary public, and an objection that the same was not administered by the master in chancery would be overruled.

And in *Nance v. Hill*, 26 S. Car. 227, the direction in the sheriff's notice re-



to do so<sup>1</sup> some element of corruption or fraud,<sup>1</sup> or some defect touching the substance of the proceedings, should appear.<sup>2</sup>

**6. Proceedings to Set Aside Assignment.**— Since the parties are given ample opportunity to contest the report of the commissioners assigning homestead,<sup>3</sup> and since the report and the subsequent proceeding relating thereto may be reviewed when properly brought to the notice of the superior tribunal,<sup>4</sup> the court will not, after the homestead has been assigned, set aside such assignment unless for fraud or serious irregularity;<sup>5</sup> and where the

quiring the appraisers to be sworn, as well as the recitals in the return that they were sworn, were held, in the absence of evidence to the contrary, sufficient to show that they were duly qualified.

**Convenience of Claimant.**— It is no objection to an assignment of a homestead that it might have been assigned in a manner more convenient to the claimant. *Ray v. Thornton*, 95 N. Car. 571.

**1. Doughty v. Little**, 61 N. H. 365; *Simonds v. Haithcock*, 24 S. Car. 209; *Chambers v. Penland*, 74 N. Car. 341.

**North Carolina Code**, §§ 501-524, prescribes how a homestead shall be ascertained and laid off, and section 523, having reference to such ascertainment, provides that any appraisal or allotment by appraisers or assessors may be set aside for fraud or complicity or other irregularities, but whenever any allotment or assessment shall be made or confirmed by the Superior Court at term time, the said homestead shall not thereafter be set aside or again laid off by any creditor. See *Gully v. Cole*, 96 N. Car. 447.

**Return of Majority of Appraisers Valid.**

— In *State Sav. Bank v. Evans*, 28 S. Car. 521, the court, after a long discussion of the rules prevailing in several jurisdictions, held that, whatever might be the rule elsewhere, in *South Carolina* the return of a majority of the appraisers appointed to lay off the homestead is valid, especially where, as in the case in judgment, the appraisers were appointed, not by the parties, but by the court, to perform a duty prescribed by law.

**2. Commissioners Unsworn.**— Freeholders appointed under *North Carolina* Act of 1868 to lay off a homestead must be sworn, and it must appear that they were sworn, and when this requirement has not been complied with their proceedings may be treated by creditors as a nullity. *Smith v. Hunt*, 68 N. Car. 482; *Coble v. Thom*, 72 N. Car. 121.

But see as to the effect of recitals in the return, *Nance v. Hill*, 26 S. Car. 227.

**Commissioners Disqualified by Relationship.**— In *Tennessee* the three commissioners appointed to lay off a homestead must be disinterested freeholders, not connected with the parties; and if one of them is related to the plaintiff in the execution, he is incompetent, and their proceedings will be illegal and may be quashed. *Wilson v. Lowe*, 7 Coldw. (Tenn.) 153.

**3. See supra**, V. 5. *Exceptions to Proceedings for Assignment.*

**4. Appeal.**— Any order setting aside a homestead is appealable. Cal. Code of Civ. Pro., § 963; *Gruwell v. Seybolt*, 82 Cal. 10. See also *Burns's Estate*, 54 Cal. 223. Compare *Aiken v. Gardner*, 107 N. Car. 239.

**Certiorari.**— The proceedings of commissioners appointed to set apart a homestead are in the nature of a judicial proceeding, and if the commissioners have exceeded their jurisdiction, or powers, or either of them was incompetent to act as a commissioner, their proceedings may be brought by certiorari into the Circuit Court and there quashed on motion. *Wilson v. Lowe*, 7 Coldw. (Tenn.) 153.

**Recordari.**— In *North Carolina*, prior to the Act of 1876-77, c. 14, a homesteader, if dissatisfied with the appraisalment, had the right of appeal to the board of township trustees; but by that act the board of trustees was abolished, and the homesteader was put to such other means of relief as were given by the law. As the appraisers are not a court of record, the party deprived of his appeal had the right to bring his case before the Superior Court by a writ of recordari. *Hartman v. Spiers*, 94 N. Car. 153.

**5. Fenwick v. Wheatley**, 23 Mo. App. 641; *Gully v. Cole*, 96 N. Car. 447. See also *Gulley v. Cole*, 102 N. Car. 333; *Chambers v. Penland*, 74 N. Car. 341; *Gruwell v. Seybolt*, 82 Cal. 7; *Wicker*

plaintiff has slept on his rights and failed to object at the proper time, the court will not aid him to the extent of declaring the assignment void.<sup>1</sup> And it is the general policy of the courts not to allow an assignment of homestead to be attacked in a collateral proceeding.<sup>2</sup>

**VI. SALE OF PROPERTY AND PAYMENT OF MONEY IN LIEU OF HOMESTEAD — 1. In General.** — Unless so provided by statute, the court as a general rule has no power to order a sale of the homestead property and a payment of money in lieu of the same.<sup>3</sup>

*sham v. Comerford*, 96 Cal. 433; *Rhea v. Meridith*, 6 Lea (Tenn.) 605.

Where the heirs of a decedent fail to appeal from an order setting aside a homestead to the widow absolutely as her own separate property out of her deceased husband's separate property, they will not be allowed to come in and set aside the decree after the estate has been fully administered, where their complaint fails to show that any fraud or device was resorted to, so as to prevent them from making proof in reference to the character of the property from which the homestead was selected. *Gruwell v. Seybolt*, 82 Cal. 7.

Nor can an assignment be attacked in chancery by dissatisfied creditors unless the complaint contains allegations necessary to impeach the decree. *Rhea v. Meridith*, 6 Lea (Tenn.) 605.

**Remedy Not Confined to Appeal or Motion.** — Where the creditor claims that a fraud has been introduced for the purpose of misleading the court in assigning a probate homestead, he is not restrained in his remedy to an appeal from the order assigning the homestead, nor to a motion to vacate the order, but he may maintain an action in equity to set it aside on the ground of fraud. *Wickersham v. Comerford*, 96 Cal. 433.

1. Where, in proceedings for the allotment of a homestead to the minor children of a decedent, the main purpose was accomplished under the direction of the court having jurisdiction of the parties and the subject-matter, and neither party excepted to what was done until after the full benefit of the constitutional provision had been enjoyed by those entitled to it, the allotment will not be declared void so as to permit the statute of limitations to run against a judgment the collection of which has been stayed by the existence of such allotment. *Formeyduval v. Rockwell*, 117 N. Car. 320.

So where the homesteader had failed entirely to designate any of his property which he wished to have set off as a homestead, and the sheriff has appointed appraisers for the purpose of setting off the same, the homesteader cannot have the proceedings and report of the appraisers set aside on the ground that they failed to set off to him certain valuable timber land, where the assignment in other respects was correct and of the proper value. *Meyer v. Nickerson*, 100 Mo. 604.

2. *Meyer v. Nickerson*, 101 Mo. 184; *Formeyduval v. Rockwell*, 117 N. Car. 325; *Barney v. Leeds*, 54 N. H. 128.

3. *Campbell v. White*, 95 N. Car. 491; *Oakley v. Van Noppen*, 96 N. Car. 247; *Noah's Estate*, 73 Cal. 590; *In re Walkerly*, 81 Cal. 580.

In *Isaacs's Estate*, 30 Cal. 113, the court said: "We find no authority in the Probate Act, nor in any other statute, authorizing the court to set apart money to the widow in lieu of a homestead," but as no complaint was made on this ground the point was not directly passed upon. So, in *Cummins v. Denton*, 1 Tex. Unrep. Cas. 184, it was held that the homestead having been set apart to the family was no longer the subject of administration, and a sale thereof made under the order of the Probate Court for the support of the family was declared a nullity.

**Property Incapable of Division.** — In *North Carolina* it has been held that the court had no power to order such sale, and the rule was sustained where the property was incapable of division, and it would have been for the advantage of the creditors to have it sold. *Oakley v. Van Noppen*, 96 N. Car. 247. In *Campbell v. White*, 95 N. Car. 491, where the court below ordered the sale of an undivided interest in the homestead property because the same was incapable of division, the Supreme Court, after citing the *North Carolina*

**2. Where Severance Is Impracticable.** — The court has authority in some cases, however, to order a sale where a severance would greatly depreciate the value of the premises,<sup>1</sup> or to order a trans-

statute, said: "This statutory requirement contemplates the allotment of a specific and defined part of the land in severalty, involving no community of interest between the ownership of that constituting the excess, which at a sale the purchaser may acquire. A sale of the entirety with a view to an apportionment of the funds would defeat the primary object of the law, which seeks to reserve a home and shelter for the insolvent debtor and his family. The method pursued by the judge to solve the perplexing problem as to the respective rights of creditor and debtor in a case like this has no warrant in the provisions of the law, and the order must be reversed as erroneous." *Compare* *Hinson v. Adrian*, 92 N. Car. 121, holding that where an action was brought by mortgagees and judgment creditors to have the property sold for the payment of the mortgages and judgments, and a sale was made without objection on the part of the debtor, it was too late for him to ask for a homestead by metes and bounds, after such sale had been made, and that in such cases it was competent and proper, certainly by the consent of the parties, to set apart the value of the homestead in money.

In *California* the provisions of the code authorizing a homestead to be set apart to the family of a decedent, where none has been selected before his death, contain no limitation as to the value of such homestead. Code Civ. Pro., §§ 1465, 1468. There is such a limitation where a homestead is declared before his death. Code Civ. Pro., §§ 1474, 1475. And in that case, where it is sought to have the same set apart to the family after his death, provision is made for the sale of the property and payment of five thousand dollars to the family as or in lieu of the homestead, if the property exceeds that amount in value, and cannot be divided. Code Civ. Pro., § 1476. There is no provision for the payment of money in lieu of the property where no homestead has been declared, and the Supreme Court has held that it cannot be done in this class of cases. *In re Walkerly*, 81 Cal. 579, citing *Noah's Estate*, 73 Cal. 590.

1. *Palmer v. Palmer*, 50 Vt. 310; *Lindsey v. Brewer*, 60 Vt. 627; *McCaughey's Estate*, 50 Cal. 544; *Schaeffer v. Beldsmeier*, 9 Mo. App. 441; *Hinson v. Adrian*, 92 N. Car. 121.

In *California*, when no homestead has been selected during the lifetime of a deceased husband, it must be set apart by the Probate Court. If the homestead thus set apart is encumbered by mortgages, liens, etc., so that it cannot be conveniently partitioned, the court may direct it to be sold, subject to such liens, and the homestead to be set apart out of the proceeds. *McCaughey's Estate*, 50 Cal. 544.

In *Illinois* the statute provides that if the premises on which the homestead is situated are found to be of greater value than one thousand dollars, and not susceptible of division, then notice shall be given to the debtor that unless he pay such surplus to the officers within sixty days the property shall be sold. See *Green v. Marks*, 25 Ill. 221; *Muller v. Inderreiden*, 79 Ill. 382.

In *South Carolina* Gen. Stat., c. 71, § 1994, provides that wherever the appraisers shall find that the premises exceed the value of one thousand dollars, and that the same cannot be divided without injury to the remainder, they shall make and sign under oath an appraisal thereof and deliver the same to the sheriff, who shall within ten days thereafter deliver a copy thereof to the head of the family claiming the homestead, etc., with notice attached that unless the persons so claiming the homestead shall pay to the sheriff the surplus of the appraised value over and above one thousand dollars, within sixty days thereafter, such premises shall be sold. See *Simonds v. Haithcock*, 24 S. Car. 209.

In *Vermont* a probate court may order a sale of the homestead belonging to the widow and children of deceased persons whenever its severance would greatly depreciate the value of the residue of the premises; and this remedy is available to either the owner of the homestead or the owner of the residue. Rev. Laws, § 1914; *Lindsey v. Brewer*, 60 Vt. 627. And this statutory provision was held to apply where the land in connection with the homestead ex-

fer of money or property as between the owner of the homestead and the owner of the residue.<sup>1</sup>

**VII. ORDERS SETTING ASIDE SALES.** — A general sale of land in which a valid claim of homestead exists without first laying off the same is generally void,<sup>2</sup> and may be set aside upon a bill by the householder, when his homestead has not been waived, released, or abandoned.<sup>3</sup> Yet where the claimant has failed to assert his right at the proper time and in the manner provided by statute,<sup>4</sup> the court is not inclined to disturb vested rights by setting aside sales after they have been confirmed,<sup>5</sup> unless parties have been materially injured thereby.<sup>6</sup>

ceeded half an acre. *Palmer v. Palmer*, 50 Vt. 310.

**Homestead Subject to Easement.** — To prevent a sale of the homestead, a severance may be effected by setting out the homestead, subject to a perpetual easement of way over it, where this can be done without greatly depreciating the value of the premises or greatly inconveniencing the parties. *Schaeffer v. Beldsmeier*, 9 Mo. App. 438.

1. **Missouri.** — See Rev. Stat. Mo., § 2698; *Schaeffer v. Beldsmeier*, 9 Mo. App. 441.

**Vermont.** — See Rev. Laws Vt., § 1908; *Lindsey v. Brewer*, 60 Vt. 627.

2. *Mebane v. Layton*, 89 N. Car. 396; *McCracken v. Adler*, 98 N. Car. 400; *Hartwell v. McDonald*, 69 Ill. 293; *Bartlett v. Wilson*, 102 Ill. 302; *Hartman v. Schultz*, 101 Ill. 437; *Kingman v. Higgins*, 100 Ill. 319; *Bullen v. Dawson*, 139 Ill. 641; *Hubbell v. Canady*, 58 Ill. 425. See also *Stevens v. Hollingsworth*, 74 Ill. 202.

In *Gray v. Baird*, 4 Lea (Tenn.) 212, it was held that the mere fact that the officer in selling the land failed to assign the homestead does not deprive the debtor of the right. *Burnett v. Austin*, 10 Lea (Tenn.) 565.

So, where separate property of a *feme covert* was sold by a commissioner, under a judgment obtained against her, wherein no homestead was set out, it was held that this sale of the whole tract would be set aside. *Bailey v. Barron*, 112 N. Car. 54.

3. *Barrett v. Wilson*, 102 Ill. 302; *Hartman v. Schultz*, 101 Ill. 437.

**Scope of Decree Setting Aside.** — In *Hubbell v. Canady*, 58 Ill. 428, it was held that where a judgment was satisfied by the sale of a homestead, and where upon a bill filed for that purpose the sheriff's deed was set aside, the court should by the same decree set

aside the satisfaction of the judgment.

4. See *supra*, IV. *Waiver of Exemption*.

The homesteader must assert his right at the proper time or at the first opportunity, and motions to set aside sales after the same have been confirmed will be denied. *Cook v. Klink*, 8 Cal. 352.

5. *Jarrell v. Payne*, 75 Ala. 577; *Sherry v. Brown*, 66 Ala. 52; *Martin v. Lile*, 63 Ala. 406; *Norris v. Kidd*, 28 Ark. 485. See also *Maddox v. Epler*, 48 Ill. App. 265; *Kuntz v. Baehr*, 28 La. Ann. 90; *Williston v. Schmidt*, 28 La. Ann. 416; *Hartman v. Spiers*, 94 N. Car. 150; *Hinson v. Adrian*, 92 N. Car. 121.

**Wife Represented by Husband.** — Where a judgment has been fairly rendered against a husband and wife, with an order for the sale of land upon which the creditor claimed a lien for the payment of his debt, the wife cannot, by subsequent suit, have such order revoked upon the ground that it subjects the homestead to sale. Nor will the fact that she relied upon the promises of her husband, by whom she was deceived, to have a defense made for her in the first suit to protect her homestead rights entitle her to relief against the judgment. *Baxter v. Dear*, 24 Tex. 17.

6. **Cloud upon the Title.** — If a homestead is sold under execution when not liable to levy and forced sale, a court of equity will set the same aside as a cloud upon the title, on bill filed by a grantee of the judgment debtor, where the sale is made after a conveyance to him. *Green v. Marks*, 25 Ill. 221.

**Sale En Masse.** — It is the duty of a sheriff to lay off a homestead to the execution debtor, and to sell the rest of his property in such a manner as to realize

**VIII. PLEADING HOMESTEAD**—1. **Generally.**—Wherever in an action property is sought to be recovered out of which a homestead is to be claimed, the right of homestead exemption should be set up in the pleading.<sup>1</sup>

2. **By Plea or Answer.**—The claim of homestead or homestead exemption is usually set up in the plea or answer of a defendant.<sup>2</sup> In order that such plea or answer shall avail, it must set forth all the essential requirements of the statute, showing that the defend-

a fair price thereon; and so, where he sold the same *en masse*, and subject to the lien of the homestead, it was held that such sale was fraudulent, and might be avoided by the creditor who was not present and did not consent to the sale. *Andrews v. Pritchett*, 72 N. Car. 135.

So, where the homestead is sold under execution with other parcels of land for a gross sum the entire sale should be set aside; but upon application the satisfaction of the execution will be vacated in order that an *alias* execution may issue. *Phillips v. Root*, 68 Wis. 128.

Where it was sought to set aside a sale under execution of four lots of ground, for the reason that, as claimed by the defendant in the execution, the same constituted his homestead, and had been sold without summoning a jury to set off the homestead as required by the statute, it was held, the lots being sold separately, and the one on which his house was situated being worth more than one thousand dollars, that a decree setting aside the sale as to such lot alone was proper, and gave to the complainant all the relief to which he was entitled; though, had, the lots been sold in a body, it would have been impossible to give this relief without setting aside the sale as to the other lots. *Linton v. Quimby*, 57 Ill. 271.

1. See *Bergsma v. Dewey*, 46 Minn. 357; and *infra*, IX. *Actions to Recover Homestead*.

2. *Alabama*.—*Zelnicker v. Brigham*, 74 Ala. 598.

*Arkansas*.—*Hughes v. Watt*, 26 Ark. 228; *Trotter v. Trotter*, 31 Ark. 148.

*California*.—*Sargent v. Wilson*, 5 Cal. 504; *Marks v. Marsh*, 9 Cal. 96; *Moss v. Warner*, 10 Cal. 296.

*Illinois*.—*Knapp v. Gass*, 63 Ill. 495; *Schaefer v. Kienzel*, 123 Ill. 430.

*Indiana*.—*Over v. Shannon*, 75 Ind. 352; *Guerin v. Kraner*, 97 Ind. 533; *Huseman v. Sims*, 104 Ind. 317.

*Iowa*.—*Haynes v. Meek*, 14 Iowa 320.

*Kentucky*.—*Caldwell v. Truesdell*, (Ky. 1890) 13 S. W. Rep. 101; *Mullins v. Clark*, (Ky. 1891) 15 S. W. Rep. 784.

*Michigan*.—*Matson v. Melchor*, 42 Mich. 477.

*Minnesota*.—*Bergsma v. Dewey*, 46 Minn. 357.

*North Carolina*.—*Rankin v. Shaw*, 94 N. Car. 405; *Wilson v. Taylor*, 98 N. Car. 275.

*Texas*.—*Tadlock v. Eccles*, 20 Tex. 782; *Jenkins v. Volz*, 54 Tex. 636; *Canadian, etc., Mortg., etc., Co. v. Kyser*, 7 Tex. Civ. App. 475.

*United States*.—*Goodwin v. Colorado Mortg. Invest. Co.*, 110 U. S. 1.

**Disposal of Issue Before Judgment.**—In an action by creditors to have an alleged fraudulent deed set aside, the answer set up that the donor was entitled to a homestead in the conveyed land. It was held erroneous to strike out such answer, and order the sheriff to lay off the homestead and sell the excess, since the defense ought to have been disposed of before rendering final judgment, inasmuch as if the answer were found to be true, it would be a finding that all the defendant's land would be required for the homestead exemption, and the action could then proceed no further. *Rankin v. Shaw*, 94 N. Car. 405.

**Default for Want of Answer.**—Where both husband and wife were made parties defendant to an action in which the petition alleged that they were claiming homestead rights, and called upon them to set up their rights so as to have them adjudicated, it was held that the plaintiff was entitled to have the question adjudicated, and that the defendants having failed to answer, it was proper to enter judgment by default against them. *Canadian, etc., Mortg., etc., Co. v. Kyser*, 7 Tex. Civ. App. 475.

ant is entitled to the exemption<sup>1</sup> and that his defense is based

1. *Kitchell v. Burgwin*, 21 Ill. 44, holding that an answer failed to make out a case where it contained no averments that the land was owned by the defendant, or that the debt was not incurred for its purchase or improvement, such averments being declared indispensable.

**Sufficiency of Answer to Bill in Equity.** — Where a bill was filed in aid of an execution that was levied on a lot which had been conveyed in fraud of creditors and was occupied as a homestead, and the answer setting up the fact that the lot levied on was occupied as a homestead, relied on the conveyance and did not set up the exemption nor aver the value of the land to be low enough to bring it within the constitutional exemption, it was held to show no obstacle to a sale under the levy, although it indicated that some action could have been taken under the levy to ascertain the homestead right or secure such interest as might remain over in case the value of the property exceeded the amount of the levy. *Matson v. Melchor*, 42 Mich. 477.

**Failure to Reply.** — Where a bill alleged that the widow was entitled to dower in land, and the widow in her answer averred that she was entitled to her dower in the premises as well as a homestead, no replication being filed, it was objected that there were no facts alleged out of which the right of homestead could arise. The court held, however, that failing to reply to the claim set up in the answer was an admission by the complainant that the widow had a homestead right in the premises, and that the allegation in the answer that the widow was entitled to a homestead was sufficient to warrant a decree for its allowance. *Knapp v. Gass*, 63 Ill. 495, followed in *Schaefer v. Kienzel*, 123 Ill. 430.

**Fatal Variance.** — In *Bergsma v. Dewey*, 46 Minn. 357, it was held that in an action to enforce a mechanic's lien which accrued prior to the amendment to the *Minnesota* Constitution in 1888, the defendant, to prove the fact that the land constituted his homestead, must plead it. In such an action, the wife being a defendant with her husband, who contracted for the building, their answer, alleging that the land was hers and that she possessed and occupied it and that it was her home-

stead, the land being in fact his, will not admit proof that it was his homestead.

**Nul Disseisin to Writ of Entry.** — Under the plea of *nul disseisin* the defendant in a writ of entry may avail himself of his homestead right without specifying the same. *Swan v. Stephens*, 99 Mass. 7, disposing of the doubt suggested upon the question in *Castle v. Palmer*, 6 Allen (Mass.) 401.

**General Averment of Homestead.** — An answer which averred in general terms that the defendant was in possession of the land, and that it was his homestead, was held sufficient. *Hughes v. Watt*, 26 Ark. 228.

**General Averment of Exemption.** — In an action to recover real property an answer setting up that said property was exempt from execution, and wrongfully sold by the sheriff, but failing to show that the defendant took the steps required by law to secure exemption, is insufficient. *Over v. Shannon*, 75 Ind. 352.

**In Arkansas**, where an answer set up that the claimant was a citizen of Arkansas, a freeholder, the owner of one hundred and sixty acres of land, was the head of a family, and an actual resident upon the land with his wife and children at the time of his death, it was held that such answer set up every material fact requisite to entitle the husband to a homestead. *Trotter v. Trotter*, 31 Ark. 148.

**In Kentucky** it is well settled that the debtor, to avail himself of a homestead exemption, must be a *bona fide* housekeeper with a family, and in possession of the land when levied upon, and he must also have acquired it before the existence of the demand to satisfy which it is sought to be subjected and sold, and an answer which fails to aver these essential conditions should not be allowed to be filed. *Caldwell v. Truesdell*, (Ky. 1890) 13 S. W. Rep. 101.

**In Colorado** a separate plea of a married woman which sets up the homestead law of Colorado as a defense against an action for the recovery of real estate is bad if it fails to aver that the word "homestead" is written on the margin of the record title of the premises occupied as a homestead, as required by law, even if it also avers a defect of acknowledgment by the wife.

upon a valid claim of homestead.<sup>1</sup>

**Amendment of Answer.**—An original answer setting up an insufficient claim of homestead may sometimes be rectified by amendment.<sup>2</sup>

**IX. ACTIONS TO RECOVER HOMESTEAD — Parties Plaintiff.** — Any person entitled to a homestead may maintain an action to recover the same where it has been conveyed away or lost through no fault or negligence on the part of the claimant.<sup>3</sup>

*Goodwin v. Colorado Mortg. Invest. Co.*, 110 U. S. 1.

**In Indiana**, in an action to recover real property, where the answer, claiming the same as exempt and wrongfully sold by the sheriff, further alleged that the defendant filed with the sheriff a schedule of his property, it was held that such allegation was not sufficient to show the filing of such a schedule as the law required. *Over v. Shannon*, 75 Ind. 352, 91 Ind. 99. See also *Huseman v. Sims*, 104 Ind. 317. Such answer is also bad if it does not aver that the schedule "contained a full account of all property held at the time the writ was issued." *Over v. Shannon*, 75 Ind. 352; *Guerin v. Kraner*, 97 Ind. 533.

In an action to recover possession of real property an answer alleging that the defendant claimed the property as exempt, but failing to allege that he had any title to it, was held insufficient. *Over v. Shannon*, 75 Ind. 352.

**1. Defense to Action for Specific Performance.** — In an action for the specific performance of a contract to convey the homestead, in the execution of which the wife did not join, allegations in the answer showing that it is a homestead and that the wife refused to join in the conveyance, present a valid defense. *Yost v. Devault*, 9 Iowa 60.

**Answer of Junior Mortgagee.** — So, in an action to foreclose a senior mortgage, executed by the husband, an answer by a junior mortgagee, alleging that the mortgaged property was the homestead of the mortgagor when the mortgage was executed, and that the wife did not join in the execution of the same, constitutes a good defense to the action, even when the mortgagor makes no defense. *Alley v. Bay*, 9 Iowa 509.

**In Ejectment.** — In *Illinois* the defense that the deed or mortgage does not operate as a release of the right of homestead may be set up as a bar to the action. *Connor v. Nichols*, 31 Ill. 148; *Pardee v. Lindley*, 31 Ill. 174; *Hoskins*

*v. Litchfield*, 31 Ill. 137; *Smith v. Miller*, 31 Ill. 157; *Patterson v. Kreig*, 29 Ill. 514. And the fact that the premises were of value exceeding one thousand dollars does not at all weaken the defense as a bar to such recovery. *Smith v. Miller*, 31 Ill. 157; *Pardee v. Lindley*, 31 Ill. 174.

**Answer by Wife.** — Where there has been no abandonment the wife as well as the husband may set up the defense of homestead in an action of ejectment brought by the purchaser at a sheriff's sale. *Williams v. Young*, 17 Cal. 406. See also *Patterson v. Kreig*, 29 Ill. 514.

**In Forcible Entry and Detainer.** — In an action of divorce, property was awarded to the wife as alimony, described as certain lands of the husband, and such lands were afterwards sold under the decree for non-payment of the alimony. In an action of forcible entry and detainer, brought by the purchaser under the sheriff's deed to obtain possession of the land, it was held that the husband could not assert his homestead right as a defense, since he should have set it up under the former decree. *Hemenway v. Wood*, 53 Iowa 21.

**2. *Zelnicker v. Brigham***, 74 Ala. 598.

**3. See *supra*, II. Parties in Cases Affecting Homesteads.**

**Action by Wife and Children.** — In an action by a wife and minor children to recover premises set apart as a homestead to the husband, who was alive at the commencement of the suit, it was held, upon motion to dismiss the case on the ground that the suit should have been brought in the name of the husband as the head of the family to whom the homestead had been assigned, that inasmuch as the wife and minor children were the beneficiaries of this homestead, they might maintain the action in their own names, without joining the father and head of the family as party plaintiff. *Eve v. Cross*, 76 Ga. 695; *Mauldin v. Cox*, 67 Cal. 390; *Prey v. Stanley*, 110 Cal. 423. See also

**Bill in Equity.**—The usual form of action for the recovery of homestead is a bill in equity;<sup>1</sup> but this is by no means the

*supra*, II. *Parties in Cases Affecting Homesteads.*

**Action by Wife.**—In *Iowa* a wife may maintain an action to recover possession of the homestead conveyed away by her husband without her consent, but she must bring such action within the statutory period or the same will be barred. *Boling v. Clark*, 83 *Iowa* 481.

In *McKee v. Wilcox*, 11 *Mich.* 358, it was held that a homestead might be claimed in property held under contract of purchase, and where the husband canceled this contract without the assent of his wife, the wife might maintain a bill in equity in her own name to have a specific performance of the same.

**Action for Damages.**—So she may maintain an action in her own name for the recovery of damages to the land and crops growing thereon before she became the sole owner of the land by partition. *Houston, etc., R. Co. v. Knapp*, 51 *Tex.* 592.

In *Houston, etc., R. Co. v. Knapp*, 51 *Tex.* 592, it was held that the surviving wife had such an estate in the homestead, being part of the community estate of herself and her deceased husband, as would enable her to maintain an action in her own name for its injury; and if the heirs of the deceased husband, who were not joined as plaintiffs, had also an interest in the land at the time of the injury, a party sued by her could only avail himself of that fact by plea in abatement, or by way of apportionment of damages.

**Action by Insolvent.**—Where it appeared that the plaintiff had a perfect title to a homestead when he filed his petition for discharge of his debt, under the insolvent laws, it was held that he might maintain an action of ejectment to recover possession of his homestead, although his application for discharge as an insolvent was still pending. *Moore v. Morrow*, 28 *Cal.* 552.

**Action by Minors.**—A proceeding in equity is a proper mode of enforcing the right of minors to the homestead if they are entitled to have one assigned to them. *Strachn v. Foss*, 42 *N. H.* 43. See also *Gunnison v. Twitchel*, 38 *N. H.* 62. Nor does the absence of one of them from the premises prevent him from availing himself of his right if he has one that can be enforced. *Atkin-*

*son v. Atkinson*, 37 *N. H.* 436, *cited in Strachn v. Foss*, 42 *N. H.* 44.

**Action Against Purchaser at Execution Sale.**—Where lands of a defendant in execution are sold and conveyed by the sheriff, subject to homestead exemption, after the defendant has filed the proper schedule claiming the homestead therein, the widow and minor children of said defendant may maintain a bill in equity to assert their title to the homestead as against the purchaser and have the deed from the sheriff declared void as against the land. *Andrews v. Melton*, 51 *Ala.* 400. And so, in *Riggs v. Sterling*, 51 *Mich.* 157, it was held that where the rights of a claimant had been disregarded by sale on execution, he might bring an action of ejectment and set up his homestead rights against the purchaser at such sale.

**Exemption in Public Lands.**—In *Kitcherside v. Myers*, 10 *Oregon* 21, where public land was sought to be held as exempt under the Homestead Act, and the claimant had a right to the possession of the land for the purpose of doing the required acts to secure his title, but was prevented from taking possession by one without legal title, it was held that he might ask the aid of equity to put him in possession of his rights.

1. *Riggs v. Sterling*, 51 *Mich.* 157; *Miles v. Miles*, 46 *N. H.* 261; *McKee v. Wilcox*, 11 *Mich.* 358; *Andrews v. Melton*, 51 *Ala.* 400. See also *Strachn v. Foss*, 42 *N. H.* 43; *Atkinson v. Atkinson*, 37 *N. H.* 436.

In *Georgia* courts of equity alone have jurisdiction of suits for the recovery of property which has been set apart under the homestead and exemption laws of Georgia, and which was sold previous to February 15, 1876, or for the recovery of any interest therein. *Zellers v. Beckman*, 64 *Ga.* 747.

It is not necessary to resort to equity, however, to secure the exemption allowed by section 2040 of the code in the case of an insolvent estate. Section 2049 provides for the case, and the widow having failed, while a wife, to assert her right in a proper manner, can assert it as a widow by simply returning a schedule to the ordinary and having the same recorded. *Mapp v. Long*, 62 *Ga.* 568.



invariable rule.<sup>1</sup>

**Requisites of Bill or Complaint.** — Whatever the nature of the action, however, the claimant should show himself clearly entitled to the exemption by setting out all the requisites of the statute under which he claims.<sup>2</sup>

**X. ACTIONS TO PROTECT HOMESTEAD — 1. Parties Plaintiff.** — So in actions for the protection of the homestead, any person having a valid claim thereto may institute proceedings.<sup>3</sup>

**By Cross-bill.** — The defendant conveyed premises without his wife's signature to the deed. A judgment creditor of the defendant levied upon the premises, and filed a bill in aid of his execution. It was contended that as the wife did not join in the conveyance the deed was void, under the *Michigan* Homestead Law of 1848, and that she was entitled to be protected in the enjoyment of forty acres of the land, under that law. But it was held that if she had any equitable interest in a homestead to be selected from the premises, it could not be adjudicated in that suit, but that she must join her husband in a cross-bill, and so bring her claim before the court. *Wisner v. Farnham*, 2 Mich. 472.

1. *Moore v. Morrow*, 28 Cal. 552.

**Writ of Homestead.** — In *Woodward v. Lincoln*, 9 Allen (Mass.) 241, it was suggested by Mr. Justice Dewey that a homestead might be recovered by writ of homestead, in analogy to a writ of dower. See also *Silloway v. Brown*, 12 Allen (Mass.) 33.

2. See *supra*, III. *Application for Homestead*.

Thus, upon a complaint or bill in equity by a husband and wife to recover the homestead conveyed by the husband alone, there must be an averment that the premises were occupied as a homestead at the date of the husband's conveyance, or that they had not been previously abandoned. *Harper v. Forbes*, 15 Cal. 204.

And it was held in *Georgia* that a married woman could not take a homestead, under the Constitution of 1877, out of her own property, as the head of a family, where her petition showed her husband to have been the head of the family, and that he refused to take a homestead, and did not show that the applicant had the care and support of her children or dependent females of any age, or even that her husband was unable to support her children and her-

self out of his property. *Robson v. Walker*, 74 Ga. 823.

Where a bill was brought to recover certain property as being a homestead, and the proceedings attached as exhibits showed that the ordinary had set apart the lands as a homestead before the surveyor had made his return and before he had sworn to the same, the bill was properly dismissed on demurrer. *Falls v. Crawford*, 76 Ga. 35.

**Action to Set Aside Sale.** — In an action to set aside a certificate of sale made by the sheriff of certain premises, claimed as a homestead, the bill alleged that the plaintiffs were owners in fee of the premises, describing them, "and have their residence in the building situated on said lot, and occupy the same as a homestead, \* \* \* and that said premises were occupied by complainants, who were then husband and wife, as a homestead at the time of said levy," and this was held to be a sufficient allegation that there was a dwelling on the premises. *Lozo v. Sutherland*, 38 Mich. 168.

**General Averment Sufficient if Not Answered.** — In *Schaefer v. Kienzel*, 123 Ill. 430, the bill alleged that the plaintiff "is entitled to homestead in said premises." No answer being filed, the bill was taken for confessed. It was contended that the bill was not sufficient to authorize the decree because no facts were alleged out of which the claim for exemption could arise, but the court held, on the authority of *Schaefer v. Kienzel*, 63 Ill. 495, that failure to answer the bill was an admission of the allegation and warranted the decree.

3. *Comstock v. Comstock*, 27 Mich. 102; *Farr v. Dunsmoor*, 36 Minn. 437; *Norris v. Duncan*, 21 Tex. 594; *Sossaman v. Powell*, 21 Tex. 664; *Abell v. Lothrop*, 47 Vt. 375. See also *supra*, VIII. *Pleading Homestead*.

**A Husband** who, through fraud and misrepresentation, has been induced

**2. Bill or Complaint.** — In such case a party claiming a specific remedy by reason of the denial of his rights under homestead exemption must show that he has complied with all the provisions of the statute.<sup>1</sup>

**3. Injunctions** — *a. EQUITABLE JURISDICTION* — *In General.* — Where irreparable injury is threatened and there is no adequate remedy at law, equity will assume jurisdiction to protect the homestead from forced sale under execution by enjoining such sale, upon proper application, as a cloud upon the title.<sup>2</sup>

to unite in a conveyance of real property belonging to his wife, and which included the homestead, may maintain an action to set the conveyance aside. *Farr v. Dunsmoor*, 36 Minn. 437.

**Wife.** — Where purchase-money mortgages are being foreclosed upon a homestead property, and the homestead right is denied, the wife may file a bill to protect the same, and such bill will not be held premature because no execution has been levied on the premises and no sale advertised under the decree. *Comstock v. Comstock*, 27 Mich. 97, where the right of a married woman to sue for the protection of her homestead property was placed in the same category as her right to sue for the protection of her sole property.

In *Bartholomew v. Hook*, 23 Cal. 277, it was held that where no declaration of homestead had been filed, and a judgment was rendered against the husband, his wife, after filing such declaration, acquired such an interest in the homestead as to enable her to maintain an action against the sheriff to compel him to exhaust the husband's personal property before proceeding to sell the homestead.

**The Heirs** of a deceased person may bring suit with reference to the homestead property occupied by him without taking out letters of administration. *Sossaman v. Powell*, 21 Tex. 664; *Norris v. Duncan*, 21 Tex. 594.

1. *Guerin v. Kraner*, 97 Ind. 533; *Shoemaker v. Gardner*, 19 Mich. 96.

**Legal Conclusions.** — An allegation in the complaint that the complainant complied with all the statutory provisions entitling the property to exemption is merely a conclusion which does not in any way help the complaint. *Guerin v. Kraner*, 97 Ind. 533.

**Allegation of Value.** — In a bill to set aside an execution as levied upon a homestead, an allegation that "the whole value of the said premises over

and above the amount of two mortgages prior in date to the date of the record of the levy of the execution \* \* \* does not exceed the sum of fifteen hundred dollars" was considered sufficient on a general demurrer, though it would have been better to set forth the mortgages in detail. *Lozo v. Sutherland*, 38 Mich. 168.

Where, however, the bill did not aver that the value of the premises claimed as a homestead did not exceed the sum allowed by statute (\$1,500) it was held defective. *Shoemaker v. Gardner*, 19 Mich. 96.

**Defect Cured by Answer.** — Upon a complaint filed, praying an injunction to restrain the sale of certain property claimed as a homestead, it was contended that the complaint was fatally defective in that it did not allege that the plaintiffs had selected the property in controversy as a homestead, and caused the declaration of their selection to be recorded as bound by law. It was held that in this respect the complaint was undoubtedly defective, but that an allegation in the answer, wherein the defendant stated distinctly the date when the plaintiffs filed their declaration of homestead for recordation, cured the defect. *Hawthorne v. Smith*, 3 Nev. 189.

2. *California.* — *Roth v. Insley*, 86 Cal. 134; *Dunn v. Tozer*, 10 Cal. 167; *Shattuck v. Carson*, 2 Cal. 588; *Culver v. Rogers*, 28 Cal. 520; *Miller v. Little*, 47 Cal. 348.

*Florida.* — *Lewton v. Hower*, 18 Fla. 872.

*Georgia.* — *Johnson v. Griffin Banking, etc., Co.*, 55 Ga. 691. See also *Colley v. Duncan*, 47 Ga. 668.

*Illinois.* — *Conklin v. Foster*, 57 Ill. 104; *Boyd v. Cuddeback*, 31 Ill. 113.

*Louisiana.* — *Tison v. Taniehill*, 28 La. Ann. 793.

*Mississippi.* — *Irwin v. Lewis*, 50 Miss. 363.

**Laches or Negligence of Plaintiff.** — But a court of equity will not interpose by injunction to prevent the execution of legal process of a court of law on a judgment regularly obtained, where there is laches or negligence on the part of the complainant, and no fraud is alleged or shown on the part of the judgment creditor.<sup>1</sup>

*New Hampshire.* — *Lucker v. Kenniston*, 47 N. H. 267.

*South Carolina.* — *Ketchin v. McCarley*, 26 S. Car. i.

*Texas.* — *Gardner v. Douglass*, 64 Tex. 76; *Nichols v. Snow*, 42 Tex. 72.

*Wisconsin.* — *Smith v. Zimmerman*, 85 Wis. 542; *Goodell v. Blumer*, 41 Wis. 436.

*United States.* — *Fink v. O'Neil*, 106 U. S. 272; *Webb v. Hayner*, 49 Fed. Rep. 601.

**Action by Grantee of Homestead.** — In *Smith v. Zimmerman*, 85 Wis. 542, certain land was occupied as a homestead by the owner at the time of the recovery of a judgment against him. Afterwards, having contracted to sell the same, he assigned said contract and conveyed his interest in the land to another person. The statute made judgments a lien on lands of the debtor excepting homesteads. It was held that inasmuch as the judgment was an apparent lien, but in reality no lien, the grantee, although not in actual possession of the land, could maintain an action to restrain the sale thereof on the execution upon the ground that the sale would create a cloud upon his title, and that in such action he need not allege that the land was the homestead of the judgment debtor at the time of the issuing of the execution.

**Sale without Setting Out Homestead.** — Where an officer, after application to set out the debtor's homestead, without setting it out undertakes to dispose of it, a court of equity will interfere by injunction, founded upon a bill *quia timet*. *Tucker v. Kenniston*, 47 N. H. 268; *Barney v. Leeds*, 51 N. H. 279.

**Judgment for Damages.** — In *White v. Givens*, 29 La. Ann. 571, an injunction was granted to prevent the sale of a homestead and a judgment of damages rendered for attorney's fees, loss of crops, etc., occasioned by the seizure.

**Injunction without Notice.** — In *Lewton v. Hower*, 18 Fla. 872, it was held that in the case of pressing necessity, where the threatened injury is imminent, and the defendant could not be found in time to serve him with notice, it was no abuse of discretion to allow

an injunction without notice. Such an injunction was not an "injunction to stay proceedings at law" within the meaning of the statute requiring notice of application therefor, and a bond in double the amount of the verdict.

**To Protect United States Homestead.** — In *Miller v. Little*, 47 Cal. 348, it was held that an injunction would be granted restraining the sale of a homestead claimed under the laws of the United States, where the judgment was recovered on a debt contracted before the homestead claim was patented.

**Adequacy of Legal Remedy.** — The test of the right of equitable interposition in such cases is not merely that there is a remedy at law, but such remedy must be as plain and adequate and efficient to the ends of justice and its prompt administration as the remedy in equity. *Irwin v. Lewis*, 50 Miss. 368. See also *Ketchin v. McCarley*, 26 S. Car. 7; *Roth v. Insley*, 86 Cal. 139; *Booker v. Anderson*, 35 Ill. 66.

**Remedy by Motion.** — In *Roth v. Insley*, 86 Cal. 139, an execution had been levied upon a homestead which might have been levied upon other property of the defendant, and it was claimed that the proper remedy of the defendant in such case was an application to the justice to recall the execution, but the court held that an injunction to restrain the sale of the homestead should not be refused upon the ground that a remedy by motion existed.

**The Right Should Exist at the Time of Seizure** and at the time the injunction is asked. *Borron v. Sollibellos*, 28 La. Ann. 355. See also *Moore v. Granger*, 30 Ark. 574.

1. *Platt v. Sheffield*, 63 Ga. 627; *Brinson v. Wessolowsky*, 58 Ga. 293. See also *Borron v. Sollibellos*, 28 La. Ann. 355; *Kuntz v. Baehr*, 28 La. Ann. 90; *Williston v. Schmidt*, 28 La. Ann. 416.

After affirmance, by the Supreme Court, of a final decree, directing, among other things, the sale of certain property, equity will not enjoin the sale, at the instance of a party to the decree, where no substantial ground for injunction appears, but what was,

*b. TEMPORARY INJUNCTION.* — Where the right of homestead is a disputed issue, a temporary injunction may be granted restraining the sale until the respective rights of the claimants have been fully adjudicated and determined.<sup>1</sup>

*c. BILL OR COMPLAINT.* — Where an injunction is sought, it is sufficient if the bill or complaint sets out facts showing a cloud upon the title and that irreparable injury will be done unless the injunction is granted,<sup>2</sup> observing in all cases such particularity of allegation as will enable the court to determine the nature of the relief sought.<sup>3</sup>

**XI. FORECLOSURE OF HOMESTEAD MORTGAGE — 1. Parties.** — Where an action is brought to foreclose a mortgage upon the homestead, made by the husband alone, the wife should be joined as a defendant,<sup>4</sup> and when she is not made a party she may inter-

or might have been, presented for adjudication in the cause in which the decree was rendered. The matter of the controversy must be regarded as *res adjudicata*. *Brinson v. Wessolowsky*, 58 Ga. 293.

1. *Brown v. Thornton*, 47 Ga. 474. *Kilgore v. Beck*, 40 Ga. 296. See also *Colley v. Duncan*, 47 Ga. 668.

In *Johnson v. Griffin Banking, etc., Co.*, 55 Ga. 691, where an application was made for homestead and was resisted by a judgment creditor who held an absolute deed to the premises which if valid would have defeated the application, and such deed was attacked by the applicant on the ground that the same was void on account of usury, it was held that the sale of the land by the sheriff to satisfy the judgment would be enjoined until the right of homestead had been determined.

**Conflicting Affidavits.** — In *Farley v. Hopkins*, 79 Cal. 203, an application was made for a temporary injunction to restrain the sheriff from selling property claimed as a homestead. Affidavits filed in the case were conflicting as to whether the upper story of the building on the premises was part of the homestead or not, and it was held that it was no error on the part of the trial court to refuse to anticipate the final judgment and determine on motion and by the affidavits, whether or not the upper story of the building constituted part of the homestead claim; and an order granting a temporary injunction covering the entire premises was sustained.

**Purchaser with Notice.** — Where the head of a family applied to the ordinary to have a homestead set apart for his family under section 2103 of the

Georgia Code, and pending such application the land was sold on execution by the sheriff, it was held that the purchaser took with notice of the homestead right and that an injunction would be granted to prevent eviction of the family until the parties could be heard and their respective rights determined. *Kilgore v. Beck*, 40 Ga. 296.

2. *Roth v. Insley*, 86 Cal. 139. See also *Corey v. Schuster*, 44 Neb. 269.

3. A bill seeking to enjoin a judgment and execution should specify what judgment and execution are meant; and where the prayer for injunction is not limited to any particular judgment and execution the bill is demurrable. *Adams v. White*, 23 Fla. 352.

In *Alexander v. Mullen*, 42 Ind. 398, upon a complaint alleging that a judgment had been recovered and execution levied upon a certain house and lot claimed as a homestead, and that other property had been offered in satisfaction of the execution, concluding with a prayer that the sheriff be enjoined from selling said homestead, it was held that the complaint was defective for not alleging that the property offered in satisfaction of the execution belonged to or was the property of the execution defendant.

4. *Moss v. Warner*, 10 Cal. 296; *Sargent v. Wilson*, 5 Cal. 504; *Marks v. Marsh*, 9 Cal. 96; *Hefner v. Urton*, 71 Cal. 479; *Watts v. Gallagher*, 97 Cal. 51; *Fitzgerald v. Fernandez*, 71 Cal. 508; *Mabury v. Ruiz*, 58 Cal. 11; *Revalk v. Kraemer*, 8 Cal. 72; *Stockton Bldg., etc., Assoc. v. Chalmers*, 75 Cal. 332; *Shoemaker v. Collins*, 49 Mich. 595; *Comstock v. Comstock*, 27 Mich.

vene or, by permission of the court, be allowed to file a separate answer.<sup>1</sup> But she is not bound to adopt such course, for if left out she is at liberty to elect a separate remedy.<sup>2</sup>

**2. Answer.**—In this class of actions the claim of homestead should generally be set up in the answer as a defense to the foreclosure.<sup>3</sup>

97. See also *supra*, II. *Parties in Cases Affecting Homesteads*.

In order to foreclose the wife's interest and have a complete settlement of the question involved, viz., whether the mortgage is a lien, the wife is a necessary party. She has a right to question the execution or validity of the mortgage; whether it has been barred, or whether it has been paid. *Hefner v. Urton*, 71 Cal. 479.

**Wife Omitted Not Concluded.**—Where there is a valid homestead on the premises at the date of the commencement of an action to foreclose a mortgage thereon, executed by the husband if the wife is not a party to the action, a judgment therein, so far as it directs a sale of the homestead premises, is void as against her, *Watts v. Gallagher*, 97 Cal. 51; since a decree of foreclosure cannot conclude the homestead rights of any person not a party to it, *Shoemaker v. Collins*, 49 Mich. 595.

**Bringing In Wife as a Party.**—Where a husband sets up the right of homestead in his answer, the court should order the wife to be brought in as a party, so that the final decree may be binding upon all parties in interest, and avoid a multiplicity of suits. *Marks v. Marsh*, 9 Cal. 96.

**Nonappearance of Wife Duly Served.**—In *Fitzgerald v. Fernandez*, 71 Cal. 508, it was held that in an action against a husband and wife, brought to foreclose a mortgage, where process was served upon both, and the court thereby acquired jurisdiction of the person of the wife, as well as the subject-matter, the decree entered was not void because the wife did not appear but was represented by an attorney who, employed by the husband without her knowledge or consent, appeared and answered for her.

1. *Moss v. Warner*, 10 Cal. 296; *Sargent v. Wilson*, 5 Cal. 504.

**Amendment of Complaint.**—In such case the plaintiff is at liberty to amend his complaint if any matters are set up in the answer which he might wish to

anticipate by further allegations. *Moss v. Warner*, 10 Cal. 296.

2. *Comstock v. Comstock*, 27 Mich. 97.

3. *Wing v. Cropper*, 35 Ill. 262; *Haynes v. Meek*, 14 Iowa 320; *Moss v. Warner*, 10 Cal. 296; *Larson v. Reynolds*, 13 Iowa 579; *Sargent v. Wilson*, 5 Cal. 504. See also *Mullins v. Clark*, (Ky. 1891) 15 S. W. Rep. 784; *Dye v. Mann*, 10 Mich. 291. See *supra*, VIII. *Pleading Homestead*.

**Where the Surviving Wife Was Sued as Executrix** of her husband to foreclose a mortgage made by her husband upon the homestead premises, a judgment of foreclosure will not affect her individual right in the premises as a homestead, even though as executrix she has set up in her answer the claim of homestead. *Stockton Bldg., etc., Assoc. v. Chalmers*, 75 Cal. 332.

**Failure to Reply.**—Where, in an action to foreclose a mortgage, the answer alleged that the defendant was entitled to the homestead in the mortgaged property, and it appeared from the mortgage which was filed as an exhibit in the case, that the property was conveyed without reservation, it was held that no reply was necessary and that a failure to reply did not admit the claim made by the defendant. *Mullins v. Clark*, (Ky. 1891) 15 S. W. \*Rep. 784.

**In Illinois**, since the exemption can only be lost by release or abandonment in the mode pointed out by statute, a mere failure to claim the right by answer or cross-bill in a suit to foreclose a mortgage wherein the right is not released, will not have the effect to bar the right or be considered a relinquishment of the benefits of the statute. *Moore v. Titman*, 33 Ill. 361.

Where land was conveyed by A to B by deed containing no formal release of the homestead right, and B gave A a bond to reconvey upon payment of a certain sum, it was held that the fact that A made no defense to a bill (containing no allegation respecting the homestead right), filed by B, to sub-

**3. Receivers.** — Where foreclosure of homestead property is sought, it is doubtful whether a receiver can be appointed, especially where the amount due upon the mortgage is in dispute.<sup>1</sup>

**4. Judgment of Foreclosure.** — The homestead should be judicially ascertained before judgment of foreclosure is rendered;<sup>2</sup> and after a judgment of foreclosure and sale the validity of the mortgage will not be allowed to be questioned in a subsequent action.<sup>3</sup>

**XII. PARTITION OF HOMESTEAD PROPERTY.** — Proceedings for partition of homestead property are usually the subject of statutory provision, but wherever several parties are entitled to undivided shares in property out of which a homestead has not been assigned, either of the parties interested may maintain a bill for partition of the property.<sup>4</sup> Where the parties in interest, how-

ject the land to the payment of the purchase-money, till after the master's sale and the execution of a deed to the purchaser, when he and his wife filed a bill to restrain the execution of a writ of possession, to vacate the sale and to have a homestead set off, was no waiver of the exemption. *Silsbe v. Lucas*, 36 Ill. 462. See also *Wing v. Cropper*, 35 Ill. 256.

In *Allen v. Hawley*, 66 Ill. 164, it was held that a wife, to preserve her right of homestead, where she has not signed a mortgage and released the same, is not compelled to set up the right when a foreclosure of such a mortgage is sought, and failing to set it up is not estopped from asserting the right in subsequent proceedings.

Where a bill to foreclose a mortgage upon homestead property contains no allegation that the premises in question were not subject to the homestead exemption, a decree upon the bill taken *pro confesso* is not an admission that the defendant had no right to insist upon his exemption, and does not conclude him therefrom. *Silsbe v. Lucas*, 36 Ill. 462; *Wing v. Cropper*, 35 Ill. 256; *Moors v. Dixon*, 35 Ill. 208; *Moore v. Titman*, 33 Ill. 358; *Allen v. Hawley*, 66 Ill. 164. See also *Hoskins v. Litchfield*, 31 Ill. 137.

1. *Callanan v. Shaw*, 19 Iowa 183, holding that the application might be refused where the amount due was in dispute; and it was questioned whether a receiver could be appointed in any case under such circumstances.

2. *Adger v. Bostick*, 12 S. Car. 64, holding that where the mortgage was given upon a large tract of land where in the homestead was reserved, such

homestead was to be set out or ascertained by testimony taken before the court under reference for that purpose, and not in the manner prescribed in the Homestead Act.

3. A judgment against a husband and wife, foreclosing a mortgage executed by them, and ordering a sale of the homestead embraced therein, precludes the wife and infant children of the husband, after his death, from asserting claim to a homestead; and the court had no power, on a motion to revive, to go behind the judgment to inquire into the validity of the mortgage. *Harpending v. Wylie*, 13 Bush (Ky.) 158.

4. *Atkinson v. Atkinson*, 37 N. H. 434; *Barney v. Leeds*, 51 N. H. 279; *Gimmy v. Doane*, 22 Cal. 635; *Castle v. Palmer*, 6 Allen (Mass.) 404; *Silloway v. Brown*, 12 Allen (Mass.) 30; *Ferguson v. Reed*, 45 Tex. 574. See also *Gunnison v. Twitchel*, 38 N. H. 65; *Horn v. Tufts*, 39 N. H. 485; *Lindsey v. Brewer*, 60 Vt. 627.

In *Atkinson v. Atkinson*, 37 N. H. 434, it was held that while a widow entitled to a homestead right might undoubtedly maintain a bill in equity to secure an assignment to herself of her share, yet where there were others jointly interested with her in the premises she might also resort to the simpler mode of obtaining partition. See also *Horn v. Tufts*, 39 N. H. 485.

**Homesteader and Claimant of Residue.** — In *Lindsey v. Brewer*, 60 Vt. 627, it was held that although the claimant of homestead and the claimant of the residue of property were not tenants in common, between whom a partition might properly be had, yet a court of equity, upon a bill filed for such pur-

ever, are before the court in an action involving the homestead, it is the duty of the court to enter such a judgment as may be necessary to secure the possession of the homestead, and which will in effect leave each of the parties in the several enjoyment of so much of the estate as belongs to him.<sup>1</sup>

**Widow and Infant Children.** — As between the widow and the infant children there can be no partition of the homestead, unless otherwise provided by statute, so long as the widow continues to occupy it as such.<sup>2</sup> As a general rule the homestead must remain intact until the youngest child has reached his majority, and it is not competent for cotenants to have partition until after that period.<sup>3</sup>

**XIII. CREDITORS' BILLS.** — After the termination of the homestead exemption, or where for any reason property claimed as such has become liable for debt, a creditors' bill may be maintained to subject the debtor's interest therein.<sup>4</sup> The creditor

pose, might exercise its discretion in partitioning the property between the several claimants.

**After Divorce.** — Where a homestead has been established upon common property of the husband and wife, such homestead may be partitioned and set apart in case of a divorce. *Gimmy v. Doane*, 22 Cal. 635.

**Partition by Vendee.** — Where a husband and wife transfer an undivided interest in their homestead, such conveyance carries with it the right to enjoy the interest so conveyed, and the vendee may compel partition of the premises. *Ferguson v. Reed*, 45 Tex. 574.

**In Massachusetts**, under Gen. Stat., c. 104, § 9, the party entitled to homestead, or any other party interested, may cause partition to be made, and the homestead estate to be set off. *Castle v. Palmer*, 6 Allen (Mass.) 404; *Silloway v. Brown*, 12 Allen (Mass.) 30.

1. *Castle v. Palmer*, 6 Allen (Mass.) 404. See also *Pittsfield Bank v. Howk*, 4 Allen (Mass.) 347.

2. *Nicholas v. Purcell*, 21 Iowa 266; *Trotter v. Trotter*, 31 Ark. 145.

Where the widow had been assigned a homestead and occupied the same as such since the death of her husband, in an action by the children of the husband by a former marriage, all of full age, for partition, it was held that the widow was entitled to occupy the homestead during her life, and that such action for partition was properly dismissed. *Yoe v. Hanvey*, 25 S. Car. 94.

3. *Hoppe v. Fountain*, 104 Cal. 101;

*Phelan v. Smith*, 100 Cal. 170; *Stunz v. Stunz*, 131 Ill. 210; *Hoffman v. Neuhaus*, 30 Tex. 634; *Osborn v. Osborn*, 76 Tex. 494; *Hudgins v. Sansom*, 72 Tex. 229.

In *Hoppe v. Fountain*, 104 Cal. 101, the court said: "The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it."

**In Texas** the property is not subject to partition, so long as the guardian of a minor is permitted by order of court to use and occupy it. *Hall v. Fields*, 81 Tex. 553; *Osborn v. Osborn*, 76 Tex. 494; *Hudgins v. Sansom*, 72 Tex. 229.

**Appointment of Guardian.** — Where an action was brought to partition the homestead property, after the death of both parents, among the heirs, one of whom was a minor without any guardian and whose right to occupy the homestead property had never been determined by the court, it was held that it was a duty of the court to arrest the proceedings and suspend further action in the case, until the county court should appoint a guardian and determine whether or not he should be permitted to occupy and use it for his ward. *Osborn v. Osborn*, 76 Tex. 494.

4. See article CREDITORS' BILLS, vol. 5, p. 388.

The judgment creditor may maintain an action to subject homestead property to his claim after the exemption covering such property has expired, and the fact that he was party to the judgment setting aside such prop-

may likewise institute proceedings to subject the excess over the homestead to the satisfaction of his judgment,<sup>1</sup> or to set aside an order assigning homestead where elements of fraud or corruption have been introduced for the purpose of misleading the court.<sup>2</sup>

**XIV. CHATTEL EXEMPTIONS—1. Nature of Right—A Personal Privilege.**—In close analogy to the subject of homesteads in real property above treated, according to the terms of certain statutes, various articles of personal property are held as exempt when owned by the head of a family and not exceeding in value a fixed sum. As in the case of homestead exemption the right to retain certain chattels as exempt from legal process is a personal privilege belonging to the debtor,<sup>3</sup> and he alone can plead such fact in an action to recover property claimed as exempt.<sup>4</sup>

erty as a homestead in the first instance is no bar to a subsequent action. *Hanby v. Henritze*, 85 Va. 177, holding also that where pending the bill the homestead exemption expired, the bill may be amended for the purpose of asking the sale of the entire property.

1. *Demartin v. Demartin*, 85 Cal. 74.

In Texas the court said that it is doubtful whether a judgment creditor can invoke the equitable powers of the court in a proceeding seeking to subject the excess of two hundred acres of the homestead of the debtor to the satisfaction of his judgment, and that if such a proceeding can be maintained, it must be where the creditor cannot obtain satisfaction of his judgment in the ordinary way, and it must be in subordination to the right of the debtor to point out property and to possess the homestead of his own selection. Where the petition in such a suit failed to aver that the debtor had no other property liable to be taken in execution in satisfaction of the debt, and to allege that an opportunity had been afforded him to point out and designate the excess, it was held to be insufficient. *Mackey v. Wallace*, 26 Tex. 526.

2. *Wickersham v. Comerford*, 96 Cal. 433. See *supra*, VII. *Orders Setting Aside Sales*.

**Undervaluation.**—Where it is made to appear that appraisers, whether selected by the sheriff or appointed by the court, have by fraud or mistake undervalued the land set apart to the debtor as a homestead, a subsequent creditor not a party to the former proceeding has the right to have such undervaluation corrected by judgment of a court of equity, and so much of the land as exceeded one thousand dollars

in value subjected to his debt. *Louden v. Yager*, 91 Ky. 57.

3. *Indiana*.—*State v. Melogue*, 9 Ind. 196.

*Minnesota*.—*Howland v. Fuller*, 8 Minn. 50; *Orr v. Box*, 22 Minn. 485.

*Missouri*.—*Osborne v. Schutt*, 67 Mo. 712; *Terry v. Wilson*, 63 Mo. 497.

*New York*.—*Twinam v. Swart*, 4 Lans. (N. Y.) 264; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 508; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Mickles v. Tousley*, 1 Cow. (N. Y.) 114; *Earl v. Camp*, 16 Wend. (N. Y.) 570; *Baker v. Brinrall*, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 258.

*Ohio*.—*Butt v. Green*, 29 Ohio St. 670.

*Pennsylvania*.—*Line's Appeal*, 2 Grant's Cas. (Pa.) 197; *Strouse v. Becker*, 38 Pa. St. 193; *Dodson's Appeal*, 25 Pa. St. 232.

**An Assignee of the Judgment Debtor**, although claiming under a general assignment which does not except exempt property, cannot claim property as exempt from execution after having stood by at the sale and made no claim thereto as assignee. *Smith v. Hill*, 22 Barb. (N. Y.) 656.

**A Trustee under a Deed** conveying to him, for the purpose of securing a debt, property exempt from execution cannot set up the exemption against an execution. *Terry v. Wilson*, 63 Mo. 497.

**The Vendee** of personal property cannot, when it is levied on under process against his vendor, claim the benefit of the vendor's right of exemption. *Howland v. Fuller*, 8 Minn. 50.

4. *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Earl v. Camp*, 16 Wend. (N. Y.) 570; *Mickles v. Tousley*, 1 Cow. (N. Y.) 114.

**A Bailee or Agent of the Debtor** cannot



**2. Rights of Parties at Time of Levy** — *a. GENERALLY.* — The rights of the several parties at the time of the levy of execution must, in a great measure, depend upon the terms of the exemption statute and the practice in levying executions in general.<sup>1</sup>

*b. DUTY OF OFFICER.* — *As a General Rule,* it is the duty of an officer holding an execution, if practicable, to notify the defendant thereof or that a levy has been made,<sup>2</sup> and to notify the debtor as to his right of exemption.<sup>3</sup>

*By Statute.* — Since the right of exemption, however, is entirely a matter of statutory enactment, the officer should comply strictly with the statutory terms, and in setting aside the exemption should follow the provisions laid down by the terms of the statute.<sup>4</sup> If the defendant, after notice, neglects or refuses to

maintain an action for the recovery of the property. *Mickles v. Tousley*, 1 Cow. (N. Y.) 114; *Earl v. Camp*, 16 Wend. (N. Y.) 570.

**Defense to Action by Levying Officer.** — Where a constable levied an execution in favor of A on property of B which was exempt, and afterwards the sheriff seized the property upon a writ of replevin at the suit of B, it was held in an action by the constable against the sheriff that the latter might defend on the ground that the property was exempt from execution. *Connaughton v. Sands*, 32 Wis. 387.

1. See article EXECUTIONS AGAINST PROPERTY, vol. 8, p. 303.

2. *People v. Palmer*, 46 Ill. 398; *Cook v. Scott*, 6 Ill. 333; *Foote v. People*, 12 Ill. App. 94; *Wright v. Deyoe*, 86 Ill. 490; *Bingham v. Maxcy*, 15 Ill. 290; *Blair v. Parker*, 4 Ill. App. 409; *Wyckoff v. Wyllis*, 8 Mich. 48; *Elliott v. Whitmore*, 5 Mich. 532.

**Absence of Debtor.** — In *Illinois*, in case of the absence of the defendant from the county, while the officer holds the execution, so that he cannot be notified, it is the duty of the sheriff to levy on all property not specifically exempt, and thereafter the defendant may make his selection of the property so levied upon of the same quality and value as before the levy. *People v. Palmer*, 46 Ill. 398; *Foote v. People*, 12 Ill. App. 94. But in such case the defendant should surrender or offer to surrender an amount of other property sufficient to satisfy the execution, and failing to do this, the officer may proceed with the sale, unless the aggregate value of the property selected does not exceed the value of the property exempt by statute. *People v. Palmer*, 46

Ill. 398. Compare *McCluskey v. McNeely*, 8 Ill. 578, where it was held that if a debtor resides in one county, and his property in another county is taken in execution, he is entitled to notice to make selection of exempt property as if he resided in the county where execution was levied.

3. *State v. Romer*, 44 Mo. 99; *State v. Barada*, 57 Mo. 562; *State v. Farmer*, 21 Mo. 160; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136, holding it to be the duty of an officer levying an execution to require a party claiming an exemption to make an election at the time of the levy.

4. In *Michigan* an officer levying execution is required under the statute to appraise the goods and set aside so much as is exempt; and it is not necessary when the levy is made that the execution debtor should assert a claim to the property as exempt. *Vanderhorst v. Bacon*, 38 Mich. 669.

**Attachment.** — Upon seizing property under attachment the officer was required under Comp. Laws 1270, §§ 4747, 4748, to make an inventory and serve a copy of it with a copy of the writ upon the defendant if he was found in the county, and have an appraisal of the property made by two disinterested freeholders. *Wyckoff v. Wyllis*, 8 Mich. 49.

In *Mississippi*, under the Code of 1857, p. 529, arts. 280, 281, and Act 1865, p. 1378, two modes are indicated to determine *prima facie* the right of exemption. In case of doubt, the sheriff may summon three disinterested citizens of the county to resolve it. Under the 5th section, the judgment debtor may designate the property specifically claimed as exempt, "and no property so design-

make a selection of the property allowed him by statute, the officer may proceed to levy on any of his property not specifically exempt, and sell the same regardless of any subsequent claim.<sup>1</sup>

c. DUTY OF DEBTOR. — The right of exemption is a privilege which must be claimed,<sup>2</sup> and the duty of claiming the same, as a general rule, devolves upon the judgment debtor.<sup>3</sup>

nated shall be seized by the officer, otherwise than as provided for in the 4th section." That is to say, such designation raises a doubt as to the liability of the property, and before the sheriff shall proceed further he must refer it for resolution to "three disinterested citizens;" and where under this statute the sheriff did not take the decisions of the three citizens as to the exemption of the property, and the debtor did not specifically designate the several articles claimed to be exempt, it was held that the levy was made on the sheriff's responsibility, and if unlawfully made he might be sued in trespass or case. *Perry v. Lewis*, 49 Miss. 443.

In *New Jersey* an officer having an execution or attachment in his hands has a right to seize the goods of the debtor and hold them until an inventory and appraisement can be made according to law; and the officer will not be liable to an action of trespass for unlawfully taking goods by seizure on civil process until he has time to make the inventory and appraisement. *Bonnell v. Dunn*, 29 N. J. L. 435.

1. *Wright v. Deyoe*, 86 Ill. 492; *Cook v. Scott*, 6 Ill. 333; *Bingham v. Maxcy*, 15 Ill. 290; *People v. Palmer*, 46 Ill. 398.

2. *Gresham v. Walker*, 10 Ala. 374; *Jordan v. Autrey*, 10 Ala. 276; *Simpson v. Simpson*, 30 Ala. 225; *Lindley v. Miller*, 67 Ill. 244; *Howland v. Fuller*, 8 Minn. 50; *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Turner v. Borthwick*, 20 Hun (N. Y.) 119; *Miller's Appeal*, 16 Pa. St. 300; *Bair v. Steinman*, 52 Pa. St. 423; *Strouse v. Becker*, 44 Pa. St. 206; *Dodson's Appeal*, 25 Pa. St. 232; *Weaver's Appeal*, 18 Pa. St. 307; *Strouse v. Becker*, 38 Pa. St. 190, where the court said: "The exemption is not given against creditors in general, nor against judgment creditors, but only against 'levy and sale on execution, or by distress for rent.' Hence the debtor must claim it against every execution creditor. If he do not, there is nothing to prevent one execution creditor from

levying on goods that have been appraised and set apart under the process of another creditor." See also *Dodson's Appeal*, 25 Pa. St. 232; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197.

**Successive Levies.** — Where a debtor's land was levied upon and he claimed exemption, whereupon an appraisement was made but no sale effected under that execution, and afterwards another creditor levied upon a part of the same land and sold it without the debtor having given the notice and made a claim of exemption upon him, it was held that the debtor had waived his right and was not entitled to three hundred dollars out of the proceeds of the sale. *Dodson's Appeal*, 25 Pa. St. 232.

In *Pennsylvania* attachment execution is execution process, and exemption may be claimed against a creditor proceeding by such process as effectually as against one who comes with execution in ordinary form. *Strouse v. Becker*, 38 Pa. St. 190.

**Proceedings Supplementary to Execution.** — In *Indiana*, where on the trial of proceedings supplementary to execution the special finding of the court shows that the execution debtor is a resident householder of the state, and that he has no property subject to execution except the amount exempt by law, he is entitled to a judgment in his favor, without demanding his exemption, as such claim is made against an execution in the hands of an officer. *Wallace v. Lawyer*, 54 Ind. 501.

3. *Gresham v. Walker*, 10 Ala. 370; *Blair v. Parker*, 4 Ill. App. 409; *Seaman v. Luce*, 23 Barb. (N. Y.) 250; *Twinam v. Swart*, 4 Lans. (N. Y.) 265. See *infra*, XIV. 7. *Selection of Exempt Property.*

**Property Which Is Indivisible** and of greater value than the amount exempt by statute cannot be claimed by the judgment debtor, nor can he retain such property by paying the officer the excess of value in money. *Waldo v. Gray*, 14 Ill. 184.

**Foreign Debtor.** — A debtor cannot claim exemption when he is without the

**3. Who May Claim — In General.** — Any person authorized by the terms of the statute may claim property as exempt,<sup>1</sup> the demand being usually made by the owner in person.<sup>2</sup>

**Absence of Debtor.** — During the temporary absence of the owner, however, any person left in charge of the premises is authorized to claim the benefit of the exemption law,<sup>3</sup> since such statutes are for the benefit of the family, and not of the debtor, except so far as he is a member of that family.<sup>4</sup>

**4. Manner of Claiming.** — The privilege of a debtor is not a privilege from having his property sold, but the right to obtain exemption in a designated manner, and he who would secure the same must comply with the statutory provisions.<sup>5</sup> The claim of exemption may be made by parol or in writing.<sup>6</sup> In all cases,

jurisdiction of the state with no intention of returning. *Orr v. Box*, 22 Minn. 485.

1. In order to insist upon an exemption, the party claiming the same should, of course, be a person intended to be protected by the statute. Such a person is usually required to be a head of a family and a resident of the state. See *Butt v. Green*, 29 Ohio St. 670, and the various exemption statutes.

2. See the preceding section.

3. *Wilson v. McElroy*, 32 Pa. St. 82; *Waugh v. Burket*, 3 Grant's Cas. (Pa.) 319; *Regan v. Zeeb*, 28 Ohio St. 483; *Butt v. Green*, 29 Ohio St. 670.

**Daughter.** — In *Wilson v. McElroy*, 32 Pa. St. 82, it was held that a daughter of the execution defendant, being of proper age, was competent to make the claim in the absence of the head of the family.

**Wife — Attorney.** — In *Waugh v. Burket*, 3 Grant's Cas. (Pa.) 319, the claim was made by the debtor's wife and counsel, and was held sufficient. See also *Regan v. Zeeb*, 28 Ohio St. 483; *Butt v. Green*, 29 Ohio St. 670.

**A Subtenant or Assignee of the Tenant,** who has not been recognized as such by the landlord, cannot claim the benefit of the exemption law as against a distress for rent, the goods being levied upon as those of the original lessee by whom no claim for exemption is made. *Rosenberger v. Hallowell*, 35 Pa. St. 372.

4. *Regan v. Zeeb*, 28 Ohio St. 483.

In the absence of the defendant in execution, or after his death, the head of the family may select the goods claimed as exempt. *Bonnel v. Dunn*, 29 N. J. L. 435, where the court said:

"To give effect to the obvious design of the act, the word 'defendant' must be held to include not only the defendant, but the head of the family in his absence left in charge of the goods, and therefore clothed with the necessary power, by implied agency, to protect them from unlawful seizure."

5. *Line's Appeal*, 2 Grant's Cas. (Pa.) 197.

**In Pennsylvania,** under the Exemption Laws of 1849, the debtor must request an appraisement in due season after execution is levied. *Line's Appeal*, 2 Grant's Cas. (Pa.) 197. And he must make a demand for appraisement upon each particular execution. A demand upon a former writ which has been stayed is not sufficient. *Bechtel's Appeal*, 2 Grant's Cas. (Pa.) 375, holding, however, that where several writs are in the sheriff's hands at the same time, one demand is sufficient as against them all.

**Description of Property.** — In *Bingham v. Maxcy*, 15 Ill. 291, it was held that when the sheriff had notified the defendant of an execution in his hands, it was the duty of the latter, if he claimed the benefit of the statute, to furnish the officer with the description of his other property liable to sale under execution; if he had such notice and failed to furnish such description, he must be considered as waiving his right under the statute, and the sheriff would proceed to levy on any of his property not otherwise exempt from execution.

6. *McCluskey v. McNeely*, 8 Ill. 582; *Simpson v. Simpson*, 30 Ala. 226; *Bowman v. Smiley*, 31 Pa. St. 225; *Gregory v. Latchem*, 53 Ind. 453; *Mark v. State*, 15 Ind. 98.

In *McCluskey v. McNeely*, 8 Ill. 582,

however, the claim must be made in such manner as will sufficiently apprise the officer that the statutory exemption is the thing demanded.<sup>1</sup>

**5. Time of Claiming.** — The right to retain property as exempt is not complete until it is asserted,<sup>2</sup> and the usual time for demanding exemption is at the time of the levy, unless absence or other good cause be shown to excuse the delay.<sup>3</sup> The time limit, as laid down in the decisions, has been set at the day of sale, and in order to make the claim available the demand should be made before that day.<sup>4</sup>

it was objected that the notice of the claim of exemption by the defendant should have been in writing and before the day of sale. In passing upon the question the court said: "The statute does not require, in express terms, that any notice whatever should be given, yet, inasmuch as a selection has to be made by a debtor, a notice of such selection must necessarily be given to the officer. But that selection and notice may as well be by parol as in writing. If the officer, as it is his duty to do, notifies the defendant before the levy is made that he has the execution and is about to levy, the selection should be made before the levy; and when, as in this case, all of his property is exempt from the execution, he may, of course, select and retain the whole. If, however, the officer does not notify the party before the levy, the selection may be made and notice given at any reasonable time before the sale."

**Language of Statute.** — It seems that a claim for the benefit of exemption may be made by parol request to the sheriff when absent from his office. It need not be made in the precise language of the statute. *Bowman v. Smiley*, 31 Pa. St. 225.

1. *Diehl v. Holben*, 39 Pa. St. 213.

2. *Simpson v. Simpson*, 30 Ala. 226; *Gresham v. Walker*, 10 Ala. 370.

The mere right to select a portion out of many articles of property as exempt does not render any article exempt until the selection has been made. *Slaughter v. Detiney*, 10 Ind. 103, 15 Ind. 49.

In *Strouse v. Becker*, 38 Pa. St. 193, the court said: "The time and manner of making the claim must be adapted to the nature of the process, but if no claim there is no exemption."

3. *Gilleland v. Rhoads*, 34 Pa. St. 190.

**Absence of Debtor.** — In *Haswell v. Parsons*, 15 Cal. 266, it was held that

the absence of the execution defendant, when the sale of the exempt property took place, was a sufficient excuse for not claiming the exemption at the time, where the absence was caused by sickness of the members of his family, and the plaintiff was aware of the claim, since in consequence of its assertion the property had been previously released from seizure under an execution issued by himself upon the same judgment.

In *Kentucky*, where the head of the family was absent at the time process was levied and sale made, it was held that after his death his widow had not waived her right of exemption, although she was present at the sale, and at that time made no objection. *Myers v. Forsythe*, 10 Bush (Ky.) 394.

In *Pennsylvania*, under the Act of April 9, 1849, a demand upon the day of sale is too late. It must be made, as regards personal property, before the day of sale, and generally before the advertisements are put up, unless there are special circumstances, such as absence from home or ignorance of the levy, to excuse delay. *Diehl v. Holben*, 39 Pa. St. 213.

In *Rogers v. Waterman*, 25 Pa. St. 182, it was held that where the defendant knew that his property was advertised before the time appointed for the sale he was bound to find the constable and demand his appraisal before the hour set for the sale and before it commenced, and failing in this his right of exemption was waived.

4. *Alabama*. — *Simpson v. Simpson*, 30 Ala. 226; *Gresham v. Walker*, 10 Ala. 370; *Daniels v. Hamilton*, 52 Ala. 105; *Ross v. Hannah*, 18 Ala. 125.

*Arkansas*. — *Parham v. McMurray*, 32 Ark. 261.

*Illinois*. — *McCluskey v. McNeely*, 8 Ill. 578.

*Indiana*. — *Perkins v. Bragg*, 29 Ind. 507; *State v. Manly*, 15 Ind. 8;

**6. Waiver of Exemption — In General.** — Exemption is a privilege that must be claimed to be effectual, but the debtor may waive the same if he so chooses.<sup>1</sup> And a neglect to claim exemption until after the sale will constitute a waiver.<sup>2</sup> The defendant may also forfeit or waive his right of exemption by falsely denying the ownership of property, and thus hindering or delaying the

*Slaughter v. Detiney*, 10 Ind. 103, 15 Ind. 49; *Eltzroth v. Webster*, 15 Ind. 21.

*Kentucky.* — *Perry v. Hensley*, 14 B. Mon. (Ky.) 381.

*New York.* — *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

*Ohio.* — *Frost v. Shaw*, 3 Ohio St. 274; *Butt v. Green*, 29 Ohio St. 670.

*Pennsylvania.* — *Bair v. Steinman*, 52 Pa. St. 423; *Strouse v. Becker*, 44 Pa. St. 206; *Miller's Appeal*, 16 Pa. St. 300; *Hammer v. Freese*, 19 Pa. St. 257; *Diehl v. Holben*, 39 Pa. St. 213; *Rogers v. Waterman*, 25 Pa. St. 182; *Gilleland v. Rhoads*, 34 Pa. St. 187.

*Tennessee.* — *Pyett v. Rhea*, 6 Heisk. (Tenn.) 138.

In *State v. Manly*, 15 Ind. 8, a claim was made to have property exempted after the court had ordered the same to be sold. In passing upon this question the court said: "The order for the sale of the property was a final judgment, beyond which the officer was not required to look, and behind which the relator could not go, in order to assert his right to claim the property as exempt from sale. If the proper practice be for the officer serving the attachment, upon proper demand, to set apart to the debtor such property as may be exempt from execution, then he only returns, as attached, such as is not thus exempt, and such only is ordered to be sold upon final judgment against the defendant. If, however, such be not the proper practice, and if the officer cannot thus be required to determine, at his peril, whether the defendant is entitled to hold the property as exempt, the remedy of the debtor is sufficiently plain. He may set up his claim, to hold the property as exempt from sale, in the court from which the attachment issues, as a defense to such attachment. \* \* \* If neither of these courses be pursued, but final judgment be rendered against the defendant and the attached property ordered to be sold, we think it too late for the defendant to set up a claim that the property is exempt from sale for his debts."

**An Assignee of the Judgment Debtor**, although claiming under a general assignment which does not except exempt property, cannot claim property as exempt from execution after having stood by at the time of the sale and made no claim to the property as assignee. *Smith v. Hill*, 22 Barb. (N. Y.) 656.

**Foreclosure Sale.** — The mortgagor cannot, after the mortgaged property has been ordered to be sold on foreclosure, claim the property as exempt from execution. *Slaughter v. Detiney*, 15 Ind. 49, 10 Ind. 103.

1. *State v. Haggard*, 1 Humph. (Tenn.) 390; *Turner v. Borthwick*, 20 Hun (N. Y.) 120; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 508; *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Osborne v. Schutt*, 67 Mo. 714; *Bingham v. Maxcy*, 15 Ill. 290; *Line's Appeal*, 2 Grant's Cas. (Pa.) 197; *Weaver's Appeal*, 18 Pa. St. 307; *Miller's Appeal*, 16 Pa. St. 300; *Rogers v. Waterman*, 25 Pa. St. 182; *Ross v. Hannah*, 18 Ala. 125.

In *Haswell v. Parsons*, 15 Cal. 267, it was held that if the execution defendant had agreed to place the property in the hands of a third person to be sold for the benefit of his creditors, it did not follow that the exemption from forced sale had thereby been waived.

**Presumption of Waiver.** — In *State v. Haggard*, 1 Humph. (Tenn.) 390, it was held that while the debtor might waive the benefit of the exemption act, in the absence of proof it would be presumed that he did not waive it.

**Result of Waiver.** — A waiver of the right of exemption is a release of the right to an appraisal, for the latter is inseparable from the former. *Bowman v. Smiley*, 31 Pa. St. 225.

2. *Turner v. Borthwick*, 20 Hun (N. Y.) 120; *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Dodson's Appeal*, 25 Pa. St. 232.

In *Line's Appeal*, 2 Grant's Cas. (Pa.) 197, it was held that the defendant waived his exemption by failing to request an appraisal in due season.

sheriff in his levy.<sup>1</sup> Nor can he after disclaiming title to the property maintain an action of trespass against the officer for selling the same.<sup>2</sup> But the right of exemption, being intended for the benefit of the family, is not of a nature to be lightly disregarded, and there must be some unequivocal act amounting to a waiver before the court will regard the claim as lost.<sup>3</sup> The privilege of exemption is not lost by offering for sale the exempt property or making a change in the place or conditions of occupancy.<sup>4</sup> Neither will the fact that the defendant retained possession, or purchased the property, either directly or through others, at the execution sale, amount to a waiver of his right to claim the property as exempt.<sup>5</sup>

**Execution of Delivery Bond.** — So the debtor does not waive the benefit of the statute by executing a delivery bond.<sup>6</sup>

**7. Selection of Exempt Property**—*a. RIGHT AND DUTY TO*

1. *Strouse v. Becker*, 38 Pa. St. 190.

So in *Gilleland v. Rhoads*, 34 Pa. St. 187, it was held that the defendant in execution had no right to have appraised and set apart to him goods to which he disclaimed title. The court said: "A debtor who shuffles and conceals his property, denies his ownership, and does his best to defeat the lawful process of his creditor is not the proper object of the statute's bounty; nor is he capable of repairing his mistake by throwing off disguises which have been found unavailing and suing for damages."

In *Twinam v. Swart*, 4 Lans. (N. Y.) 263, it was held that the purchaser of property exempt from execution at an execution sale was not liable in an action for its recovery brought without demand, where the owner, being present, failed to claim his exemption, but forbade the sale upon grounds having no foundation in fact. In this case the defendant in execution attended the sale and forbade the same on the ground that the goods belonged to her brother, while at the trial she swore that the goods were her own.

In *Farrell v. Higley*, Hill & D. Supp. (N. Y.) 87, however, it was held that although the debtor lied to the officer at the time of the levy, claiming that he had sold the goods to another person, yet where the officer disregarded such statement and sold the goods, the debtor in an action of trespass was not estopped from claiming the same.

2. *Gilleland v. Rhoads*, 34 Pa. St. 187.

3. **Wife Not Bound by Husband's Waiver.**

— Under Pa. Act of June 13, 1836, § 20, relating to domestic attachments, it is

provided that the wife and family of the debtor shall be entitled to retain for their own use such articles as may by law be exempted from levy and sale on execution, and in such cases it has been held that the wife's right is not affected by her husband's waiver of exemption. *Hess v. Beates*, 78 Pa. St. 431.

4. *Rosenthal v. Scott*, 41 Mich. 632; *O'Donnell v. Segar*, 25 Mich. 367; *Kenyon v. Baker*, 16 Mich. 373, note; *Kennedy v. Baker*, 4 Chand. (Wis.) 19.

5. *Parham v. McMurray*, 32 Ark. 261; *Crump v. Starke*, 23 Ark. 131; *Atkinson v. Gatcher*, 23 Ark. 104, note.

6. *Jordan v. Autrey*, 10 Ala. 276; *Daniels v. Hamilton*, 52 Ala. 105; *Jacks v. Bigham*, 36 Ark. 481; *Atkinson v. Gatcher*, 23 Ark. 101; *Parham v. McMurray*, 32 Ark. 261; *Perry v. Hensley*, 14 B. Mon. (Ky.) 381, holding that where property which was exempt by statute from execution was levied upon by an officer without the assent of the defendant, and a delivery bond was given, the same was not obligatory and equity would relieve against it.

**Receipt for Goods.** — An execution debtor does not waive the right to bring replevin for goods improperly seized by having receipted for them to the officer and agreed to deliver them at a specified time or pay the judgment. *Vanderhorst v. Bacon*, 38 Mich. 669. See also *Main v. Bell*, 27 Wis. 517.

**After Forfeiture of Bond.** — In *Jordan v. Autrey*, 10 Ala. 276, it was held that even after forfeiture of a forthcoming bond and execution issued thereon, the defendant might assert his privilege and refuse to deliver up the property. *Gresham v. Walker*, 10 Ala. 374.

**SELECT — In General.** — To the debtor belongs the right of electing what property he will claim as exempt.<sup>1</sup> The right of the defendant to select what property he will retain is not affected by the fact that he has other personal property of greater value than the amount exempted.<sup>2</sup> Nor is he bound to tender other property in lieu of that levied upon.<sup>3</sup> And he need not select his exempt property if the whole amount of his property does not exceed the statutory limit.<sup>4</sup>

**Liability of Sheriff.** — In order, however, to render the sheriff liable for wrongful seizure the debtor must demand his exemption,<sup>5</sup> and this even where the property of the execution defendant is confessedly insufficient to satisfy the exemption.<sup>6</sup>

**Refusal to Select.** — Upon the refusal of the debtor to select prop-

1. *Alabama.* — *Ross v. Hannah*, 18 Ala. 125; *Bray v. Laird*, 44 Ala. 295.

*Illinois.* — *Blair v. Parker*, 4 Ill. App. 409; *Cook v. Scott*, 6 Ill. 333; *Cornelia v. Ellis*, 11 Ill. 584; *Bingham v. Maxcy*, 15 Ill. 290; *People v. Palmer*, 46 Ill. 398; *Good v. Fogg*, 61 Ill. 449; *Wright v. Deyoe*, 86 Ill. 490.

*Michigan.* — *Elliott v. Whitmore*, 5 Mich. 532; *Wyckoff v. Wyllis*, 8 Mich. 48.

*Missouri.* — *State v. Farmer*, 21 Mo. 160.

*New York.* — *Lockwood v. Younglove*, 27 Barb. (N. Y.) 506; *Seaman v. Luce*, 23 Barb. (N. Y.) 242; *Smith v. Slade*, 57 Barb. (N. Y.) 641; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382.

*North Carolina.* — *Curlee v. Thomas*, 74 N. Car. 51.

In *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136, it was held that a party having several pieces of property of the same kind, one of which was exempt from execution, had the right to elect which he would reserve, and if he failed to do so until after the levy had actually been made, he had the right at any time before the sale, upon tendering to the officer another piece which was in his possession when the levy was made, to take possession of the one in the hands of the officer.

**Selection in Good Faith.** — An execution debtor can select what of his property he wishes to be exempt under the law, provided it be done in good faith and without attempting thereby to cover up other property from the officer seeking a levy. *Fuller v. Sparks*, 39 Tex. 136.

**Under the Alabama Statute**, in the ab-

sence of any provision for the selection of property it must be chosen by the family. *Brewer v. Granger*, 45 Ala. 580.

2. *Bray v. Laird*, 44 Ala. 295.

3. *Bray v. Laird*, 44 Ala. 295; *Ross v. Hannah*, 18 Ala. 125.

If the debtor has no more property than the law exempts from execution, he is not required to turn out one piece of it for an officer to levy upon as a condition upon which he may retain the residue. *Vaughan v. Thompson*, 17 Ill. 78.

4. *State v. Haggard*, 1 Humph. (Tenn.) 390. See *Smith v. Slade*, 57 Barb. (N. Y.) 641; *Wallace v. Lawyer*, 54 Ind. 509.

In *Wilson v. McElroy*, 32 Pa. St. 82, it was held that where the apparent value of the goods levied upon was less than the amount exempted by law, it was unnecessary, at least until after the appraisal, to make any further specification than was implied in a demand for the benefit of exemption; and so in *Keller v. Bricker*, 64 Pa. St. 379, it was held that where the goods that were actually the defendant's were less than the exemption allowed by law, his claiming "all that belonged" to him was a sufficient election.

**Demand Sufficient.** — Where the property of the debtor is insufficient to satisfy the exemption "it is no longer a case of selection but one of mere demand." *Slanker v. Beardsley*, 9 Ohio St. 592, quoted in *Regan v. Zeeb*, 28 Ohio St. 486.

5. *Regan v. Zeeb*, 28 Ohio St. 487; *Slanker v. Beardsley*, 9 Ohio St. 589; *Gilleland v. Rhoads*, 34 Pa. St. 187.

6. *Regan v. Zeeb*, 28 Ohio St. 487; *Slanker v. Beardsley*, 9 Ohio St. 589,

erty as exempt it becomes the duty of the sheriff to select the same for him.<sup>1</sup>

**b. MANNER OF SELECTING — In General.** — Where the defendant claims the benefit of the exemption allowed by law, he must elect to retain such articles as he desires, and such election must be notified to the officer at the time.<sup>2</sup> As a general rule there is no prescribed form of election to retain by the debtor. It is enough if it is made to the officer in such a manner that he could not or ought not to misunderstand it.<sup>3</sup>

**Under Some Statutes,** however, it is required that the debtor present a schedule or inventory in order to perfect his claim.<sup>4</sup>

1. *Slaughter v. Detiney*, 10 Ind. 103, 15 Ind. 49.

**Under the Michigan Statute** it is the sheriff's duty, on the levy of an execution upon goods a portion of which are exempt by law, to have an inventory and appraisal made out, and to permit the defendant to select, or, on his neglect, to select for him, property to the amount allowed by law. *Wyckoff v. Wyllis*, 8 Mich. 49; *Elliott v. Whitmore*, 5 Mich. 532.

**Exclusion of Defendant.** — The sheriff has no right to exclude the owner from his premises and then select and set aside the property exempt. *Bayne v. Patterson*, 40 Mich. 658.

**Selection of Mortgaged Property.** — An execution defendant is entitled to the full statutory amount of exempt property, and a selection for him, by the sheriff, of property that is mortgaged for more than its appraised value defrauds him, and under the law no selection can be made of any specific portion of it so as to bind the mortgagee. *Bayne v. Patterson*, 40 Mich. 658.

2. *Keller v. Bricker*, 64 Pa. St. 382; *Hammer v. Freese*, 19 Pa. St. 255; *Perry v. Lewis*, 49 Miss. 446.

3. *Keller v. Bricker*, 64 Pa. St. 379.

If, after levy and before sale, the debtor should put the articles not levied upon out of the officer's way, it will amount to an election to retain them, and will determine his right of selection. *Ross v. Hannah*, 18 Ala. 125; *Bray v. Laird*, 44 Ala. 295.

4. **In Illinois**, Sess. Laws 1877, p. 102, after declaring a few articles of personal property specifically exempt, provides: "One hundred dollars' worth of property, to be selected by the debtor, and in addition, when the debtor is the head of a family and resides with the same, three hundred dollars' worth of other property, to be selected by the

debtor." By the second section of the act it is declared that "whenever any debtor against whom an execution, writ of attachment, or distress warrant has been issued, desires to avail himself of the benefit of this act, he shall \* \* \* make a schedule of all his personal property of every kind and character, including money on hand and debts due and owing to the debtor, and shall deliver the same to the officer having the execution, writ of attachment, or distress warrant, or file the same with the justice, or in the court where the writ is issued, which said schedule shall be subscribed and sworn to by the debtor, and any property owned by the debtor and not included in said schedule shall not be exempt as aforesaid; and thereupon the officer having the execution, writ of attachment, or distress warrant shall summon three householders, who, after being duly sworn to fairly and impartially appraise the property of the debtor, shall fix a fair valuation upon each article contained in said schedule, and the debtor shall then select from such schedule the articles he or she may desire to retain, the aggregate value of which shall not exceed the amount exempted to which he or she may be entitled, and deliver the remainder to the officer having the writ," etc.

**Time for Preparing Schedule.** — Under this statute, after giving notice to the debtor, the sheriff, if the debtor desires to claim the benefit of the act, should delay making the levy for a reasonable time, as the statute does not fix a time for the debtor to prepare his schedule, it not being contemplated by the statute that in ordinary cases the officer will take and remove the property until the schedule is made, appraisement had, and the debtor selects the articles he wishes to obtain under the statute,



*c.* TIME FOR SELECTING. — The selection should, as a general rule, be made at the time of the levy.<sup>1</sup> But it is sufficient if it is made within a reasonable time<sup>2</sup> and before sale.<sup>3</sup>

**XV. ACTIONS TO ENFORCE RIGHT OF EXEMPTION — 1. In General.** — Where property of the debtor is levied upon in violation of his statutory right of exemption he may maintain an action for the unlawful taking.<sup>4</sup>

**2. Parties — a. PLAINTIFF — The Owner.** — The usual party plaintiff in such actions is the owner of the property, or one showing a rightful possession,<sup>5</sup> constructive possession also being suffi-

after which the remainder is to be delivered to the officer for the purpose of making a levy thereon. *Blair v. Parker*, 4 Ill. App. 411.

*Second Schedule.* — The statute has not provided for more than one schedule, nor has it made the officer the judge to determine whether the omission of the property from the schedule was intentional or occurred through inadvertence on the part of the debtor, and therefore it was held, without deciding whether the officer would be justified in allowing an amendment to such schedule, that he was at least not liable to a penalty for not doing so, or for refusing to accept the second schedule after he had acted upon the first one. *Blair v. Parker*, 4 Ill. App. 409.

**Provisions for Family Use.** — In *Arkansas* provisions on hand for family use are exempt whether the defendant has other property subject to execution or not, and he is not bound to furnish the officer with an inventory of his provisions. *Atkinson v. Gatcher*, 23 Ark. 101.

**Second Exemption.** — Where an execution defendant has once made his schedule and had the amount of property exempt by statute appraised and set off to him, he is required, when a subsequent execution issues against him, to make out his schedule again and have his property appraised, to entitle him to his exemption. *Finley v. Sly*, 44 Ind. 266.

1. *Frost v. Shaw*, 3 Ohio St. 270; *Butt v. Green*, 29 Ohio St. 671; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136; *Cook v. Scott*, 6 Ill. 333; *McCluskey v. McNeely*, 8 Ill. 578.

Where a defendant in execution is notified by the officer that he holds an execution, and that he will, at a certain time and place, levy upon property, and such defendant neglects and fails by

the time named to make his selection under the statute exempting sixty dollars' worth of property, suitable, etc., he will lose the right to make his selection on a day subsequent to the levy, and the officer levying upon property not specifically exempt will not be liable for selling the same, regardless of any subsequent selection by the debtor. *Wright v. Deyoe*, 86 Ill. 490.

**In Pennsylvania**, under the Act of April 9, 1849, the debtor should make his selection at the time of levy. He may be in time, however, if he demands it after it is seized, provided he does not wait so long that a compliance with his request would postpone the sale. *Hammer v. Freese*, 19 Pa. St. 257.

2. *Blair v. Parker*, 4 Ill. App. 409; *Lindley v. Miller*, 67 Ill. 249; *Frost v. Shaw*, 3 Ohio St. 270; *Butt v. Green*, 29 Ohio St. 671; *Smith v. Slade*, 57 Barb. (N. Y.) 641; *Seaman v. Luce*, 23 Barb. (N. Y.) 242; *Lockwood v. Younglove*, 27 Barb. (N. Y.) 506.

3. *Frost v. Shaw*, 3 Ohio St. 270; *Butt v. Green*, 29 Ohio St. 671; *Pyett v. Rhea*, 6 Heisk. (Tenn.) 136.

4. *Faulkner v. Bradley*, 2 Dana (Ky.) 141; *Perry v. Lewis*, 49 Miss. 443; *Frost v. Mott*, 34 N. Y. 253; *Wymond v. Amsbury*, 2 Colo. 213; *Dow v. Smith*, 7 Vt. 469; *Fry v. Canfield*, 4 Vt. 9; *Hart v. Hyde*, 5 Vt. 328.

**After Disclaimer of Title.** — If the debtor, at the time of the appraisement of his goods under the Pa. Act of 1849, disclaims title to a portion of the goods levied upon he cannot afterwards maintain an action of trespass against the constable for selling the same. *Gilleland v. Rhoads*, 34 Pa. St. 187.

5. *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 572.

**Possession as Evidence of Title.** — In showing title, proof that the plaintiff was in possession claiming title is sufficient *prima facie* evidence to enable

cient foundation for maintaining the action in some cases.<sup>1</sup>

*b. DEFENDANT.* — The usual party defendant in such actions is the officer making the wrongful levy.<sup>2</sup> The debtor is not con-

him to maintain the action. *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 572.

A debtor having an equitable interest in personal property, coupled with actual possession, may maintain an action of trespass against the sheriff for wrongful seizure thereof, though he is not the absolute owner. *Frost v. Mott*, 34 N. Y. 253.

**Bailor.** — The general owner of goods cannot maintain an action of trespass or trover for them where there is an outstanding possession in another accompanied with a special property, and so where a party brought an action of trespass for the attachment of certain property in the hands of his bailee, who held the goods as security for a liability assumed, a judgment for the plaintiff was reversed. *Bourne v. Merritt*, 22 Vt. 429. See also *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121.

**Receiver.** — Where, pending an action brought by the plaintiff for the conversion of personal property as exempt from levy and sale upon execution, a receiver of the plaintiff's property is appointed in proceedings supplementary to execution, the right of action which the plaintiff has in the pending suit does not pass to the receiver. *Andrews v. Rowan*, 28 How. Pr. (N. Y. Supreme Ct.) 126.

**Assignee of Bankrupt.** — In *Williams v. Miller*, 16 Conn. 148, it was held that where an assignee in bankruptcy had set out to the bankrupt certain exempt articles which were sold by the sheriff, the right of action to recover the same was in the bankrupt himself, and not in the assignee.

**Actions by Wife.** — Under the *Michigan* exemption statute it was held that the exemption being intended quite as much for the benefit of the wife and family as for that of the husband, the wife could maintain an action of trespass against the sheriff for levying upon and selling exempt property. *King v. Moore*, 10 Mich. 538, where the court said that "the same reasoning applies here as in the case of a homestead exemption." See *supra*, II. *Parties in Cases Affecting Homesteads*.

In *Ohio*, by the express provision of the statute, where the husband has sold property exempt from sale under exe-

cution, the wife may maintain an action in her own name to recover the property or its value. *Slanker v. Beardsley*, 9 Ohio St. 590. And where the husband executed a chattel mortgage on all his personal property where the same did not exceed three hundred dollars in value, and the mortgagee caused the property to be seized upon execution upon a judgment for the debt which the mortgage was given to secure, it was held that this was such a disposing of and parting with the property on the part of the husband that the wife could maintain an action against the officer for its recovery. *Colwell v. Carper*, 15 Ohio St. 279.

1. *Hart v. Hyde*, 5 Vt. 328; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121. See also *Putnam v. Wyley*, 8 Johns. (N. Y.) 432.

In *Hart v. Hyde*, 5 Vt. 328, which was an action of trespass to recover possession of exempt property taken upon attachment and sold, it was insisted that the plaintiff could not recover for want of possession in him at the time of the trespass. In passing upon the question the court said: "The ownership of chattels draws after it the legal or constructive possession, and this is sufficient for the purposes of this action. If, indeed, the owner had parted with the right of possession for a specific period, he cannot maintain trespass for an act done during that period; but if he have the right of resuming the possession at pleasure the action lies. Hence it is not necessary that the plaintiff have actual possession."

2. *Alabama.* — *Noland v. Wickham*, 9 Ala. 169; *Ross v. Hannah*, 18 Ala. 125; *Brewer v. Granger*, 45 Ala. 580.

*Arkansas.* — *Parham v. McMurray*, 32 Ark. 261.

*California.* — *Calhoun v. Knight*, 10 Cal. 394.

*Colorado.* — *Wymond v. Amsbury*, 2 Colo. 213.

*Illinois.* — *Cornelia v. Ellis*, 11 Ill. 585; *Vaughan v. Thompson*, 17 Ill. 78; *Amend v. Murphy*, 69 Ill. 337.

*Indiana.* — *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Austin v. Swank*, 9 Ind. 109; *Gregory v. Latchem*, 53 Ind. 449.

*Kentucky.* — *McGee v. Anderson*, 1

fined, however, to recovery against the officer, but may sue the plaintiff in execution,<sup>1</sup> or the purchaser at the execution sale,<sup>2</sup> or the sheriff and execution plaintiff jointly;<sup>3</sup> or he may bring suit on the sheriff's bond, making the sheriff and his sureties parties defendant.<sup>4</sup>

**3. Form of Action — Replevin.** — At common law the owner of a chattel might, by the action of replevin, take it from the possession of any person who unlawfully held it, unless it was in the custody of the law.<sup>5</sup> But replevin would not lie to take from an officer goods which he had wrongfully taken by virtue of legal process already issued. See article REPLEVIN.<sup>6</sup>

**Trespass.** — The usual form of action for the recovery of exempt property unlawfully seized is an action of trespass.<sup>7</sup>

B. Mon. (Ky.) 187; *Faulkner v. Bradley*, 2 Dana (Ky.) 141.

*Maryland.* — *Bramble v. State*, 41 Md. 435.

*Michigan.* — *King v. Moore*, 10 Mich. 538; *Kenyon v. Baker*, 16 Mich. 373; *Alvord v. Lent*, 23 Mich. 369.

*Minnesota.* — *Lynd v. Pickett*, 7 Minn. 184.

*Mississippi.* — *Moseley v. Anderson*, 40 Miss. 49; *Perry v. Lewis*, 49 Miss. 443.

*Missouri.* — *Mahan v. Scruggs*, 29 Mo. 282; *State v. Romer*, 44 Mo. 99; *State v. Barada*, 57 Mo. 562.

*New York.* — *Farrell v. Hingley*, Hill & D. Supp. (N. Y.) 87; *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444; *Carrick v. Myers*, 14 Barb. (N. Y.) 9; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Eastman v. Caswell*, 8 How. Pr. (N. Y. Supreme Ct.) 75; *Frost v. Mott*, 34 N. Y. 253.

*Ohio.* — *Frost v. Shaw*, 3 Ohio St. 270; *Regan v. Zeeb*, 28 Ohio St. 483.

*Pennsylvania.* — *Gilleland v. Rhoads*, 34 Pa. St. 187; *Hammer v. Freese*, 19 Pa. St. 255; *Diehl v. Holben*, 39 Pa. St. 213.

*Vermont.* — *Crocker v. Spencer*, 2 D. Chip. (Vt.) 68; *Leavitt v. Metcalf*, 2 Vt. 342; *Dow v. Smith*, 7 Vt. 465.

1. *Haswell v. Parsons*, 15 Cal. 266; *Fuller v. Sparks*, 39 Tex. 136.

2. *Stewart v. Welton*, 32 Mich. 56; *Hart v. Hyde*, 5 Vt. 328.

3. *Wilson v. McElroy*, 32 Pa. St. 82; *Gilleland v. Rhoads*, 34 Pa. St. 187; *Atkinson v. Gatcher*, 23 Ark. 101; *Finley v. Sly*, 44 Ind. 266; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121; *Matthews v. Redwine*, 25 Miss. 99.

4. *State v. Moore*, 19 Mo. 369; *State*

*v. Farmer*, 21 Mo. 160; *Meier v. Lester*, 21 Mo. 112; *Com. v. Stockton*, 5 T. B. Mon. (Ky.) 192. See also *State v. Schacklett*, 37 Mo. 285.

5. *Funk v. Israel*, 5 Iowa 450.

6. *Funk v. Israel*, 5 Iowa 450; *Cromwell v. Owings*, 7 Har. & J. (Md.) 55. See also *Ilsey v. Stubbs*, 5 Mass. 280.

The Iowa statute has so far altered the common law that a person entitled to present possession of personal property, wrongfully detained from him, on making oath that the property was not taken from him by any legal process, or, if so taken, that it was exempt from seizure by such process, may have the possession restored to him. *Funk v. Israel*, 5 Iowa 450, holding that an averment in the plaintiff's petition that the property is exempt from seizure is sufficient, unless the petition discloses facts which show that the action will not lie.

7. *Dow v. Smith*, 7 Vt. 469; *Crocker v. Spencer*, 2 D. Chip. (Vt.) 68; *Leavitt v. Metcalf*, 2 Vt. 342; *Kilburn v. Demming*, 2 Vt. 404; *Spooner v. Fletcher*, 3 Vt. 133; *Fry v. Canfield*, 4 Vt. 9; *Haskill v. Andros*, 4 Vt. 609; *Hart v. Hyde*, 5 Vt. 328; *Leavitt v. Holbrook*, 5 Vt. 405; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121; *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Wymond v. Amsbury*, 2 Colo. 213; *Faulkner v. Bradley*, 2 Dana (Ky.) 141.

**Trover.** — In *Davlin v. Stone*, 4 Cush. (Mass.) 359, the court was of the opinion that trespass was the proper form of action at common law for the taking of exempt goods under legal process, but that by force of the Massachusetts statute of 1839, c. 151, § 4, trover would also lie.

In *New Jersey* the officer is not liable to an action of trespass for goods seized

**Action on Statute.** — By statute in some states the debtor may proceed against an officer who seizes upon his property exempt from execution, for double or treble the value of the property so taken.<sup>1</sup>

**Indictment.** — By statute in several states an illegal levy upon exempt property may be prosecuted by indictment, although such mode of redress is rather unusual.<sup>2</sup>

**4. Demand.** — Before instituting suit against an officer for the recovery of property claimed to be exempt the debtor should demand his exemption, and unless such demand is made he cannot recover.<sup>3</sup>

until he has had time to make an inventory and appraisal. *Bonnel v. Dunn*, 29 N. J. L. 435.

**In Mississippi**, where property exempt from execution or attachment is levied upon, the owner may bring his action of trespass or case for damages or may sue out his writ of replevin for the recovery of the specific property. *Moseley v. Anderson*, 40 Miss. 49.

**Set-off.** — In an action of trespass against the sheriff and the execution plaintiff for disregarding the defendant's claim for the benefit of the exemption law, the debt cannot be set off against the damages recovered. *Wilson v. McElroy*, 32 Pa. St. 82.

**1. Illinois.** — *Cornelia v. Ellis*, 11 Ill. 585; *Amend v. Murphy*, 69 Ill. 337. He may waive the penalty and proceed in an ordinary action of trespass for single damages. *Cornelia v. Ellis*, 11 Ill. 585; *Pace v. Vaughn*, 6 Ill. 30; *Amend v. Murphy*, 69 Ill. 337.

**Election.** — Where three counts of the declaration claimed the statutory penalty of treble the value of the property, and the last count claimed the actual value only, it was held that the plaintiff might elect on the trial whether to proceed for simple damages or for the penalty. *Amend v. Murphy*, 69 Ill. 337.

**In Colorado** the statute provides that "if any officer or other person, by virtue of any execution or other process, or by any right of distress, shall take or seize any of the articles hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." But where, in an action to recover treble damages, the declaration contains counts for treble damages and a count in the ordinary form for single damages, a general verdict upon all the counts cannot be ap-

plied to those which are founded upon the statute. *Wymond v. Amsbury*, 2 Colo. 213.

**2. In Tennessee**, where an officer seizes and sells under execution the only farm horse, mule, or yoke of oxen which the head of the family, engaged in agriculture, may have, he may be prosecuted by indictment for misdemeanor in office. *State v. Haggard*, 1 Humph. (Tenn.) 390.

**In North Carolina** an officer who levies upon personal property of a defendant, and refuses to lay off to such defendant, upon demand, his personal property exemption, is guilty of a misdemeanor and may be prosecuted by indictment. *State v. Carr*, 71 N. Car. 106.

**3. Seaman v. Luce**, 23 Barb. (N. Y.) 250; *Twinam v. Swart*, 4 Lans. (N. Y.) 265; *Lindley v. Miller*, 67 Ill. 249; *Strouse v. Becker*, 44 Pa. St. 206; *Bair v. Steinman*, 52 Pa. St. 423.

In *Seaman v. Luce*, 23 Barb. (N. Y.) 250, the judge charged that the plaintiff in such case must, within a reasonable time after notice that a levy has been made and before commencing his action, give notice to the officer making the levy that he claims the exemption, and that unless he does so he cannot recover; and this was held to be the more reasonable rule in *Twinam v. Swart*, 4 Lans. (N. Y.) 265.

So in *Bair v. Steinman*, 52 Pa. St. 423, it was held that a defendant in an attachment execution must make demand of the sheriff for three hundred dollars exemption when the process was served or within a reasonable time thereafter, and if he failed to make such demand a subsequent plea of his rights would not avail. See also *Strouse v. Becker*, 44 Pa. St. 206.

**The Rule Qualified.** — And so in *Lynd v. Pickett*, 7 Minn. 184, a qualified view of the question was taken, and it was

**5. Declaration, Plea, Replication.** — In trespass or trover against an officer for levying upon exempt property the declaration is in the common form.<sup>1</sup> In the plea the defendant justifies the taking by virtue of his process,<sup>2</sup> and in a replication to the plea the plaintiff sets up his right of exemption.<sup>3</sup>

**6. Question of Fact — Burden of Proof.** — Whether the articles claimed as exempt are necessary for the purposes of trade or upholding life, is a question of fact to be submitted to the jury,<sup>4</sup> the burden of proof being on the party claiming exemption.<sup>5</sup>

held that where a separate and distinct article of property is taken which is expressly exempt by statute, and the party holding or directing the service of the writ knows before or at the time of such service that the property seized is exempt, there is no reason for claiming that the liability of the party attaching does not occur at the time of the levy, nor that a demand and refusal are necessary in order to make the party liable as a wrongdoer. In such circumstances, the wrong is committed at the instant of seizing the property and the cause of action then accrues. A demand would not be necessary to inform the creditor of the rights of the debtor, for those are fixed by statute and the demand would be an idle ceremony.

**Demand in Replevin.** — Demand is not necessary before bringing replevin against an officer whose seizure of goods is an abuse of his authority. *Vanderhorst v. Bacon*, 38 Mich. 669.

1. See *Tipton v. Pickens*, 1 Swan (Tenn.) 25; *Prewit v. Walker*, 7 J. J. Marsh. (Ky.) 332, and articles TRESPASS; TROVER.

In *Tennessee* it was held that a declaration in trespass for levying upon property contrary to the Exemption Act of 1833, c. 80, § 5, must show by special averments that the plaintiff is the head of a family, etc. *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659; *Pollard*

*v. Thomason*, 5 Humph. (Tenn.) 56, a case erroneously reported as trover instead of trespass, according to the opinion in *Hawkins v. Pearce*, 11 Humph. (Tenn.) 44; but it is held that a declaration in trover need not make any special averments. *Hawkins v. Pearce*, 11 Humph. (Tenn.) 44.

2. See *Prewit v. Walker*, 6 J. J. Marsh. (Ky.) 332; *Tipton v. Pickens*, 1 Swan (Tenn.) 25.

3. *Tipton v. Pickens*, 1 Swan (Tenn.) 25, where the replication was held sufficient. *Prewit v. Walker*, 7 J. J. Marsh. (Ky.) 332, holding a replication averring that the plaintiff was a *bona fide* housekeeper, etc., insufficient because it did not bring him within the statutory provisions which confined the exemption to "*bona fide* housekeepers with a family."

4. *Willson v. Ellis*, 1 Den. (N. Y.) 462; *Sammis v. Smith*, 1 Thomp. & C. (N. Y.) 444; *Patten v. Smith*, 4 Conn. 450; *Towns v. Pratt*, 33 N. H. 349; *Davlin v. Stone*, 4 Cush. (Mass.) 359.

5. *Brown v. Davis*, 9 Hun (N. Y.) 43; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Wilcox v. Hawley*, 31 N. Y. 648; *Tuttle v. Buck*, 41 Barb. (N. Y.) 417; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456; *Carrick v. Myers*, 14 Barb. (N. Y.) 9; *Van Sickler v. Jacobs*, 14 Johns. (N. Y.) 434; *Calhoun v. Knight*, 10 Cal. 393; *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659.

# HOMICIDE.

By S. B. FISHER.

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## CROSS-REFERENCES.

*As to Assault with Intent to Murder*, see article *ASSAULT AND BATTERY*, vol. 2, p. 851.  
*Burglary with Intent to Commit Murder*, see article *BURGLARY*, vol. 3, p. 781.  
*Coroners' Inquests*, see article *CORONERS' INQUESTS*, vol. 5, p. 38.  
*Civil Action for Homicide*, see article *DEATH BY WRONGFUL ACT*, vol. 5, p. 848.

**I. SCOPE OF THE ARTICLE.** — In this article it is intended to deal with the pleading and practice in prosecutions for homicide, as gathered from the numerous and not always harmonious decisions on the subject. Beginning with jurisdiction, an attempt will be made to show what facts will give jurisdiction, and to treat in order the indictment and what it must contain to support a conviction for the different grades of the offense, its service, the arraignment and plea of the defendant, the instructions to the jury as based upon the evidence, the verdict and sentence, and, finally, the proceedings to secure new trial and appeal and writ of error.

**II. JURISDICTION** — 1. *As to the Place* — a. **UNDER ENGLISH PRACTICE.** — At the early common law, where the act causing death occurred in one county, and the death itself in another, it was doubtful whether the crime could be prosecuted in either



county.<sup>1</sup> The more common opinion, however, was that the offense should be prosecuted in the county where the stroke was given.<sup>2</sup> To remove this doubt and prevent a failure of justice, the act of 2 and 3 Edward VI. was passed, which established the venue in the county in which the death took place.<sup>3</sup> It was also doubtful, at common law, whether the killing of one who died in England of a blow received in foreign parts, and *vice versa*, could have been inquired of. This was settled by the statute of George II., which provides that "when the stroke has been given in England and the death occurs out of England, or the reverse, \* \* \* the killing may be inquired of in that part of England where either the death or stroke shall happen respectively."<sup>4</sup>

b. UNITED STATES PRACTICE — (i) *In State Courts*. — In some of the United States prosecution in the county in which the death occurred is authorized by statute.<sup>5</sup> In other states it is

1. 1 East P. C. 361; 1 Hale P. C. 426; 1 Hawk. P. C. 31, § 13. See also *State v. McCoy*, 8 Rob. (La.) 547; *State v. Cummings*, 5 La. Ann. 330; *Riley v. State*, 9 Humph. (Tenn.) 646; 1 Chitty's Cr. Law 178.

In 2 Hawk. P. C. 301 it is said that "at the common law, if a man have died in one county and the stroke received in another, it seems to have been the more general opinion that regularly the homicide was indictable in neither of them, because the offense was not completed in either, and no grand jury could inquire of what happened out of their own county." In 1 Hawk. P. C., c. 13, § 13, it was said that "it has been holden by others that if the corpse had been carried into the county where the stroke was given the whole might be inquired of by a jury of the same county."

2. 1 East P. C. 361; 1 Hale P. C. 426; 1 Hawk. P. C. 31, § 13. See also *State v. McCoy*, 8 Rob. (La.) 547; *Riley v. State*, 9 Humph. (Tenn.) 646.

According to Blackstone, the offender could be punished in either county. 3 Black. Com. 303. According to Lord Hale, at common law, if a man had been stricken in one county and died in another, it was doubtful whether the offender were indictable or triable in either; but "the more common opinion was that he might be indicted where the stroke was given; for that alone is the act of the party, and the death is but a consequence and might be found though in another county." 1 East P. C., c. 5, § 128.

3. 1 East P. C. 361. This statute provides that "where any person or per-

sons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, then an indictment thereof founden by jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body or before the justices of peace or other justices or commissioners which shall have authority to inquire of such offenses, shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden, any law or usage to the contrary notwithstanding."

By 7 George IV. the venue in all cases, when the offense is begun in one county and completed in another, may be laid in either county. Archbold Crim. Pr. 68.

4. 1 East P. C. 366. See also *State v. McCoy*, 8 Rob. (La.) 548.

5. *Com. v. Parker*, 2 Pick. (Mass.) 550; *Com. v. Macloon*, 101 Mass. 1; *State v. Orrell*, 1 Dev. L. (N. Car.) 139. In *Tyler v. People*, 8 Mich. 320, by statute, the unlawful death was held to be a crime, and the state in which death occurred had jurisdiction.

In *Stoughton v. State*, 13 Smed. & M. (Miss.) 255, it was held by express statute that the party may be indicted in a county wherein the death took place, and that in the absence of clear authority at the common law for indicting him in the county where the blow was given, an indictment there could not be sustained.

In *Com. v. Parker*, 2 Pick. (Mass.)

provided by statute that the accused may be indicted and tried either in the county where the injuries were inflicted or in the county where death ensued.<sup>1</sup> The weight of authority, however, would seem to hold that the crime may be prosecuted in the county in which the blow is struck.<sup>2</sup>

550, it was held that the *Massachusetts* statute of 1795, c. 45, providing that where the cause of death happens in one county and the death in another an indictment thereof may be found in the latter, is not repugnant to the declaration in the constitution that "in criminal prosecutions the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen."

1. *State v. Sweat*, 16 S. Car. 624; *State v. Jones*, 38 La. Ann. 792, *overruling* *State v. McCoy*, 8 Rob. (La.) 545; *Ex p. Slater*, 72 Mo. 102; *State v. Blunt*, 110 Mo. 322.

In *State v. Pauley*, 12 Wis. 537, it was held that where a mortal blow was struck in one county and death ensues thereupon in another, that court in either county which first takes cognizance of the offense has exclusive jurisdiction thereof, and no other court can acquire any jurisdiction of it except by a change of venue as provided by statute.

**Crime Committed on Railway Train or Vessel.**—In *Illinois* it is provided by statute that where the offense is committed upon a railway train or upon a vessel navigating the waters of the state, and it cannot readily be determined in what county the offense was committed, the offense may be charged to have been committed and the offender may be tried in any of the counties through or along or into which such railroad car or vessel may pass on or near the day when the offense was committed. *Watt v. People*, 126 Ill. 9.

2. *Alabama*.—*Green v. State*, 66 Ala. 40.

*Georgia*.—*Roach v. State*, 34 Ga. 78.

*Indiana*.—*Archer v. State*, 106 Ind. 426.

*Kansas*.—*State v. Bowen*, 16 Kan. 475.

*Maine*.—*State v. Kelly*, 76 Me. 331.

*Maryland*.—*Stout v. State*, 76 Md. 317.

*Minnesota*.—*State v. Gessert*, 21 Minn. 369.

*New Jersey*.—*State v. Carter*, 27 N. J. L. 499; *Hunter v. State*, 40 N. J. L. 495.

*Tennessee*.—*Riley v. State*, 9 Humph. (Tenn.) 646.

*Washington*.—*State v. Baldwin*, 15 Wash. 15.

*United States*.—*U. S. v. Guiteau*, 1 Mackey (D. C.) 498.

"It is undoubtedly true that the courts of the latter place [place of death] do sometimes have jurisdiction. But we are satisfied that when this is so it is not because the crime is to be regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime." *State v. Kelly*, 76 Me. 334.

So, in *State v. Bowen*, 16 Kan. 476, it was objected that the information below was insufficient because it omitted to allege the death in the county where the indictment was found. *Brewer, J.*, said, after reviewing the authorities: "It seems to us, without pursuing the authorities further, reasonable to hold that, as the only act which the defendant does toward causing the death is in giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that these movements do not, unless under express warrant of the statute, change the place of offense, and that while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

In *Virginia* it was formerly held, in the case of *Com. v. Linton*, 2 Va. Cas. 205, that if a person was struck in that state and died of his wound in another state, he could not be tried in Virginia. This has, however, been changed by statute, and at the present time the

It is held by some authorities that even where the statutes of 2 and 3 Edw. VI., giving the place of death jurisdiction, are a part of the common law, they do not divest the jurisdiction of the place of the blow.<sup>1</sup>

(2) *In Federal Courts.*—The United States courts have jurisdiction over all homicides committed on the high seas, or in any river, haven, basin, or other like place, out of the jurisdiction of particular states, or in any fort, magazine, arsenal, dockyard, or other place, or district, or country under the sole and exclusive authority of the United States.<sup>2</sup>

Virginia courts have jurisdiction. Va. Code, 3637. See also *Hunter v. State*, 40 N. J. L. 514.

**Where Murder Is Committed by Poison,** the offense is triable where the poison was administered. *Robbins v. State*, 8 Ohio St. 131.

**Shooting Across County Line.**—Where a party in one county fires a shot by which a person in another county is killed, the offense is triable in the latter county, as the act is considered to be completed in such county. *People v. Adams*, 3 Den. (N. Y.) 207.

1. 1 Wharton's Crim. Law, § 292.

2. Sections 3 and 8 of the Act of April 30, 1790, c. 36, for the punishment of certain crimes against the United States; *U. S. v. Holmes*, 5 Wheat. (U. S.) 412; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184; *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76; *U. S. v. Bevans*, 3 Wheat. (U. S.) 336; *U. S. v. Grush*, 5 Mason (U. S.) 290; *U. S. v. Clark*, 31 Fed. Rep. 710; *U. S. v. M'Gill*, 4 Dall. (Pa.) 426.

**Meaning of "Out of the Jurisdiction of Any Particular State."**—The words "out of the jurisdiction of any particular state" mean any particular state of the Union. *Smith v. U. S.*, 1 Wash. Ter. 262; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184.

The courts of the United States have jurisdiction, under the Act of 1790, of murder or robbery committed on the high seas, although not committed on board of vessels belonging to citizens of the United States, as if the vessel had no national character, but was held by pirates or persons not lawfully sailing under the flag of any foreign nation. In the same case, and under the same act, it was said that if the offense be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, or by a

citizen or foreigner on board of a piratical vessel, the offense is equally cognizable by the courts of the United States. *U. S. v. Holmes*, 5 Wheat. (U. S.) 412.

It makes no difference as to the jurisdiction of the United States courts whether the offense was committed on board of a vessel or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard. *U. S. v. Holmes*, 5 Wheat. (U. S.) 412.

**Foreign Murderer on Foreign Vessel.**—The courts of the United States have no jurisdiction of a murder committed at sea on board a foreign vessel by one foreigner upon another. They have jurisdiction of murder or robbery committed on the high seas, although on board of a vessel not belonging to citizens of the United States (here a vessel having no national character, but held by pirates or persons not lawfully sailing under the flag of any foreign nation). *U. S. v. Furlong*, 5 Wheat. (U. S.) 184.

**Place Gives Jurisdiction.**—Under the Act of 1790 it is not the offense committed, but the place in which it is committed, which must be out of the jurisdiction of the state in order to give jurisdiction to courts of the United States. The fact that the state could not punish the offense would make no difference, if the place were within its jurisdiction; thus, murder committed on board a ship of war lying within the harbor of Boston is not cognizable in the Circuit Court of the United States. *U. S. v. Bevans*, 3 Wheat. (U. S.) 336.

**Manslaughter in a Foreign Country.**—The courts of the United States have no jurisdiction under the Act of 1790 over a manslaughter committed on board of a United States vessel in the river of a foreign country. Such a

It has been held in some cases that not only the cause of death, but the death also, must occur at one of the places designated.<sup>1</sup>

**2. As to the Court.**—All homicides are usually triable by the same courts, and in like manner, as other felonies.<sup>2</sup>

**3. As to the Person.**—A citizen of a foreign state who is charged with the commission of homicide in one of the United States is within the jurisdiction of the court, and may be tried and punished in the same manner as a citizen of the state where the offense is committed.<sup>3</sup>

**4. Change of Venue.**—As to change of venue, see article CHANGE OF VENUE, vol. 4, p. 373.

**III. LIMITATION OF PROSECUTION — Murder in First Degree.**—There is no time prescribed within which the crime of murder in its highest degree must be prosecuted, but the offender is continually liable to punishment.<sup>4</sup>

**Lower Degrees of Murder.**—In the lower degrees of murder, however, the time for prosecution is occasionally limited.<sup>5</sup>

**Manslaughter.**—In many states the time within which the crime

place is not on the high seas within the meaning of the section. *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 76.

**Homicide Committed on a Boundary Line.**—Manslaughter committed by a blow given on the river St. Clair beyond the boundary line between the United States and Canada, and within the county, in said province, from which blow death resulted, is not within the Crimes Act of Congress of March 3, 1857, and the Circuit Court of the United States has no jurisdiction. *Tyler v. People*, 8 Mich. 320.

**Military Reservation.**—The United States Circuit Court has jurisdiction of a homicide committed by one soldier upon another within a military reservation of the United States. *U. S. v. Clark*, 31 Fed. Rep. 710.

**Indian Reservation.**—The United States has sole jurisdiction of a homicide when committed on an Indian reservation. *Shapoonmash v. U. S.*, 1 Wash. Ter. 188.

1. *U. S. v. M'Gill*, 4 Dall. (Pa.) 426.

2. *People v. Gardiner*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 143, in which case it was held that a Court of Oyer and Terminer has jurisdiction to try all cases of murder committed within the county. A murder committed by a soldier in the military service of the United States in time of war, insurrection, or rebellion, forms no exception.

3. *People v. McLeod*, 1 Hill (N. Y.) 377. In this case it was held that a homicide committed within the terri-

tory of the United States by a subject of Great Britain, in time of peace, may be prosecuted in our courts as murder though avowed to be under the direction of local authorities of Great Britain.

The courts of the state have jurisdiction to try and punish an Indian who is charged with killing another Indian within the jurisdiction of the court, even though the defendant is, and the deceased was, a member of a tribe maintaining treaty relations with the general government, and having a tribal organization, etc., especially, where the record fails to show that the homicide was committed within the limits of the reservation. *Hunt v. State*, 4 Kan. 60.

4. *State v. Williams*, 30 La. Ann. 843; *State v. Abellanado*, 18 La. Ann. 141; *People v. Miller*, 12 Cal. 291; *White v. State*, 4 Tex. App. 488; *Heward v. State*, 13 Smed. & M. (Miss.) 261; *State v. Ellis*, 74 Mo. 207.

**An Accessory Before the Act** to the crime of murder is considered guilty of the crime itself, and the time for the prosecution of his offense is not limited in the absence of a limitation for the prosecution of murder. *People v. Mather*, 4 Wend. (N. Y.) 229.

**5. Murder in the Third Degree.**—In *Florida*, under a statute providing that "all offenses not punishable with death shall be prosecuted within two years next after the same shall have been committed," a conviction of murder in the third degree, although had on an

of manslaughter may be prosecuted is limited by statute,<sup>1</sup> and a conviction for such offense will not be sustained where the indictment is found after the expiration of the prescribed time, even though the indictment charges the crime of murder.<sup>2</sup>

**IV. PRELIMINARY EXAMINATION — 1. Necessity For.** — It is usual and sometimes necessary, before prosecuting by information or indictment a person who has been apprehended for felonious homicide, to have him examined and committed by a magistrate upon a finding of probable cause to believe him guilty.<sup>3</sup>

**2. Before Whom Conducted.** — Proper magistrates before whom preliminary examinations should be conducted are justices of the

indictment for murder, cannot be sustained where the offense was not prosecuted within two years next after it was committed. *Nelson v. State*, 17 Fla. 195.

1. *People v. Miller*, 12 Cal. 291; *State v. Freeman*, 17 La. Ann. 69; *State v. Foster*, 7 La. Ann. 255; *State v. Joseph*, 40 La. Ann. 5; *People v. Burt*, 51 Mich. 199; *Riggs v. State*, 30 Miss. 635; *White v. State*, 4 Tex. App. 488.

**When Statute Begins to Run.** — The prescription of one year for prosecution for murder runs from the time of the death of the deceased, and not from the wounding or the arrest. *State v. Taylor*, 31 La. Ann. 851.

**Suspension of Time.** — In *Louisiana* where a party has fled from justice, or the crime has not been discovered within a year of the indictment, such facts suspend the operation of the statute. *State v. Foster*, 7 La. Ann. 255. See also *State v. Joseph*, 40 La. Ann. 5.

2. *People v. Miller*, 12 Cal. 291; *State v. Freeman*, 17 La. Ann. 69.

One who was guilty of manslaughter, but convicted of murder, should be discharged on vacating the judgment against him if the right to prosecute him for manslaughter was outlawed when the proceedings for murder were taken. *People v. Burt*, 51 Mich. 199.

**Limitation.** — In *Texas* it was held that though the code put no limitation on prosecution for murder, it did prescribe limitations on prosecutions for all other offenses, wherefore a conviction for manslaughter, though had on an indictment for murder, was not sustained when the indictment was not presented within the period of limitations (three years after the commission of the offense) prescribed in general for felonies not excepted or specifically provided for. *White v. State*, 4 Tex. App. 488.

**Manner of Computing Time.** — In *Florida*, where time is to be computed from a particular day, or when an act is to be performed within a specified period, as from or after a day named, the rule is to exclude the first day designated and to include the last day of the specified period. Under this rule an indictment found on the 13th day of December, 1880, for an offense alleged to have been committed on the 13th day of December, 1878, is good, the offense not being barred by the statute of limitations. *Savage v. State*, 18 Fla. 970.

3. *People v. McCurdy*, 68 Cal. 576. See also *Murphy v. Com.*, 11 Bush. (Ky.) 217; and early cases in *Virginia*: *Com. v. Linton*, 2 Va. Cas. 205; *Bailey's Case*, 1 Va. Cas. 258; *Sorrell's Case*, 1 Va. Cas. 253; *Com. v. Myers*, 1 Va. Cas. 188. See in general upon this subject, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume; and article PRELIMINARY EXAMINATIONS.

**Irregularity in the Examination Not Fatal.** — In *People v. McCurdy*, 68 Cal. 576, it is held that a defendant cannot be prosecuted by information until after an examination and commitment by a magistrate, but it does not follow that an information will be set aside for mere irregularities in the examination or commitment.

**Cannot Acquit of Murder and Remand for Manslaughter.** — In *Virginia* it was early held that an examining court has no power to acquit a person, charged before it with murder, of the murder of which he so stands charged and to remand him for trial for manslaughter only. And if the court does make such discrimination, the prisoner is not thereby discharged, but may be indicted for murder in the Superior Court. *Com. v. Myers*, 1 Va. Cas. 188. See also *Sorrell's Case*, 1 Va. Cas. 253; *Bailey's Case*, 1 Va. Cas. 258.

peace,<sup>1</sup> or persons having the same general jurisdiction, as, for instance, mayors or police justices of cities.<sup>2</sup> So, also, a coroner is authorized to have parties who are, by the inquest, implicated in the crime of murder, arrested and held for trial.<sup>3</sup> See also the article PRELIMINARY EXAMINATIONS.

**3. Waiver.**—A defendant may expressly waive the preliminary examination, and after having done so it is not open to him to object that such examination was not made.<sup>4</sup>

**V. THE INDICTMENT — 1. Finding and Presentment.**—As to the finding and presenting of an indictment for homicide, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

**2. Caption.**—As to the form of the indictment, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

**3. Charging the Offense — a. GENERALLY.**—As in the case of other crimes, an indictment for homicide must fully and clearly set out all the elements of such crime or facts necessary to constitute it,<sup>5</sup> and any omission so to do will be fatal to the indictment even after verdict.<sup>6</sup> It may be stated as a general rule that an indictment will be sufficient which contains a statement of the acts which constitute the offense, in ordinary language, and in such a manner that a person of ordinary intelligence may understand from the indictment that the defendant is charged with having inflicted with felonious intent a mortal wound upon deceased, from which the latter died within a year and a day from the time of the stroke,<sup>7</sup> and an indictment will not be insufficient by reason of a defect which does not tend to prejudice the substantial rights of the defendant on the merits.<sup>8</sup>

**Averment of Defendant's Act.**—It should be directly averred that the defendant committed the act causing death.<sup>9</sup>

1. *Murphy v. Com.*, 11 Bush (Ky.) 217; *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Com. v. M'Neill*, 19 Pick. (Mass.) 127; *Com. v. Linton*, 2 Va. Cas. 205.

**Before Two Justices.**—In the case of *Murphy v. Com.*, 11 Bush (Ky.) 217, it was held that one justice of the peace cannot act at an examining court where the defendant is charged with the commission of a felony. See also *Com. v. Leight*, 1 B. Mon. (Ky.) 107.

2. *Santo v. State*, 2 Iowa 165; *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Com. v. Myers*, 1 Va. Cas. 188.

In *Holmes v. State*, 44 Tex. 631, it is held that the mayor is not *ex officio* a justice of the peace having the power to conduct a preliminary examination.

3. *Bass v. State*, 29 Ark. 142; *People v. Budge*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 519; *Wormeley v. Com.*, 10 Gratt. (Va.) 658; *Reg. v. Taylor*, 9 C. & P. 672, 38 E. C. L. 284.

4. *State v. Cobb*, 71 Me. 198. And

see in general article PRELIMINARY EXAMINATIONS.

Under the Penal Code of *California* waiver of examination by one accused of homicide is not authorized. *Kalloch v. Superior Ct.*, 56 Cal. 229.

5. *State v. Verrill*, 54 Me. 408; *People v. Wallace*, 9 Cal. 30; *People v. Aro*, 6 Cal. 207.

6. *People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32.

**Omission of Technical Epithets.**—The omission of technical epithets in an indictment for murder has been held fatal. *Republica v. Honeyman*, 2 Dall. (Pa.) 228.

7. *People v. Lloyd*, 9 Cal. 54; *People v. Davis*, 73 Cal. 355; *White v. Com.*, 9 Bush (Ky.) 179.

8. *White v. Com.*, 9 Bush (Ky.) 179. See in general the article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume.

9. *Flinn v. State*, 24 Ind. 286. In Volume X.

*b.* AS AT COMMON LAW. — At common law homicide could be prosecuted only by indictment, and this, as a general rule, is still the case. Prosecutions by information are, however, sometimes allowed.<sup>1</sup> At the present time an indictment will be sufficient which charges the offense substantially as at common law,<sup>2</sup> and the particularity necessary at common law is held not to be requisite if the indictment contains all that is substantially necessary to inform the defendant of the crime of which he is charged.<sup>3</sup> An indictment good at common law which does not specify the degree will sustain a conviction of murder in any degree defined by the statute under which the defendant is prosecuted.<sup>4</sup>

*c.* IN THE LANGUAGE OF THE STATUTE. — An indictment will be sufficient for any grade of homicide which charges the offense committed in the form prescribed by the statute.<sup>5</sup>

this case an information for murder which informed the court that F. was in custody on the charge of felony without indictment, "said charge being described as follows," and followed by a description of murder in the second degree, was held insufficient because it did not allege directly, in proper form, that F. did the act with which he was charged.

**Name of Deceased Substituted for Defendant's.** — Where by mistake the name of the person killed was substituted for that of the defendant, thus making the indictment allege a mortal wounding of the deceased by himself, the error was held to be fatal and incurable. *State v. Edwards*, 70 Mo. 480.

1. *Noles v. State*, 24 Ala. 672; *People v. Giancoli*, 74 Cal. 642. See in general article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume.

**United States Constitution.** — In the federal courts prosecutions for homicide must be by indictment, as all grades of homicide are infamous crimes. But the provision of the Constitution limiting prosecutions to this form is not applicable to the states. *Noles v. State*, 24 Ala. 672.

2. *People v. Dolan*, 9 Cal. 576; *People v. Lloyd*, 9 Cal. 54, *Gehrke v. State*, 13 Tex. 568.

Under the *Texas* Penal Code, art. 593, defining the offense of manslaughter as "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law," the common-law indictment for manslaughter is not sufficient. *Jennings v. State*, 7 Tex. App. 350.

3. *People v. Dolan*, 9 Cal. 576.

4. *McAdams v. State*, 25 Ark. 405; *Green v. Com.*, 12 Allen (Mass.) 155; *Cargen v. People*, 39 Mich. 549; *People v. Willett*, 102 N. Y. 251; *Taylor v. State*, 11 Lea (Tenn.) 708; *Mitchell v. State*, 5 Yerg. (Tenn.) 340; *Hines v. State*, 8 Humph. (Tenn.) 597; *Wall v. State*, 18 Tex. 682; *White v. State*, 16 Tex. 206; *Cluverius v. Com.*, 81 Va. 787; *Livingston v. Com.*, 14 Gratt. (Va.) 592. See also *State v. Millain*, 3 Nev. 409; *Tenorio v. Territory*, 1 N. Mex. 279; *McConnell v. State*, 22 Tex. App. 354. Compare, however, *Fouts v. State*, 4 Greene (Iowa) 500, in which it is held that a good indictment for murder at common law will not include murder in the first degree under the *Iowa* Code.

5. *People v. De La Cour Soto*, 63 Cal. 165; *People v. Dolan*, 9 Cal. 576; *People v. Murray*, 10 Cal. 309; *Nichols v. State*, 46 Miss. 284; *Graves v. State*, 45 N. J. L. 203; *O'Kelly v. Territory*, 1 Oregon 51; *Cathcart v. Com.*, 37 Pa. St. 108; *Peterson v. State*, 12 Tex. App. 650; *Dwyer v. State*, 12 Tex. App. 535.

An indictment charging murder in the language of the *New Jersey* Criminal Procedure Act, § 45, sufficiently sets forth the "nature and cause of the accusation" within the Constitution. The words "deliberately and of his malice aforethought" sufficiently indicate the grade. *Graves v. State*, 45 N. J. L. 203.

An indictment following the form prescribed by the *Texas* Act of March 26, 1881, is sufficient in charging that defendant "did with malice aforethought kill H. C. by striking him with a cantling, against the peace and dig-

**4. Essential Averments — a. INTENT — (1) *Averment of Intent to Kill.*** — It is almost universally the rule that in an indictment for murder the purpose to kill must be specifically averred as a part of the description of the offense.<sup>1</sup> Such purpose is an

nity of the state." *Dwyer v. State*, 12 Tex. App. 535. See also *Peterson v. State*, 12 Tex. App. 650.

**Statutory Language in Manslaughter.** — In *Nichols v. State*, 46 Miss. 284, an indictment for manslaughter was held insufficient for not following the words of the statute in charging the killing.

1. *Florida.* — *Simmons v. State*, 32 Fla. 387; *Wiggins v. State*, 23 Fla. 180.

*Indiana.* — *Bechtelheimer v. State*, 54 Ind. 128; *Snyder v. State*, 59 Ind. 105.

*Iowa.* — *State v. Gillick*, 7 Iowa 287; *State v. McCormick*, 27 Iowa 402; *State v. Watkins*, 27 Iowa 415; *State v. Shelton*, 64 Iowa 333; *State v. Baldwin*, 79 Iowa 714; *State v. Dooley*, 89 Iowa 584.

*Kansas.* — *Smith v. State*, 1 Kan. 365; *State v. Brown*, 21 Kan. 38; *State v. Petty*, 21 Kan. 54; *State v. Stackhouse*, 24 Kan. 445; *State v. Bridges*, 29 Kan. 138; *State v. McGaffin*, 36 Kan. 315.

*Louisiana.* — *State v. Causey*, 43 La. Ann. 897.

*Maine.* — *State v. Smith*, 65 Me. 257.

*Massachusetts.* — *Com. v. Hersey*, 2 Allen (Mass.) 173.

*Mississippi.* — *Morgan v. State*, 13 Smed. & M. (Miss.) 242.

*Nebraska.* — *Schaffer v. State*, 22 Neb. 557.

*North Carolina.* — *State v. Slagle*, 83 N. Car. 630.

*Ohio.* — *Fouts v. State*, 8 Ohio St. 98; *Robbins v. State*, 8 Ohio St. 131; *Kain v. State*, 8 Ohio St. 306; *Loeffner v. State*, 10 Ohio St. 598; *Hagan v. State*, 10 Ohio St. 459.

*Oklahoma.* — *Jewel v. Territory*, (Okla. 1896) 43 Pac. Rep. 1075; *Holt v. Territory*, (Okla. 1896) 43 Pac. Rep. 1083.

*Texas.* — *McConnell v. State*, 22 Tex. App. 354.

*Washington.* — *Blanton v. State*, 1 Wash. 265; *State v. So Ho Ge*, 1 Wash. 275; *State v. So Ho Me*, 1 Wash. 276.

**Contra.** — As holding that it is not necessary to charge the intent to kill in an indictment for murder in the first degree, see *Territory v. Stears*, 2 Mont. 325; *Territory v. McAndrews*, 3 Mont.

158; *Territory v. Young*, 5 Mont. 242; *Territory v. Godas*, 8 Mont. 347.

**Particular Intent.** — In *People v. Conroy*, 97 N. Y. 62, it was held that "it has never been required, under the strictest and most technical rules of pleading, that the particular intent with which a homicide was committed should be set forth in the indictment; but it has uniformly been deemed sufficient to allege it to have been done feloniously, with malice aforethought, and contrary to the form of the statute." See also *People v. Enoch*, 13 Wend. (N. Y.) 159; *Kennedy v. People*, 39 N. Y. 245; *Fitzgerrold v. People*, 37 N. Y. 413.

**Insufficient Averment of Intent.** — In *Holt v. Territory*, (Okla. 1896) 43 Pac. Rep. 1083, it was held that an indictment which charged the making of an assault upon the deceased with premeditated malice and intent to kill, and the shooting, striking, and penetrating, and the mortal wounding of the deceased, all with the deliberate and premeditated malice of the defendant, was insufficient to sustain a conviction for murder, since it must charge that the unlawful acts by which the homicide was perpetrated, and the killing itself, were done with premeditated design or intent to effect the death of the deceased.

Where an indictment for murder charged that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased, by shooting him with a pistol loaded with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which mortal wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery or did the shooting or killing with the deliberate and premeditated intention of killing the deceased, it was held that such indictment did not charge murder in the first degree. *State v. Brown*, 21 Kan. 38.

An averment that the accused "feloniously, purposely, and of his deliberate and premeditated malice," did make an assault upon the deceased, and that he "did then and there feloni-



essential element of the statutory crime, although not essential at common law.<sup>1</sup>

**When Unnecessary.** — An averment of the intent to kill is not, however, necessary where the killing is charged to have been committed by means of poison unlawfully administered,<sup>2</sup> or where the killing is charged to have been committed by the accused in the commission of a felony.<sup>3</sup>

**Intent Both to Assault and Kill.** — The indictment must aver that not only the assault, but the killing itself, was done purposely.<sup>4</sup>

**Aider of Omission.** — Where the purpose to kill is not thus averred by way of description, the omission is not aided by the ordinary formal conclusion of the indictment averring that, "so" the jurors "do say that" the accused, "in manner and form aforesaid, purposely, wilfully, and of his deliberate and premeditated malice, did kill and murder," etc. Such allegation is nothing more than an argumentative statement of the legal result of the facts previously stated; and this mere legal conclusion cannot cure any defects in the premises on which it assumes to be predicated.<sup>5</sup>

**Words of Statute.** — The averment of the intent to kill need not of

ously, purposely, and of his deliberate and premeditated malice," shoot the deceased with a gun loaded, etc., inflicting a mortal wound of which the deceased then and there died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased, and shot him, it does not follow that the shooting was with the design and purpose to produce death. *Schaffer v. State*, 22 Neb. 557.

1. *Fouts v. State*, 8 Ohio St. 98.

2. *Com. v. Hersey*, 2 Allen (Mass.) 173. But see *Bechtelheimer v. State*, 54 Ind. 128, in which it is held that the purpose to kill is an essential ingredient of the crime of murder in the first degree, where the killing is effected by administering poison.

3. *Cox v. People*, 80 N. Y. 500; *State v. Watkins*, 27 Iowa 415; *People v. Giblin*, 115 N. Y. 196.

4. *Leonard v. Territory*, 2 Wash. Ter. 381; *State v. McCormick*, 27 Iowa 402; *State v. Watkins*, 27 Iowa 415; *People v. Davis*, 8 Utah 412; *State v. Brown*, 21 Kan. 38.

Thus, an indictment is not sufficient to sustain a sentence of murder in the first degree which charges the assault and shooting to have been done purposely and of deliberate and premeditated malice, but does not aver the

killing itself to have been done purposely and of deliberate and premeditated malice, and only charges manslaughter. *Leonard v. Territory*, 2 Wash. Ter. 381.

An averment merely that the accused "purposely, and of deliberate and premeditated malice, did strike, prostrate, and wound" the deceased, "giving to him \* \* \* one mortal wound," and that the deceased "of the mortal wound aforesaid died," is not sufficient, the "purpose" being predicated of the assault and wounding, but not of the killing. *Kain v. State*, 8 Ohio St. 307.

5. *Hagan v. State*, 10 Ohio St. 459; *Fouts v. State*, 8 Ohio St. 98; *Schaffer v. State*, 22 Neb. 557; *Leonard v. Territory*, 2 Wash. Ter. 381; *Blanton v. State*, 1 Wash. 265.

"An indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime; and if any one fact or circumstance which is a material ingredient in the offense, as defined by the statute, be omitted, the indictment will be bad. And a statement of any one of these facts or circumstances as a legal result, or by way of inference or conclusion from antecedent averments, is bad, and fatal to the indictment." *Fouts v. State*, 8 Ohio St. 98.

necessity be in the identical words of the statute; it will be sufficient if the language used clearly shows purpose.<sup>1</sup>

(2) *That Killing Was with Malice Aforethought.* — Malice aforethought, being an essential element of the crime of murder, must necessarily be specifically charged in the indictment,<sup>2</sup> either by

1. *Loeffner v. State*, 10 Ohio St. 598; *Smith v. State*, 1 Kan. 365.

Thus an averment that the accused "purposely and of deliberate and premeditated malice did strike, cut, and stab" H., "thereby then and there \* \* \* purposely and of deliberate and premeditated malice" giving to H. a mortal wound, of which mortal wound he instantly died, is sufficient, the intent to inflict a mortal wound importing *ex vi termini* an intent to kill. *Loeffner v. State*, 10 Ohio St. 598.

So also an indictment in which it is averred that P. assaulted and purposely wounded B., with the intent to kill him, of which wound B. died, sufficiently alleges that P. purposely killed B. *Price v. State*, 35 Ohio St. 601.

2. *Alabama.* — *Gibson v. State*, 89 Ala. 121; *Griffith v. State*, 90 Ala. 583; *Ward v. State*, 96 Ala. 100.

*Arkansas.* — *Anderson v. State*, 5 Ark. 444; *Edwards v. State*, 25 Ark. 444.

*California.* — *People v. Urias*, 12 Cal. 325; *People v. Vance*, 21 Cal. 400; *People v. Bonilla*, 38 Cal. 699; *People v. Schmidt*, 63 Cal. 28; *People v. Davis*, 73 Cal. 355.

*Colorado.* — *Redus v. People*, 10 Colo. 208.

*Idaho.* — *Territory v. Evans*, 2 Idaho 391.

*Illinois.* — *Fairlee v. People*, 11 Ill. 1.

*Indiana.* — *Finn v. State*, 5 Ind. 400.

*Iowa.* — *State v. Shelton*, 64 Iowa 333; *State v. Stanley*, 33 Iowa 526; *State v. Newberry*, 26 Iowa 467; *State v. Neeley*, 20 Iowa 108; *State v. Thurman*, 66 Iowa 693; *Fouts v. State*, 4 Greene (Iowa) 500.

*Kansas.* — *State v. Fooks*, 29 Kan. 425.

*Kentucky.* — *Jane v. Com.*, 3 Metc. (Ky.) 18.

*Louisiana.* — *State v. Green*, 42 La. Ann. 644; *State v. Forney*, 24 La. Ann. 191; *State v. Harris*, 27 La. Ann. 572; *State v. Florenza*, 28 La. Ann. 945; *State v. Thomas*, 29 La. Ann. 601; *State v. Crenshaw*, 32 La. Ann. 406; *State v. Bradford*, 33 La. Ann. 921; *State v. Williams*, 37 La. Ann. 776.

*Minnesota.* — *State v. Johnson*, 37 Minn. 493; *State v. Holong*, 38 Minn. 368.

*Mississippi.* — *Sarah v. State*, 28 Miss. 267.

*Missouri.* — *State v. Eaton*, 75 Mo. 586; *State v. Lowe*, 93 Mo. 547.

*Montana.* — *Territory v. Manton*, 7 Mont. 162.

*Nebraska.* — *Schaffer v. State*, 22 Neb. 557.

*New Hampshire.* — *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

*New York.* — *People v. White*, 22 Wend. (N. Y.) 167; *Fitzgerrold v. People*, 37 N. Y. 413.

*Ohio.* — *Loeffner v. State*, 10 Ohio St. 598.

*Tennessee.* — *Williams v. State*, 3 Heisk. (Tenn.) 376; *Riddle v. State*, 3 Heisk. (Tenn.) 401; *Witt v. State*, 6 Coldw. (Tenn.) 5; *Fisher v. State*, 10 Lea (Tenn.) 151.

*Texas.* — *Gehrke v. State*, 13 Tex. 568; *McElroy v. State*, 14 Tex. App. 235; *Henrie v. State*, 41 Tex. 573; *Banks v. State*, 24 Tex. App. 559; *Rather v. State*, 25 Tex. App. 623; *Scott v. State*, 31 Tex. Crim. Rep. 363; *Bohannon v. State*, 14 Tex. App. 271; *Sharpe v. State*, 17 Tex. App. 486; *McConnell v. State*, 22 Tex. App. 354, 58 Am. Rep. 647.

*Utah Territory.* — *People v. Halliday*, 5 Utah 467.

*Virginia.* — *Com. v. Gibson*, 2 Va. Cas. 70.

*Wisconsin.* — *State v. Duvall*, 26 Wis. 415.

*England.* — *Rex v. Nicholson*, 1 East P. C. 346.

"Malice aforethought is the ingredient in homicide which at the common law and under our statutes distinguishes murder from manslaughter." *Ward v. State*, 96 Ala. 100; *Gibson v. State*, 89 Ala. 121.

In *Com. v. Gibson*, 2 Va. Cas. 70, it is held that the offense must be charged to have been done with "malice aforethought," and that it is not sufficient that the mortal wound is charged to have been given with "malice aforethought," nor that the conclusion sub-

alleging that the homicide was committed "with malice aforethought" or by substituting words equivalent in their import.<sup>1</sup>

stitutes for those words the word "maliciously." See also *Fairlee v. People*, 11 Ill. 1.

**Omission of "Aforethought."**—An indictment for murder which alleges that the killing was done with "malice," omitting the word "aforethought," is fatally defective. *Cravey v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 658. See also *State v. Dooley*, 89 Iowa 584; *Gratz v. Com.*, 96 Ky. 162; *State v. Arnewine*, 126 Mo. 567; *State v. Rector*, 126 Mo. 328.

In *Massachusetts* it is held not necessary to aver, in an indictment for murder, that the assault was made with an intent to take life. *Com. v. Hersey*, 2 Allen (Mass.) 173.

In *Wisconsin*, for murder in the first degree, it is sufficient to charge in the words of the statute that the act was done "from premeditated design to effect the death of" the deceased, without adding the common-law phrase, "with malice aforethought." *State v. Duvall*, 26 Wis. 416.

1. *Arkansas*.—*Anderson v. State*, 5 Ark. 444; *McAdams v. State*, 25 Ark. 405.

*California*.—*People v. Dolan*, 9 Cal. 576; *People v. Urias*, 12 Cal. 325; *People v. Vance*, 21 Cal. 400; *People v. Bonilla*, 38 Cal. 699; *People v. Davis*, 73 Cal. 355; *People v. Schmidt*, 63 Cal. 28.

*Colorado*.—*Redus v. People*, 10 Colo. 208.

*Indiana*.—*Finn v. State*, 5 Ind. 400.

*Iowa*.—*State v. Johnson*, 8 Iowa 525; *State v. Neeley*, 20 Iowa 108; *State v. Thurman*, 66 Iowa 693.

*Kansas*.—*State v. McGaffin*, 36 Kan. 315.

*Louisiana*.—*State v. Phelps*, 24 La. Ann. 493; *State v. Forney*, 24 La. Ann. 191; *State v. Bradford*, 33 La. Ann. 921.

*Minnesota*.—*State v. Holong*, 38 Minn. 368.

*Missouri*.—*State v. Lowe*, 93 Mo. 547.

*Montana*.—*Territory v. Manton*, 7 Mont. 162.

*Nevada*.—*State v. Hing*, 16 Nev. 307.

*Tennessee*.—*Fisher v. State*, 10 Lea (Tenn.) 151.

*Wisconsin*.—*State v. Duvall*, 26 Wis. 415.

"The indictment must, therefore, charge that the killing was done with malice aforethought; but it is not

essential that these identical words be used. It is sufficient if words of the same import are used; or if from the language used in the indictment it clearly appears that malice aforethought is charged, or can without doubt be implied, the indictment is sufficient." *State v. Thurman*, 66 Iowa 693.

**Contra.**—In *McElroy v. State*, 14 Tex. App. 235, it is held that there is no legal synonym for "malice aforethought." In this case the court said: "'Malice aforethought' are technical words, for which, in an indictment for murder, there can be no equivalents or substitutes. They constitute an essential part of the definition of murder, both at common law and in our statute. Where the homicide is committed without 'malice aforethought,' either express or implied, it is not murder."

**Equivalent Expressions.**—In *State v. Neeley*, 20 Iowa 108, the indictment charged that the offense was committed "with intent in so doing, then and thereby, feloniously, intentionally, wilfully, maliciously, and deliberately to kill and murder," etc. It was held that the charge necessarily implied to the common understanding malice aforethought, and that under the statute the offense was sufficiently charged.

In *Anderson v. State*, 5 Ark. 444, where the second count of an indictment for murder charged the killing to have been done wilfully and wickedly and in the conclusion alleged that the defendant did kill and murder, it was held to be good without the words "malice aforethought."

To charge that the defendant did lie in wait with intent to "murder," or did feloniously "kill, slay, and murder," sufficiently implies "malice aforethought." *State v. Forney*, 24 La. Ann. 191; *State v. Phelps*, 24 La. Ann. 493.

**Terms of Equivalent Import.**—The following terms have been held to be of equivalent import with "malice aforethought:"

"Wilfully, deliberately, and premeditatedly kill and murder." *State v. McGaffin*, 36 Kan. 315.

"Deliberation" and "premeditation" synonymous with "malice aforethought." *McAdams v. State*, 25 Ark. 405.

**Intent to Kill.**— The fact that the indictment charges that the act was done with intent to kill will not supply want of such allegation, since malice aforethought and intent to kill are not necessarily identical.<sup>1</sup>

**Express or Implied Malice.**— The indictment need not, however, charge the act to have been done with express or implied malice.<sup>2</sup>

(3) *That Killing Was Felonious and Wilful.*— The indictment

"Maliciously" and "malice aforethought" mean the same thing, and one is the equivalent of the other. *Fisher v. State*, 10 Lea (Tenn.) 151.

The words "with malice and premeditation" are the legal equivalents of "with malice aforethought." *State v. Lowe*, 93 Mo. 547.

"With the premeditated design to effect the death," is equivalent to "with malice aforethought." *State v. Holong*, 38 Minn. 368.

"Wilfully, maliciously, feloniously, and premeditatedly," equivalent to "malice aforethought." *People v. Vance*, 21 Cal. 400.

**Of Malice "Aforesaid."**— An indictment which uses "aforesaid" for "aforethought," charging that the defendant "feloniously, wilfully, and of his malice aforesaid, did kill and murder," is fatally defective. *State v. Green*, 42 La. Ann. 644.

In *Maile v. Com.*, 9 Leigh (Va.) 661, the indictment charged that the prisoner "of his malice aforethought" made the assault, but the striking and wounding, and the killing and murder, were charged to have been done "of his malice aforesaid." The indictment was held good for the reason that the term "aforesaid" refers with sufficient certainty to the malice previously charged as "malice aforethought."

**With Malice "Aforethou" Insufficient.**— In *Griffith v. State*, 90 Ala. 583, it was held that the allegation that the killing was with malice "aforethou" is not equivalent to the allegation that the killing was with malice "aforethought."

**Malice as to the Act.**— In an indictment for murder the crime is sufficiently charged in the averment that the accused, with others, "did wilfully and feloniously shoot and wound \* \* \* with the intent \* \* \* feloniously, wilfully, and of their malice aforethought to kill," etc. The charge of malice in the shooting as well as in the intent to kill is not indispensable. *State v. Bradford*, 33 La. Ann. 921.

**Death by Exposure.**— An indictment charged that the defendant was the husband of the deceased, and as such owed her the duty of protection; that she was feeble, sick, and unable to walk; that the defendant had the ability to take care of her, but left her exposed in the night time to the cold and inclemency of the weather, refusing to provide her with clothing and shelter; that he did this feloniously, wilfully, purposely, premeditatedly, and of his malice aforethought, and that she, "languishing of such exposure, leaving, and of such neglecting, omitting, and refusing to provide clothing and shelter, \* \* \* did then and there die;" and that thus the defendant feloniously, wilfully, purposely, premeditatedly, and of his malice aforethought, did kill and murder her." This was held sufficiently to charge the offense of murder in the second degree, under Rev. Stat. Mont. 358, § 18, defining murder as "the unlawful killing of a human being, with malice aforethought, either express or implied," and providing that "the unlawful killing may be effected by any of the various means by which death may be occasioned." *Territory v. Manton*, 7 Mont. 162.

1. *People v. Urias*, 12 Cal. 326.

2. *Henrie v. State*, 41 Tex. 573; *Perry v. State*, 44 Tex. 473; *Longley v. State*, 3 Tex. App. 612; *Giebel v. State*, 28 Tex. App. 151; *Smith v. State*, 31 Tex. Crim. Rep. 14.

To allege that the killing was with "malice aforethought," is equivalent to alleging that the homicide was committed with express malice aforethought. *Banks v. State*, 24 Tex. App. 559. See also *Henrie v. State*, 41 Tex. 573; *Bohannon v. State*, 14 Tex. App. 271.

In *People v. Bonilla*, 38 Cal. 699, it is held that the allegation of "express malice" is not necessary in an indictment for murder, and if made need not be proved in order to justify a verdict of guilty in the first degree; the proper allegation is of "malice aforethought."

should also charge that the killing was committed "feloniously."<sup>1</sup> Likewise the charge of killing should aver that it was done wilfully.<sup>2</sup>

1. *Arkansas*. — *Anderson v. State*, 5 Ark. 444; *Edwards v. State*, 25 Ark. 444.

*Colorado*. — *Holt v. People*, (Colo. 1896) 45 Pac. Rep. 374.

*Illinois*. — *Fairlee v. People*, 11 Ill. 1.

*Indiana*. — *Henning v. State*, 106 Ind. 386; *Drake v. State*, 145 Ind. 210.

*Louisiana*. — *State v. Williams*, 37 La. Ann. 776.

*Missouri*. — *State v. Rector*, 126 Mo. 328; *State v. Herrell*, 97 Mo. 105.

*New York*. — *Fitzgerald v. People*, 49 Barb. (N. Y.) 122.

*Pennsylvania*. — *Respublica v. Honeyman*, 2 Dall. (Pa.) 228.

*Tennessee*. — *Witt v. State*, 6 Coldw. (Tenn.) 5.

*Wisconsin*. — *Allen v. State*, 85 Wis. 22.

#### Not Supplied by Averment in Conclusion.

—An indictment for murder which fails to charge that the homicidal act itself was done feloniously is insufficient, and this defect is not cured by the allegation that the assault was made feloniously, nor by the concluding words of the indictment that the defendant did "feloniously," etc., "kill and murder," the words "feloniously," etc., previously alleged, not being connected with the mortal stroke by the words "then and there." *State v. Herrell*, 97 Mo. 105. See also *State v. Andrews*, 84 Iowa 88.

#### Must Be Averred in the Conclusion.

—An indictment for murder is insufficient where the conclusion simply states that the accused "did kill and murder" the deceased, without stating that the killing was done feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, although it is so stated in the preceding portion of the indictment. *State v. Rector*, 126 Mo. 328.

**Applied to Manner of Killing.** — The omission of the technical epithets of "feloniously," "wilfully," etc., in respect to the manner of killing by striking, bruising, etc., in an indictment for murder, is fatal, although it be charged that the defendant "feloniously," etc., "did make an assault" upon the deceased. *Respublica v. Honeyman*, 2 Dall. (Pa.) 228. See also *Fairlee v. People*, 11 Ill. 1.

But see *Drake v. State*, 145 Ind. 210, in which it is held that an indictment for murder charging that the acts which finally resulted in the death of the deceased were done feloniously, unlawfully, purposely, and with premeditated malice, is sufficient though it fails to charge the killing in such manner.

**Contra.** — In *Tennessee* it is held that an indictment for murder is good without the use of the words "feloniously" or "unlawfully." *Riddle v. State*, 3 Heisk. (Tenn.) 401; *Williams v. State*, 3 Heisk. (Tenn.) 376.

See also *Chase v. State*, 50 Wis. 510, in which it is held that a count in an information for murder is not bad because it fails to state that the assault was made by the defendant "feloniously, wilfully, and of his malice aforethought."

2. *California*. — *People v. Davis*, 73 Cal. 355.

*Idaho*. — *Territory v. Evans*, 2 Idaho 391.

*Iowa*. — *Fouts v. State*, 4 Greene (Iowa) 500; *State v. Neeley*, 20 Iowa 108.

*Louisiana*. — *State v. Williams*, 37 La. Ann. 776; *State v. Scott*, 38 La. Ann. 387; *State v. Thomas*, 29 La. Ann. 601. See also *State v. Phelps*, 24 La. Ann. 493; *State v. Forney*, 24 La. Ann. 191; *State v. Florenza*, 28 La. Ann. 945; *State v. Bradford*, 33 La. Ann. 921.

*Missouri*. — *State v. Eaton*, 75 Mo. 586; *State v. Lowe*, 93 Mo. 547.

*Montana*. — *Territory v. Manton*, 7 Mont. 162.

**Contra.** — In *State v. Arnold*, 107 N. Car. 861, it is held that the word "wilfully" is not essential to the validity of an indictment for murder, either at common law or under the statute.

In *Aubrey v. State*, 62 Ark. 368, it is held that an indictment charging murder by an assault "with the felonious intent to kill and murder" is not defective by reason of the omission of the word "wilfully."

In *Massachusetts*, in an indictment for murder, it is not necessary to aver that the assault was made wilfully and with malice aforethought. *Com. v. Chapman*, 11 Cush. (Mass.) 422. See also *Com. v. Hersey*, 2 Allen (Mass.) 173.

**Language of Statute.** — In *State v.*

**Manslaughter.** — In an indictment for manslaughter it need not be averred that the killing was with malice aforethought.<sup>1</sup> It has also been held that the averment that the killing was wilful is unnecessary in such indictment and need not be proved.<sup>2</sup>

(4) *Deliberation and Premeditation.* — Where it is not charged that the homicide was committed by lying in wait or by means of poison, or in the perpetration of or attempt to perpetrate any felony, the indictment should, in addition to the allegations just mentioned, charge that the killing was committed deliberately and premeditatedly, in order that it may be sufficient to sustain a conviction of murder in the first degree.<sup>3</sup> There are numerous

Townsend, 66 Iowa 741, it was held not necessary to charge that the killing was wilful where it is charged that the act causing the homicide was done with specific intent to kill and murder. In this case the court said: "A wilful killing is simply an intended killing, and nothing could make the killing wilful except the intended result of the defendant's act. It is not necessary to charge in the precise language of the statute. It is sufficient if the words used are fully equivalent."

An information for murder in the first degree alleged, among other things, that M., C., and W. did then and there unlawfully, feloniously, purposely, and of their deliberate and premeditated malice make an assault upon T.; that M. did purposely discharge and shoot off against T. a double-barreled shotgun, giving him a mortal wound, of which he died a few hours thereafter; that C. and W. then and there, by the means and in manner aforesaid, aided, abetted, and assisted M. to do the acts set forth; that M., C., and W., in the manner and by the means stated, purposely, and of their deliberate and premeditated malice, did kill and murder T. It was held that the information taken together alleged that the killing of T. was wilful, deliberate, and premeditated. *State v. Whitaker*, 35 Kan. 731, 9 Crim. L. Mag. 42.

"Wilfully" Included in the Words "Deliberately and Premeditately." — In *Fisher v. State*, 10 Lea (Tenn.) 151, it was held that "wilfully" is included in the words "maliciously, deliberately, and premeditatedly," as a deliberate and premeditated killing must of necessity be wilful.

**Allegation that the Wounding Was Done Wilfully.** — In *State v. Arnewine*, 126 Mo. 567, the indictment alleged that the defendant "wilfully, feloniously,

deliberately," etc., made an assault on the deceased, and did then and there "wilfully" shoot at such person, giving to him a mortal wound from which he died, and that the defendant "wilfully," etc., did kill and murder the deceased. It was held to allege sufficiently that the act of wounding was done "wilfully," etc. See also *State v. Eaton*, 75 Mo. 586.

1. *State v. Sundheimer*, 93 Mo. 311; *Baldwin v. State*, 12 Neb. 61; *State v. Pike*, 49 N. H. 399.

In *Coe v. Com.*, 94 Ky. 606, it was held that in an indictment for manslaughter alleged to have been committed "unlawfully, wilfully, maliciously, feloniously, in a sudden affray," the word "maliciously" is mere surplusage and the offense is sufficiently charged.

In *State v. Pike*, 49 N. H. 399, the court said: "The practice has been, in charging manslaughter, to allege the act to have been done 'feloniously' or 'wilfully and feloniously;' in charging murder to allege it to have been done 'feloniously, wilfully, and of his malice aforethought.'"

2. *Com. v. Woodward*, 102 Mass. 155.

3. *Arkansas.* — *Cannon v. State*, 60 Ark. 564.

*Florida.* — *Wiggins v. State*, 23 Fla. 180; *Denham v. State*, 22 Fla. 664.

*Indiana.* — *Finn v. State*, 5 Ind. 400.

*Iowa.* — *Fouts v. State*, 4 Greene (Iowa) 500; *State v. Watkins*, 27 Iowa 415; *State v. McCormick*, 27 Iowa 402; *State v. Boyle*, 28 Iowa 522; *State v. Knouse*, 29 Iowa 118; *State v. Thompson*, 31 Iowa 393; *State v. Shelton*, 64 Iowa 333.

*Kansas.* — *State v. Brown*, 21 Kan. 38; *State v. McGaffin*, 36 Kan. 315.

*Missouri.* — *State v. Dale*, 108 Mo. 205; *State v. Jones*, 20 Mo. 58; *State v. Meyers*, 99 Mo. 107.

decisions, however, which hold that it is not necessary that the indictment should specifically aver in terms that the killing was "deliberate and premeditated."<sup>1</sup>

*Montana.* — State v. Metcalf, 17 Mont. 417.

*Ohio.* — Fouts v. State, 8 Ohio St. 98; Kain v. State, 8 Ohio St. 306; Hagan v. State, 10 Ohio St. 459; Loeffner v. State, 10 Ohio St. 598.

*Tennessee.* — Poole v. State, 2 Baxt. (Tenn.) 288.

*Washington Territory.* — Leonard v. Territory, 2 Wash. Ter. 381.

See also State v. Hamlin, 47 Conn. 95; State v. Perigo, 70 Iowa 657; State v. Whitaker, 35 Kan. 731; State v. Duvall, 26 Wis. 416.

In the case of Poole v. State, 2 Baxt. (Tenn.) 288, the court, in speaking of the words "wilful," "deliberate," "malicious," and "premeditated," said: "Each of the words used has been defined by this court in more than one case, and by that definition each has a meaning comprehensive within itself not peculiar to either of the others. \* \* \* We must presume that the legislature intended (as this court has held) that each word had its independent meaning, which was a necessary ingredient in the crime of murder in the first degree. While it has been holden that words of the same import will be sufficient, such holding has gone as far as construction and authority will allow, leaving it still the safer plan to employ the words of the law creating and defining the offense. Certainly we must not go to the extent of dropping one of the words, nor substituting another of a like import, and giving to another a meaning not only broad enough for itself, but also for its co-employee in language."

In State v. Jones, 20 Mo. 58, the court, in speaking of the statute defining murder in the first degree, said: "Under this statute the practice has been to describe the murder as it is laid down thereby; if it be committed by means of poison, to state it so; if by lying in wait, to set it forth accordingly; and if by any other kind of wilful, deliberate, and premeditated killing, to aver it to have been so done."

**Omission of "Deliberate."** — An indictment for murder in the first degree must charge the killing to have been deliberate as well as wilful and premeditated. An indictment which

charged the killing to have been "wilful, felonious, premeditated, and with malice aforethought," was held insufficient as an indictment for murder in the first degree, neither of these words being regarded as equivalent to the word "deliberate." State v. Boyle, 28 Iowa 522. See also Cannon v. State, 60 Ark. 564.

**"Malice Aforethought" Does Not Imply "Deliberation and Premeditation."** — The words "malice aforethought" in the description of murder do not necessarily imply that the act was committed with deliberation and premeditation. Thus where an indictment charged the prisoner with having committed the act "feloniously, wilfully, and of his malice aforethought," it was held that the indictment only contained a charge of murder in the second degree. Finn v. State, 5 Ind. 400; Fouts v. State, 4 Greene (Iowa) 500.

**"Deliberately" Includes "Premeditately."** — An indictment for murder charging that the defendant "feloniously, wilfully, deliberately," etc., killed the deceased, sufficiently charges the killing to have been done "premeditatedly," the latter term being included in "deliberately." State v. Dale, 108 Mo. 205.

**Charge Not Necessary for Killing by Torture.** — Where the indictment is for murder by killing a person by torture it is not necessary to charge such killing to have been deliberate and premeditated, under a statute providing that the unlawful killing of a person with malice aforethought by torture, or by any kind of wilful, deliberate, and premeditated killing, shall be murder in the first degree. Territory v. Vialpando, (N. Mex. 1895) 42 Pac. Rep. 64.

1. *California.* — People v. Murray, 10 Cal. 309.

*Colorado.* — Hill v. People, 1 Colo. 436; Redus v. People, 10 Colo. 208.

*Massachusetts.* — Green v. Com., 12 Allen (Mass.) 155.

*Minnesota.* — State v. Johnson, 37 Minn. 493.

*Nevada.* — State v. Crozier, 12 Nev. 300; State v. Thompson, 12 Nev. 140.

*New York.* — Fitzgerald v. People, 37 N. Y. 415; Kennedy v. People, 39 N. Y. 249.

**The Killing Itself.** — The indictment should aver that the killing itself was committed with deliberation and premeditation, and not merely that the act resulting in the death was so committed.<sup>1</sup> A failure to do this will not be supplied by the conclusion, "and so the jurors \* \* \* do say that" the prisoner, "in the manner and by the means aforesaid, \* \* \* purposely and of deliberate and premeditated malice, did kill and murder," the deceased.<sup>2</sup>

**b. AVERMENT THAT ACT WAS UNLAWFUL.** — As a general rule, it need not be averred in terms in the description of the act charged, that it was "unlawful" or committed "unlawfully." It will be sufficient if the act be so described as clearly to show it to be unlawful.<sup>3</sup> Where an indictment for murder charges

*Tennessee.* — *Mitchell v. State*, 8 Yerg. (Tenn.) 514.

*Utah.* — *Brannigan v. People*, 3 Utah 488.

*Virginia.* — *Livingston v. Com.*, 14 Gratt. (Va.) 592; *Bull v. Com.*, 14 Gratt. (Va.) 613.

*Wisconsin.* — *Chase v. State*, 50 Wis. 510.

**Language of Statute Sufficient.** — *People v. Murray*, 10 Cal. 310; *People v. Hyndman*, 99 Cal. 1; *State v. Williamson*, 4 Cinc. Wkly. L. Bul. 279; *State v. Douglass*, 41 W. Va. 537. See *supra*, p. 115.

**Common-law Forms Sufficient.** — As holding that an indictment for murder good at common law will authorize a verdict of guilty of murder in the first degree although it does not allege the killing to have been wilful, deliberate, malicious, and premeditated, see *McAdams v. State*, 25 Ark. 405; *Bull v. Com.*, 14 Gratt. (Va.) 613; *Livingston v. Com.*, 14 Gratt. (Va.) 592; *Territory v. Bannigan*, 1 Dakota 432; *Mitchell v. State*, 8 Yerg. (Tenn.) 514.

**"Malice Aforethought" Equivalent to "Deliberate and Premeditated."** — An indictment for murder which charges that the killing was committed with "malice aforethought" is equivalent to charging it to have been "deliberate and premeditated." *People v. Dolan*, 9 Cal. 576; *Redus v. People*, 10 Colo. 208; *People v. Ah Choy*, 1 Idaho 317; *State v. Hing*, 16 Nev. 307; *People v. Clark*, 7 N. Y. 393; *People v. Enoch*, 13 Wend. (N. Y.) 159; *Fitzgerald v. People*, 49 Barb. (N. Y.) 122; *Brannigan v. People*, 3 Utah 488; *Weatherman v. Com.*, (Va. 1894) 19 S. E. Rep. 778.

**"Premeditated" Contained in "Malice Aforethought."** — As holding that "pre-

meditated" is contained in the phrase "malice aforethought," the latter words being held to mean malice and premeditation, see *State v. Dale*, 108 Mo. 205; *State v. Thomas*, 78 Mo. 327; *State v. Lowe*, 93 Mo. 547.

In *Hill v. People*, 1 Colo. 436, it was held that malice aforethought is co-extensive with "deliberation and premeditation." In this case the court said that the primary and popular significance of this expression is "rather more comprehensive than 'deliberation and premeditation,' inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design."

1. *State v. Brown*, 21 Kan. 38; *Kain v. State*, 8 Ohio St. 306; *Fouts v. State*, 8 Ohio St. 98; *Leonard v. Territory*, 2 Wash. Ter. 381. See *State v. Shelton*, 64 Iowa 333.

2. *Kain v. State*, 8 Ohio St. 316; *Fouts v. State*, 8 Ohio St. 98.

3. *Beavers v. State*, 58 Ind. 530; *Jerry v. State*, 1 Blackf. (Ind.) 395; *Beasley v. People*, 89 Ill. 571; *State v. Leeper*, 70 Iowa 748; *State v. Abrams*, 11 Oregon 169; *Jackson v. State*, 22 Tex. App. 442; *Bean v. State*, 17 Tex. App. 60; *Thompson v. State*, 36 Tex. 326; *Hall v. State*, 28 Tex. App. 146. See also *Willey v. State*, 46 Ind. 363; *Sutcliffe v. State*, 18 Ohio 469; *Davis v. Utah*, 151 U. S. 262; *Williams v. State*, 3 Heisk. (Tenn.) 376; *Riddle v. State*, 3 Heisk. (Tenn.) 401.

**Surplusage.** — In *State v. Abrams*, 11 Oregon 169, where the indictment charged the defendant with having purposely, etc., killed the deceased "by then and there unlawfully and feloniously shooting him," it was held that the words "unlawfully and feloniously" were surplusage, and that the indict-



that the killing was committed with malice aforethought this sufficiently shows that the act was unlawful,<sup>1</sup> and where malice is not charged it will be sufficient if the facts stated show an unlawful act.<sup>2</sup>

*c. AVERMENT OF ASSAULT.* — According to some decisions, where the killing is charged to have resulted from a battery, an assault should be averred.<sup>3</sup>

ment charged murder in the first degree.

**Contra.** — In *Henry v. State*, 33 Ala. 389, it was held that an indictment charging that a slave "intentionally, but without malice," killed a white person, was not sufficient under the provisions of the code, and that the section dispensing with the averment of "presumptions of law" did not dispense with the necessity of averring that the killing was unlawful. In this case the court said: "That the killing was unlawful is as much a fact as that human life has been taken. It is as essential a constituent of the offense as the killing itself, and must be averred in the indictment, either by express allegation or by the use of terms or the statement of facts which conclusively imply it."

1. *Hall v. State*, 28 Tex. App. 146; *Thompson v. State*, 36 Tex. 326; *Bean v. State*, 17 Tex. App. 60; *State v. Abrams*, 11 Oregon 169.

"**Feloniously**" Includes All That Is Expressed in "Unlawfully." — In *Beavers v. State*, 58 Ind. 530, it is held that the word "feloniously" includes all the meaning that can be expressed by the word "unlawfully." See also *Jerry v. State*, 1 Blackf. (Ind.) 395.

2. *Beasley v. People*, 89 Ill. 571; *State v. Leeper*, 70 Iowa 748. See also *State v. Lay*, 93 Ind. 341; *Willey v. State*, 46 Ind. 363; *Sutcliffe v. State*, 18 Ohio 469. In this case it was held that an indictment for manslaughter charging the prisoner with an assault upon the person killed, and with unlawfully discharging and shooting off at him a loaded gun, sufficiently shows the defendant to have been engaged in committing an unlawful act.

**Murder in Producing Abortion.** — An indictment for murder in producing an abortion contained two counts, in one of which it was charged that the defendant attempted to produce a miscarriage on the deceased by means of a certain instrument, and in the other that he administered to the deceased a "certain noxious and abortifacient

drug" with the intent to produce such miscarriage; and in both counts it was alleged that it was not then and there necessary to cause such miscarriage for the preservation of the life of the deceased. It was held that an exception in the statute providing for the punishment, etc., "unless the same were done as necessary for the preservation of the mother's life," was sufficiently negated by the indictment, and that although the language used in the indictment negated more than the statute required, this formed no valid objection to the same, since it imposed on the prosecution the necessity for stricter proof. *Beasley v. People*, 89 Ill. 571.

An indictment for the crime of murder by producing the miscarriage of a pregnant woman showed that the acts alleged were done with the design and intention to produce a miscarriage, which, it was averred, was not necessary to save the life of the woman. It was held that it was sufficient under the statute defining the offense (*Iowa Code*, § 3864). *State v. Leeper*, 70 Iowa 748; and see article ABORTION, vol. 1, p. 62.

3. *Lester v. State*, 9 Mo. 666; *State v. Blan*, 69 Mo. 317.

An indictment against a medical practitioner charged that he made divers assaults on the deceased, a patient, and applied wet cloths to his body, and caused him to be put in baths. It was held that this was a proper mode of laying the offense, although all that was done was by the consent of the deceased, and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty. *Reg. v. Ellis*, 2 C. & K. 470, 61 E. C. L. 470.

**Indictment Charging Assault Not Duplicitous.** — "An indictment for murder which charges an assault as part of the crime of murder charges only a single offense; this indictment charges the assault as part of the crime of murder, and therefore charges a single

*d. MEANS AND MANNER OF KILLING*—(1) *Instrument or Means Used*.—Under the English law it was formerly necessary that the indictment should set forth particularly the manner of death and the instrument by which it was effected.<sup>1</sup> This was, however, changed by statute providing that it should not be necessary, in an indictment for murder or manslaughter or for being an accessory to such crimes, to set forth the manner in which or the means by which the death was caused.<sup>2</sup> In many of the states in this country it is held that the means by which the death was caused must be set out in the indictment.<sup>3</sup>

offense. An assault is a constituent element of the crime of murder, but is merged in the higher crime in all cases where it is charged as an ingredient of that crime." *Warner v. State*, 114 Ind. 137.

**Surplusage**.—In *Hatchard v. State*, 79 Wis. 357, it was held that where an information charged the committing of an abortion substantially in the language of the statute, the allegation of an assault was unnecessary and might be rejected as surplusage.

1. *Rex v. Sharwin*, 1 East P. C. 341.

2. 24 & 25 Vict., c. 100, § 6. In this statute it is provided that "in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased. And it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory, in the manner heretofore used and accustomed." (Similar to former provision, 14 & 15 Vict., c. 100, § 4.)

3. *Alabama*.—*Rodgers v. State*, 50 Ala. 102; *Hornsby v. State*, 94 Ala. 55. *Arkansas*.—*Haney v. State*, 34 Ark. 263.

*California*.—*People v. Choiser*, 10 Cal. 310; *People v. McNulty*, 93 Cal. 427.

*Delaware*.—*State v. Taylor*, 1 Houst.

Cr. Cas. (Del.) 436; *State v. Townsend*, 1 Houst. Cr. Cas. (Del.) 340.

*Florida*.—*Adams v. State*, 28 Fla. 511; *Hodge v. State*, 26 Fla. 11.

*Georgia*.—*Peterson v. State*, 47 Ga. 524.

*Illinois*.—*Mayes v. People*, 106 Ill. 306.

*Indiana*.—*Veatch v. State*, 56 Ind. 584; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

*Iowa*.—*State v. Dillon*, 74 Iowa 653.

*Kentucky*.—*Jeffries v. Com.*, 84 Ky. 237; *Sims v. Com.*, 12 Ky. L. Rep. 215; *White v. Com.*, 9 Bush (Ky.) 179.

*Louisiana*.—*State v. Finn*, 43 La. Ann. 895.

*Maine*.—*State v. Smith*, 32 Me. 369.

*Massachusetts*.—*Com. v. Fox*, 7 Gray (Mass.) 585.

*Missouri*.—*State v. McDaniel*, 94 Mo. 301; *State v. Jones*, 20 Mo. 58.

*Montana*.—*Territory v. Manton*, 7 Mont. 162; *Territory v. Young*, 5 Mont. 242.

*New Hampshire*.—*State v. Burke*, 54 N. H. 92.

*New Jersey*.—*State v. Fox*, 25 N. J. L. 566.

*New York*.—*Colt v. People*, 1 Park. Cr. Rep. (N. Y.) 611; *Shay v. People*, 22 N. Y. 317, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 353.

*North Carolina*.—*State v. Smith*, Phil. L. (N. Car.) 340; *State v. Owens*, 1 Murph. (N. Car.) 452; *State v. Gould*, 90 N. Car. 658; *State v. Williams*, 7 Jones L. (N. Car.) 446.

*South Carolina*.—*State v. Freeman*, 1 Spears L. (S. Car.) 57; *State v. Jenkins*, 14 Rich. L. (S. Car.) 215.

*Tennessee*.—*Witt v. State*, 6 Coldw. (Tenn.) 5.

*Texas*.—*Drye v. State*, 14 Tex. App. 185; *Jackson v. State*, 34 Tex. Crim. Rep. 38; *Sheppard v. State*, 17 Tex. App. 74; *Walker v. State*, 14 Tex. App. 609; *State v. Williams*, 36 Tex. 352.

The instrument, if known, must be described,<sup>1</sup> or it should be stated that the means, instruments, and weapons are to the jury unknown.<sup>2</sup>

*Virginia*. — *Gibson v. Com.*, 2 Va. Cas. 111.

1. *Arkansas*. — *Haney v. State*, 34 Ark. 263.

*California*. — *People v. Choiser*, 10 Cal. 310.

*Florida*. — *Adams v. State*, 28 Fla. 511.

*Georgia*. — *Peterson v. State*, 47 Ga. 524.

*Kentucky*. — *White v. Com.*, 9 Bush (Ky.) 179; *Sims v. Com.*, (Ky. 1890) 13 S. W. Rep. 1079.

*Massachusetts*. — *Com. v. Fox*, 7 Gray (Mass.) 585.

*Missouri*. — *State v. Jones*, 20 Mo. 58; *State v. McDaniel*, 94 Mo. 301.

*New York*. — *Shay v. People*, 22 N. Y. 317.

*North Carolina*. — *State v. Smith*, Phil. L. (N. Car.) 340.

*South Carolina*. — *State v. Jenkins*, 14 Rich. L. (S. Car.) 215.

*Tennessee*. — *Witt v. State*, 6 Coldw. (Tenn.) 5.

*Texas*. — *Jackson v. State*, 34 Tex. Crim. Rep. 38; *Sheppard v. State*, 17 Tex. App. 74; *Walker v. State*, 14 Tex. App. 609; *State v. Williams*, 36 Tex. 352; *Drye v. State*, 14 Tex. App. 185.

**Loaded Firearm.** — An indictment for murder in which the weapon used is described as a "loaded pistol" is sufficient, though it omits to state in what manner the weapon was charged. *People v. Choiser*, 10 Cal. 310.

The indictment need not state that the weapon was loaded. *Jeffries v. Com.*, 84 Ky. 237; *Sims v. Com.*, (Ky. 1890) 13 S. W. Rep. 1079; *Peterson v. State*, 47 Ga. 524; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 270.

**A Stick** with which the mortal blow was given may well be described in an indictment as "a certain wooden stick of no value." *State v. Smith*, Phil. L. (N. Car.) 340.

**Weapon a Deadly One.** — In an indictment for murder it is not necessary to allege that the weapon with which the crime was alleged to have been committed was a deadly or dangerous one. *Jeffries v. Com.*, 84 Ky. 237; *State v. McDaniel*, 94 Mo. 301; *Tenorio v. Territory*, 1 N. Mex. 279; *State v. Regan*, 8 Wash. 506.

**Value of Weapon.** — Under the early

common law the instrument with which the killing was done was a dead and forfeited to the crown, and it was therefore usual for the indictment to allege its value, though it seems that this was not absolutely essential (2 Hall P. C. 185). By 9 & 10 Vict., c. 62, this forfeiture to the crown was abolished. In this country the averment, though sometimes seen, is entirely unnecessary. *Dukes v. State*, 11 Ind. 557. See also *State v. Smith*, Phil. L. (N. Car.) 340.

2. *Arkansas*. — *Edmonds v. State*, 34 Ark. 720.

*California*. — *People v. Cronin*, 34 Cal. 191.

*Georgia*. — *Parker v. State*, 95 Ga. 482.

*Indiana*. — *Willey v. State*, 46 Ind. 363.

*Massachusetts*. — *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Com. v. Martin*, 125 Mass. 394; *Com. v. Sawtelle*, 11 Cush. (Mass.) 143.

*Minnesota*. — *State v. Matakovich*, 59 Minn. 514.

*Missouri*. — *State v. Rector*, 126 Mo. 328; *State v. Taylor*, 126 Mo. 531.

*Nebraska*. — *Olive v. State*, 11 Neb. 1.

*New Hampshire*. — *State v. Burke*, 54 N. H. 92.

*New York*. — *Cox v. People*, 80 N. Y. 500.

*North Carolina*. — *State v. Parker*, 65 N. Car. 460; *State v. Williams*, 7 Jones L. (N. Car.) 446.

*South Carolina*. — *State v. Jenkins*, 14 Rich. L. (S. Car.) 215.

*Texas*. — *Jackson v. State*, 34 Tex. Crim. Rep. 38; *Drye v. State*, 14 Tex. App. 185; *Harris v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 88; *Walker v. State*, 14 Tex. App. 609; *Sheppard v. State*, 17 Tex. App. 74.

*England*. — *Rex v. Grounsell*, 7 C. & P. 788, 32 E. C. L. 737.

The averment that the defendant committed the crime "in some way and manner, and by some means, instruments, and weapons to the jurors unknown," is sufficient when the circumstances of the case will not admit of greater certainty in stating the means of death. *Edmonds v. State*, 34 Ark. 720.

**Omission of "With."** — Where an

**Killing Without Weapon — Poisoning.** — Where the indictment charges the murder to have been committed in such a manner as not to require a weapon, an allegation of the instrument is of course unnecessary.<sup>1</sup> Thus where the homicide is alleged to have been committed by poison, the indictment need not name the particular poison<sup>2</sup> nor state the quantity used.<sup>3</sup> The indictment need not specify in detail the mode in which the poison affected the body; it is enough to charge that poison was administered, and that such poison so administered caused the death.<sup>4</sup>

**Allegations and Proof.** — The proof need not conform in all particulars with the allegations of the indictment as to the means causing death.<sup>5</sup> It will be sufficient if the mode of death proved agree in substance with that charged, although the weapon or instrument used be other than that averred.<sup>6</sup> Where it is alleged in the indictment that a particular weapon was used, it is not per-

indictment for murder undertakes to charge that the crime was committed by an assault with some heavy weapon, to the jurors unknown, the omission of the word "with" is fatal. *State v. Rector*, 126 Mo. 328,

1. *State v. Radford*, 56 Kan. 591; *U. S. v. Holmes*, 1 Wall. Jr. (C. C.) 1; *Rex v. Tye, R. & R. C. C.* 345; *Rex v. Culkin*, 5 C. & P. 121, 24 E. C. L. 238.

**Strangulation.** — In the case of *Redd v. State*, 69 Ala. 255, an indictment was held sufficiently descriptive of the means which charged that the defendant "unlawfully and with malice aforethought did kill L. by strangulation, in this, to wit, that he choked her to death."

2. *Carter v. State*, 2 Ind. 617; *State v. Vawter*, 7 Blackf. (Ind.) 592.

3. *Epps v. State*, 102 Ind. 539; *Puryear v. Com.*, 83 Va. 51.

It need not be alleged that the accused had knowledge of the poisonous nature of the drug. *Jane v. Com.*, 3 Metc. (Ky.) 19; *State v. Slagle*, 83 N. Car. 630; *Thornton v. Com.*, 24 Gratt. (Va.) 657.

**Allegation that Substance Was Poisonous.** — In an indictment which charges an actual poisoning, an allegation that the substance administered was a poison is unnecessary; but an indictment for an attempt to poison must allege that the substance administered was a poison. *Anthony v. State*, 29 Ala. 27.

4. *Westmoreland v. U. S.*, 155 U. S. 545. See also *Bilansky v. State*, 3 Minn. 427.

In charging the cause of death by poison "it is unnecessary to aver that the poison was taken into the stomach

of the deceased." *Westmoreland v. U. S.*, 155 U. S. 545.

5. *Maine.* — *State v. Smith*, 32 Me. 369.

*Minnesota.* — *State v. Lautenschlager*, 22 Minn. 514; *State v. Hoyt*, 13 Minn. 132.

*Nebraska.* — *Long v. State*, 23 Neb. 33.

*New Hampshire.* — *State v. Dame*, 11 N. H. 271.

*New Jersey.* — *State v. Fox*, 25 N. J. L. 566.

*North Carolina.* — *State v. Gould*, 90 N. Car. 658.

*South Carolina.* — *State v. Jenkins*, 14 Rich. L. (S. Car.) 215, 94 Am. Dec. 132.

*Texas.* — *Crenshaw v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 787.

*England.* — *Rex v. Waters*, 7 C. & P. 250, 32 E. C. L. 503; *Reg. v. O'Brian*, 2 C. & K. 115, 61 E. C. L. 115; *Rex v. Briggs*, 1 Moo. C. C. 318; *Rex v. Sharwin*, 1 East P. C. 341; *Mackalley's Case*, 9 Coke 67.

6. *Alabama.* — *Phillips v. State*, 68 Ala. 469; *Rodgers v. State*, 50 Ala. 102.

*New Jersey.* — *State v. Fox*, 25 N. J. L. 566.

*North Carolina.* — *State v. Gould*, 90 N. Car. 658.

*South Carolina.* — *State v. Jenkins*, 14 Rich. L. (S. Car.) 215, 94 Am. Dec. 132.

*England.* — *Mackalley's Case*, 9 Coke 67; *Rex v. Briggs*, 1 Moo. C. C. 318; *Rex v. Sharwin*, 1 East P. C. 341; *Rex v. Waters*, 7 C. & P. 250, 32 E. C. L. 503.

**Pleading and Proof.** — In an indictment for murder alleging the act to

missible to prove that a weapon entirely different in its character was the cause of the death.<sup>1</sup>

In some States it is held that the indictment need not allege the means used to cause the death, and in such cases the instrument or agency employed need not be set out;<sup>2</sup> and in some of those jurisdictions this practice is expressly authorized by statute.<sup>3</sup>

have been done with a specified instrument, it is not necessary to prove that the act was done with that particular instrument, if the nature of the violence and the kind of death occasioned by the means proved be the same. *State v. Smith*, 32 Me. 369. See also *Long v. State*, 23 Neb. 33.

"It is sufficient if the proof agree with the allegation in its substance and generic character, without precise conformity in every particular." *State v. Hoyt*, 13 Minn. 132; *State v. Lautenschlager*, 22 Minn. 514; *State v. Taylor*, 1 Houst. Cr. Cas. (Del.) 436.

Where an indictment charges murder by striking with a rock, and the proof shows the blow to have been given with a stick, there is no variance. *State v. Gould*, 90 N. Car. 658.

The variance between evidence of the shooting with a pistol and an allegation in the indictment that it was done with a gun is immaterial, as the weapons are of the same character and inflict the same kind of wound. *Turner v. State*, 97 Ala. 57.

An indictment for an assault with a "basket knife" is sustained by evidence of an assault with a "basket iron," provided they were calculated to produce the same sort of injury. *State v. Dame*, 11 N. H. 271, 35 Am. Dec. 495.

Where it is alleged that the accused strangled and choked the deceased with his hands, but the evidence shows that the strangling was effected by means of a scarf, there is no material variance. *Thomas v. Com.*, (Ky. 1892) 20 S. W. Rep. 226.

1. *Witt v. State*, 6 Coldw. (Tenn.) 5.

**Variance.**—An averment of a killing by cutting with a knife is not supported by evidence of striking with a pistol. *Phillips v. State*, 68 Ala. 469.

2. *California*.—*People v. King*, 27 Cal. 507; *People v. Cronin*, 34 Cal. 191; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Weaver*, 47 Cal. 106; *People v. Hyndman*, 99 Cal. 1; *People v. Murphy*, 39 Cal. 52.

*Colorado*.—*Jordan v. People*, 19 Colo. 417.

*Louisiana*.—*State v. Bartley*, 34 La. Ann. 147; *State v. Shay*, 30 La. Ann. 114; *State v. Granville*, 34 La. Ann. 1088, *reaffirmed* in *State v. Munston*, 35 La. Ann. 888.

*Maine*.—*State v. Verrill*, 54 Me. 408; Stat. of 1865, c. 329; *State v. Morrissey*, 70 Me. 401.

*Michigan*.—*People v. Bemis*, 51 Mich. 422; *Sneed v. People*, 38 Mich. 248.

*Mississippi*.—*Newcomb v. State*, 37 Miss. 383.

*North Carolina*.—*State v. Moore*, 104 N. Car. 743; *State v. Brown*, 106 N. Car. 645.

*Ohio*.—*Williams v. State*, 35 Ohio St. 175.

*Pennsylvania*.—*Cathcart v. Com.*, 37 Pa. St. 109; *Campbell v. Com.*, 84 Pa. St. 187; *Goersen v. Com.*, 11 W. N. C. (Pa.) 405; *Com. v. Buccieri*, 153 Pa. St. 535, 32 W. N. C. (Pa.) 113.

*Tennessee*.—*Alexander v. State*, 3 Heisk. (Tenn.) 475.

In the case of *People v. Cronin*, 34 Cal. 192, the court said: "While it may be well to state the means by which death was caused, we do not consider such a course indispensable." This is upon the ground that the means by which the killing was accomplished can never become material in ascertaining the offense charged. *People v. Murphy*, 39 Cal. 52.

3. Rev. Stat. La., § 1048; Rev. Stat. Wis., § 4660; Gen Stat. Colo., § 926; Acts of Legislature (Va.) 1882, c. 118, § 1; Laws of N. Car. 1887, c. 58; Rev. Stat. N. J. (1877) 275, § 45.

**Such Statutory Provisions Constitutional.**

—This provision of the state statutes is held not to be in violation of the constitutional right of the accused to know the nature and cause of the accusation against him. *Jordan v. People*, 19 Colo. 417; *Redus v. People*, 10 Colo. 208; *Hill v. People*, 1 Colo. 436; *State v. Bartley*, 34 La. Ann. 147; *State v. Granville*, 34 La. Ann. 1088; *State v. Munston*, 35 La. Ann. 888; *Goersen v. Com.*, 99 Pa. St. 388; *State v. Schnelle*, 24 W. Va. 767; *State v. Sloan*, 65 Wis. 647; *Rowan v. State*, 30 Wis.

(2) *Manner of Using Weapon—Held in Defendant's Hand.*—In *England* it was formerly held that where the death was caused by a weapon held in the hand of the defendant, such fact should be alleged by stating that it was held in both hands, or in the right or left hand.<sup>1</sup> The materiality of such allegation has, however, been denied or doubted by later English authorities.<sup>2</sup> Under our practice, it would seem from the decisions that the averment that the instrument was held in the hands of the defendant, though usual, is not essential.<sup>3</sup> Where such averment is made, it need not be proved.<sup>4</sup> The allegation that the crime was committed with one weapon, at the time held in the hands of two or more defendants, will not render the indictment demurrable,<sup>5</sup> as

129; *Bergemann v. Backer*, 157 U. S. 655.

The means, mode, or circumstances of the commission of the crime of murder are not necessarily embraced in "the nature and cause of the accusation" in the sense of the constitution, and of which the accused has the right to demand information; they are rather matters of evidence to establish the charge. *Newcomb v. State*, 37 Miss. 383.

"The reasons [means] of the perpetration of the crime and the manner of its perpetration are of the incidents, not of the substance, of the crime charged." *Merrimon, C. J.*, in *State v. Moore*, 104 N. Car. 743.

The particular means by which the assault was committed need not be set forth, although in such cases the government would be bound to prove that the murder was committed by force of some kind. *State v. Morrissey*, 70 Me. 401.

"The mode or manner refers to the instrument with which it [the crime] was committed or the specific agency used to accomplish the result. It is not necessary to aver either of these in the indictment." *Goersen v. Com.*, 99 Pa. St. 388.

1. 1 East P. C. 341; 2 Hale P. C. 185. See also *Territory v. Young*, 5 Mont. 242; *Com. v. Costley*, 118 Mass. 1.

2. In 1 East P. C. 341, after laying down the rule as to the necessity of the averment, the writer says that he does not find any ground for such particularity.

In the case of *R. v. Dale*, 1 R. & M. C. 5, it was held that the objection to an indictment for a murder by striking with stones which does not allege in what hands the stones were held was immaterial.

3. *Evans v. State*, 58 Ark. 47; *Noble v. Com.*, (Ky. 1890) 13 S. W. Rep. 429; *Com. v. Robertson*, 162 Mass. 90; *Com. v. Costley*, 118 Mass. 1; *Territory v. Young*, 5 Mont. 242; *State v. Dalton*, 27 Mo. 13; *Dennis v. State*, 103 Ind. 142; *Cathcart v. Com.*, 37 Pa. St. 108.

In *Dennis v. State*, 103 Ind. 142, an indictment for murder which charged the killing to have been done by the defendants with a club was held not bad for failing to charge that the defendants held the club "in their hands." In this case the court said: "When we are convinced that the defendants might have killed and murdered M. by striking, bruising, and mortally wounding him with a club without holding the club in their hands, it is possible, though hardly probable, that we may change our opinion on this question."

In *Com. v. Costley*, 118 Mass. 1, the court said: "It is not necessary to a full description of the crime, nor in order to inform the defendant of the particulars of the charge which he is to meet. \* \* \* We are of opinion that it is of the same character as a description of the size of the wound, the omission of which does not affect the validity of the indictment."

4. *Com. v. Costley*, 118 Mass. 1.

5. *Evans v. State*, 58 Ark. 47; *Coates v. People*, 72 Ill. 303; *State v. Brown*, 21 Kan. 38; *State v. Payton*, 90 Mo. 220; *Hash v. Com.*, 88 Va. 172.

An indictment jointly charging two persons with murder committed by shooting with a gun held in their hands is not demurrable because they "are alleged to have had in their hands only one gun, by and through the instrumentality of which only they are alleged to have taken the life of" the deceased. *Evans v. State*, 58 Ark. 47.

it does not charge a physical impossibility;<sup>1</sup> nor is the indictment rendered invalid by such errors as the omission of the word "his" before "hands."<sup>2</sup>

**The Stroke.** — Where the indictment describes the instrument of death, it should also set out the manner in which such instrument was used to produce the death of the deceased. The stroke should therefore be expressly laid.<sup>3</sup> It was formerly held essential to use the word "strike" or "stroke" in the indictment,<sup>4</sup> but

1. *Evans v. State*, 58 Ark. 47; *Coates v. People*, 72 Ill. 303. But see *State v. Gray*, 21 Mo. 492, in which an indictment for felonious assault charging the assault by several defendants with a knife, "which they then and there with their right hand held," was held bad. The court said: "This is an impossibility. It is on the face of it false, and must be bad. The proper mode, in such cases, is to charge one of the defendants with having made the assault, and the others being present, aiding and abetting, will be as much implicated as though they had actually made the assault."

2. "The omission or insertion of that pronoun [his] would go merely to the certainty of the allegation, and not to accuracy in the description of any of the acts constituting the crime, and we think the allegation sufficiently certain in its absence." *Ward v. State*, 8 Blackf. (Ind.) 101.

3. *Arkansas*. — *Edwards v. State*, 27 Ark. 493; *Thompson v. State*, 26 Ark. 324; *Haney v. State*, 34 Ark. 263.

*California*. — *People v. Aro*, 6 Cal. 207.

*Delaware*. — *State v. Townsend*, 1 Houst. Cr. Cas. (Del.) 337.

*Georgia*. — *Thomas v. State*, 71 Ga. 44.

*Illinois*. — *Palmer v. People*, 138 Ill. 357.

*Indiana*. — *Shepherd v. State*, 54 Ind. 25; *Meiers v. State*, 56 Ind. 336; *Veatch v. State*, 56 Ind. 584; *Powers v. State*, 80 Ind. 77.

*Missouri*. — *State v. Green*, 111 Mo. 585; *State v. Blan*, 69 Mo. 317; *State v. Sundheimer*, 93 Mo. 311.

*North Carolina*. — *State v. Owen*, 1 Murph. (N. Car.) 452; *State v. Morgan*, 85 N. Car. 581; *State v. Noblett*, 2 Jones L. (N. Car.) 418.

*Pennsylvania*. — *White v. Com.*, 6 Binn. (Pa.) 179.

*Virginia*. — *Gibson v. Com.*, 2 Va. Cas. 111.

*United States*. — *Ball v. U. S.*, 140 U. S. 811.

In the case of *Edwards v. State*, 27

Ark. 493, the court said: "The offense of murder is clearly charged against the defendant. \* \* \* But the appellant claims that the circumstances and manner of the killing are not fully stated, because the indictment does not allege in what manner the assault was made with the shotgun — whether the shotgun was used as a firearm, or as a bludgeon, or to frighten him to death with it. It would have been much better, and not have been considered as surplusage, to have said in the indictment that the assault was made with a shotgun, and with said gun did kill and murder him, or any other allegation of the manner of the assault and killing in accordance with the facts. It may be very material for the defendant, as a matter of defense, to know how the fatal blow was produced." See also *Shepherd v. State*, 54 Ind. 25, in which an indictment charging that the accused murdered the deceased by "firing a large \* \* \* pistol, loaded," etc., was held bad because it did not show whether the deceased was hit by the ball, or died from fright, or by what manner he came to his death.

In *State v. Blan*, 69 Mo. 317, 7 Mo. App. 582, it was held that an indictment charging that the defendants did "murder said E. W. by striking him, the said E. W., with clubs, and shooting him, the said E. W., with guns, and by mortally wounding him, the said E. W., by striking and shooting the said E. W. with clubs and guns," does not charge a shooting with clubs and guns, but sets forth the acts charged with clearness, certainty, and consistency as a shooting with guns and striking with clubs.

4. In 3 Chitty's Crim. Law (5th Am. ed.) 752 it is said that the word "strike" should always be inserted where the death is caused by violence.

this is not now required, and any equivalent term will be held sufficient.<sup>1</sup> Though the averment as to the blow need not be proved precisely as laid, yet if it is shown by the evidence that the blow was given in a way substantially different from that alleged, the variance will be fatal.<sup>2</sup>

In 1 East P. C. 342 it is said that "where the death is occasioned by a wound, bruise, or other assault, the stroke should be expressly laid. For want of this an indictment stating that the party, of malice aforethought, murdered or gave a mortal wound, without saying that he struck, etc., was holden bad. Yet Hawkins observes that in Croke's report this opinion seems to be questioned, and adds that he finds no reason given why that word should be of such absolute necessity, it not being so much as pretended in Long's Case, which seems to be the chief foundation of the opinion, that it is an appropriate word of art, but that all that seems there contended for is that where the death is occasioned by any external violence, coming under the notion of striking, it must expressly appear that a stroke was given. However, Hawkins says that it is not safe to omit the word where the fact will warrant it. Of course, it cannot be necessary in the case of poisoning, starving, or the like, where no actual force is exerted or assault made."

1. "**Stab, Stick, and Thrust.**" — In *Gibson v. Com.*, 2 Va. Cas. 111, it was held that the word *percussit* (did strike) is not technical in an indictment for murder, but when the blow is made with a dirk, the words "stab, stick, and thrust" are equivalent thereto.

**Giving Mortal Wound.** — Where in the indictment there is an averment of a stab, etc., with a dirk, it is sufficiently shown that the mortal wound was thereby given from the words "giving \* \* \* one mortal wound," etc. *Gibson v. Com.*, 2 Va. Cas. 111.

An indictment for murder charging that A B, "with a certain stick," etc., "in and upon the head and face of" C D then and there did strike and beat, giving to the said C D "then and there, with the pine stick aforesaid, in and upon the head and face of" the said C D, "several mortal wounds, of which said several mortal wounds" said C D instantly died, is good, for there is in the first clause a direct allegation of a stroke, and the participle "giving" and the words "then and

there" connect this allegation with the mortal wounds in the second clause. *State v. Owen*, 1 Murph. (N. Car.) 452.

In the case of *State v. Green*, 111 Mo. 585, an indictment for murder which alleged only that the defendant shot and discharged a pistol loaded with ball, "thereby and by thus striking the said J. B. with," etc., "inflicting on and in," etc., "one mortal wound," was held bad for failure to aver, after alleging that the defendant shot and discharged the pistol at the deceased, "that, with the bullet so shot out of the said pistol, the defendant then and there feloniously, wilfully," etc., "did strike, penetrate, and wound the said J. B., in and upon the head of him, the said J. B.," etc. The court said: "The words 'thereby and by thus striking' indicate that the pleader had previously alleged a striking and wounding, but an inspection of the indictment will demonstrate that he wholly omitted this most material averment."

**Repugnant Averment of Stab and Wound.**

— In the case of *Dias v. State*, 7 Blackf. (Ind.) 20, an indictment charging that the accused struck the deceased on the left side of the head and over the left temple, giving to him then and there, with the axe aforesaid, on the right side of the head and over the right temple, a mortal wound, was held bad for repugnancy. See also *State v. Jones*, 20 Mo. 58, in which the indictment charged the giving of blows in two different places, thereby inflicting but one wound.

2. **Variance.** — *State v. Townsend*, 1 Houst. Cr. Cas. (Del.) 337. See also *Goodwyn v. State*, 4 Smed. & M. (Miss.) 520; *Rex v. Waters*, 7 C. & P. 250, 32 E. C. L. 503; *Rex v. Spiller*, 5 C. & P. 333, 24 E. C. L. 346.

Thus when an indictment for murder charged the offense with having been committed by shooting from a gun, by means of powder and shot, proof that the murder was committed by striking the deceased on the head with a gun is inadmissible. Killing by shooting and killing by beating on the head with a gun are modes of causing death so essentially unlike that proof



*e. DESCRIPTION OF THE WOUND — (1) Dimensions.* — In England it was originally held that the indictment should set out the dimensions of the wound, in order that the court might judge whether it was of a nature to cause death.<sup>1</sup> Even at that time, however, it was held that if upon evidence the wound of which the party died appeared to be of another kind, the indictment would be sustained,<sup>2</sup> and for this reason the description subsequently came to be considered immaterial, and by later decisions of the English courts was held to be unnecessary.<sup>3</sup>

**United States Practice.** — In this country the early English rule was formerly followed in a few cases, and it was held essential that the indictment describe the wound as to its length, breadth, and depth;<sup>4</sup> but at the present time, by the decisions in the various states, it would seem to be the universal rule that such averment is unnecessary.<sup>5</sup>

of the one mode would be inadmissible under the indictment charging the other. *Guedel v. People*, 43 Ill. 226.

An indictment which stated the death to be by striking and beating the deceased with a piece of brick was not supported by proof that the prisoner knocked him down with his fist, and that the death was caused by the deceased striking his head by falling on a piece of brick in consequence of the blow. *Rex v. Kelly*, Car. C. L. 75.

1. 3 Chit. Cr. L. 734; 1 East P. C. 343; *Bryan v. State*, 19 Fla. 870; *West v. State*, 48 Ind. 483; *State v. McCoy*, 8 Rob. (La.) 546; *State v. Moses*, 2 Dev. L. (N. Car.) 452; *State v. Crank*, 2 Bailey L. (S. Car.) 66; *Robertson v. Com.*, (Va. 1894) 20 S. E. Rep. 362.

**When Description Impossible or Unnecessary.** — Where a limb was cut off, or the body of the deceased was entirely penetrated, the wound could not be described. *Heydon's Case*, 4 Coke, 42; *Long's Case*, 5 Coke, 120a.

Where the wound causing the death was in the nature of a bruise, no description was necessary. *Rex v. Mosley*, 1 Moo. C. C. 97; *Rex v. Tomlinson*, 6 C. & P. 370, 25 E. C. L. 442; 1 East P. C. 342.

2. 1 East P. C. 342.

3. *Rex v. Mosley*, 1 Moo. C. C. 97; *Rex v. Tomlinson*, 6 C. & P. 370, 25 E. C. L. 442.

4. In North Carolina it was formerly held that the wound must be described where it was capable of description. *State v. Owen*, 1 Murph. (N. Car.) 452. The necessity of thus describing the wound was abolished in this state by the Act of 1811, which provided that

"in all criminal prosecutions in the Superior Courts it shall be sufficient that the indictment contain the charge in a plain, intelligible, and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement when there appears to be sufficient in the face of the indictment to induce the court to proceed to judgment."

And see *State v. Moses*, 2 Dev. L. (N. Car.) 452, in which the court held that in an indictment for murder it is necessary to aver that a mortal wound was given, but the size and nature of the wound being matters not material to the description of the offense, nor any necessary part of the evidence, its dimensions need not be stated.

In Missouri, also, it was formerly held necessary to describe the wound. *State v. Jones*, 20 Mo. 58.

5. *California.* — *People v. Hong Ah Duck*, 61 Cal. 387; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Steventon*, 9 Cal. 273.

*Florida.* — *Hodge v. State*, 26 Fla. 11, overruling *Keech v. State*, 15 Fla. 608; *Walker v. State*, 34 Fla. 167.

*Indiana.* — *Dias v. State*, 7 Blackf. (Ind.) 20; *Dillon v. State*, 9 Ind. 408; *Dukes v. State*, 11 Ind. 557; *West v. State*, 48 Ind. 483.

*Iowa.* — *Nash v. State*, 2 Greene (Iowa) 286.

*Louisiana.* — *State v. Robertson*, 30 La. Ann. 340; *State v. McCoy*, 8 Rob. (La.) 545, 41 Am. Dec. 301; *State v. Hornsby*, 8 Rob. (La.) 554.

*Maine.* — *State v. Conley*, 39 Me. 78.

*Massachusetts.* — *Com. v. Robertson*,

(2) *Mortal Character*.—The indictment must aver that the wound inflicted by the accused was mortal; either by the use of the term "mortal,"<sup>1</sup> or, according to some decisions, by an equivalent expression, as, for instance, by the statement that the deceased at the time died of the wound.<sup>2</sup>

(3) *Location*.—At common law it was also essential that the indictment should state in what part of the body the wound causing death was inflicted.<sup>3</sup> This requirement, however, was abolished in *England* by statute,<sup>4</sup> and it is no longer necessary to state the location of the wound. In some of the states of this country, the old common-law rule formerly prevailed,<sup>5</sup> and in a

162 Mass. 90; Com. v. Woodward, 102 Mass. 155.

*Missouri*.—State v. Green, 111 Mo. 585.

*North Carolina*.—State v. Moses, 2 Dev. L. (N. Car.) 462.

*Texas*.—Hamby v. State, 36 Tex. 523; Nelson v. State, 1 Tex. App. 41; Smith v. State, 43 Tex. 643.

*Virginia*.—Lazier v. Com., 10 Gratt. (Va.) 708.

*United States*.—U. S. v. Maunier, 1 Hughes (U. S.) 412.

See also Stone v. People, 3 Ill. 326, in which it is held that an objection to the indictment for want of any particular specification of the wound of which the deceased person died can be taken only on motion to quash, and even then it seems that it would avail nothing.

"A particular description of the wound cannot be necessary to enable the defendant to know for what injury he is called upon to answer. If required for this purpose it would be valueless, because the allegation need not be accurate in correspondence with the proof. The statement of the general nature and locality of the wound and the instrument or means by which it was inflicted are all that can be required for this purpose." Com. v. Woodward, 102 Mass. 155.

In the *Massachusetts* case of Com. v. Chapman, 11 Cush. (Mass.) 422, the court apparently held in accordance with the old common law that a description was necessary in the case of an incised wound. This, however, was directly overruled in the case of Com. v. Woodward, 102 Mass. 155, where it was held that in an indictment for manslaughter there was no good reason for requiring the description of an incised wound any more than of a bruise.

1. People v. Lloyd, 9 Cal. 54; State v. McCoy, 8 Rob. (La.) 546; State v.

Hornsby, 8 Rob. (La.) 554; State v. Morgan, 85 N. Car. 581; State v. Green, 111 Mo. 585; State v. Conley, 39 Me. 78; Com. v. Robertson, 162 Mass. 90; Com. v. Woodward, 102 Mass. 155; Rex v. Lad, 1 Leach C. C. 96.

"The term 'mortal' is indispensable in describing a bruise or wound, and when so described an adequate cause of death has been assigned which will be supported by evidence of any deadly wound or bruise." State v. McCoy, 8 Rob. (La.) 546.

"**Mortal Injuries and Mortal Sickness.**"—In the case of Territory v. Godas, 8 Mont. 347, an indictment for murder was held sufficient which alleged that there had been inflicted upon the deceased "mortal injuries and a mortal sickness," instead of a "mortal wound" or "bruise."

2. People v. Judd, 10 Cal. 313; Brown v. State, 18 Fla. 472.

In Caldwell v. State, 28 Tex. App. 566, it was held that where the indictment charges that the defendant killed deceased by shooting him, it need not charge the infliction of a mortal wound.

3. 1 East P. C. 342; 2 Hale P. C. 185; 2 Hawk. P. C., c. 23, § 80; 4 Coke 40 b. "It ought to be shown in what part of the body the deceased was struck or wounded when the killing is of that sort. Therefore, if it be said to be on the arm, hand, or side, without saying either right or left, it is not good; or if it be only said about the breast. And if any of the wounds be laid with uncertainty, the laying of others with sufficient certainty will not help the indictment, if there be a general conclusion that the party died of the wounds above mentioned." 1 East P. C. 342.

4. Stat. 24 & 25 Vict., c. 100, § 6.

5. Dias v. State, 7 Blackf. (Ind.) 20; Wise v. State, 2 Kan. 419; State v.

few states at the present time it would seem necessary that the indictment should at least state that the wound was inflicted "on the body" of the deceased.<sup>1</sup> According to the more recent decisions the weight of authority would seem to hold that the part of the body on which the wound was given need not be stated.<sup>2</sup>

**Pleading and Proof.** — Both under the common law and according to the modern decisions, where the part of the body wounded is described in the indictment the proof need not correspond with the allegations as to the place of the wound, and it will be sufficient if the wound which produced the death is shown by the evidence to be in another part of the body.<sup>3</sup>

**f. AVERMENT AS TO TIME** — (1) *Of Act Causing Death.* — The time of the act by the defendant which is alleged to have caused the death of the deceased should be set out in the indict-

Jones, 20 Mo. 58; State v. Reakey, 1 Mo. App. 3; Nelson v. State, 1 Tex. App. 42; Smith v. State, 43 Tex. 643.

**Repugnancy.** — An indictment for murder which charged that the accused struck the deceased with an axe on the left side of the head, over the left temple, giving to him then and there with said axe on the right side of the head and over the right temple a mortal wound, was held bad. Dias v. State, 7 Blackf. (Ind.) 20. See also State v. Jones, 20 Mo. 58.

1. State v. Yordi, 30 Kan. 221. And see Sanchez v. People, 22 N. Y. 147.

2. *California.* — People v. Judd, 10 Cal. 313; People v. King, 27 Cal. 507, 87 Am. Dec. 95.

*Florida.* — Walker v. State, 34 Fla. 167.

*Indiana.* — Whelchell v. State, 23 Ind. 89; Jones v. State, 35 Ind. 122; Meiers v. State, 56 Ind. 343; Cordell v. State, 22 Ind. 5.

*Massachusetts.* — Com. v. Coy, 157 Mass. 200.

*Missouri.* — State v. Waller, 88 Mo. 402; State v. Blan, 69 Mo. 317; State v. Anderson, 98 Mo. 461; State v. Blan, 7 Mo. App. 582; State v. Ramsey, 82 Mo. 133; State v. Sanders, 76 Mo. 35; State v. Edmundson, 64 Mo. 398; State v. Henson, 81 Mo. 384.

*Tennessee.* — Alexander v. State, 3 Heisk. (Tenn.) 475.

*Texas.* — Giebel v. State, 28 Tex. App. 151; Wilkerson v. State, 2 Tex. App. 255, *overruling* Smith v. State, 43 Tex. 643; Nelson v. State, 1 Tex. App. 41; Williams v. State, 1 Tex. App. 465; Longley v. State, 3 Tex. App. 612.

In the case of Walker v. State, 34 Fla. 167, the court said: "In our opinion the great weight of American and more recent authority is that it is not necessary in an indictment for homicide to state upon what particular part of the body the mortal wound was inflicted."

3. 1 East P. C. 342; 2 Hawk. P. C., c. 23, § 81.

Lord Hale, in 2 P. C. 186, says: "Though the manner and place of the hurt and its nature be requisite as to the formality of the indictment, and it is fit to be done as near the truth as may be, yet if upon evidence it appears to be another kind of wound, in another place, if the party died of it, it is sufficient." And see Dias v. State, 7 Blackf. (Ind.) 20; Bryan v. State, 19 Fla. 864; State v. Waller, 88 Mo. 402; State v. Edmundson, 64 Mo. 398; State v. Moses, 2 Dev. L. (N. Car.) 462; State v. Jenkins, 14 Rich. L. (S. Car.) 215, 94 Am. Dec. 132.

**An Exception to General Rule.** — In Nelson v. State, 1 Tex. App. 41, the court held that it is not necessary that the proof shall locate the fatal wound in conformity to the charge in the indictment; this is an exception to the general rule that the *allegata* and the *probata* must correspond.

**Where Variance Material.** — In the case of Rockmore v. State, 93 Ga. 123, it was held that where the wound causing death was on the deceased's head, any variance in the proof as to its location was not material except in so far as it might bear upon the question of self-defense.

ment.<sup>1</sup> Where, however, the time at which the assault was made is set out, the averment need not be repeated as to the blow itself.<sup>2</sup>

1. *California*. — *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30.

*Georgia*. — *Thomas v. State*, 71 Ga.

44. *Indiana*. — *Welch v. State*, 104 Ind.

347. *Louisiana*. — *State v. Kane*, 33 La. Ann. 1269; *State v. Polite*, 33 La. Ann. 1016; *State v. Hobbs*, 33 La. Ann. 226.

*Maine*. — *State v. Conley*, 39 Me. 78.

*Massachusetts*. — *Com. v. Barker*, 12 Cush. (Mass.) 186.

*Minnesota*. — *State v. Ryan*, 13 Minn.

371. *Mississippi*. — *Woodsides v. State*, 2 How. (Miss.) 655.

*Missouri*. — *State v. McDaniel*, 94 Mo. 301; *State v. Sundheimer*, 93 Mo. 311; *State v. Eaton*, 75 Mo. 586; *State v. Ward*, 74 Mo. 253; *State v. Testerman*, 68 Mo. 408; *State v. Mayfield*, 66 Mo. 125; *State v. Sides*, 64 Mo. 385; *State v. Taylor*, 21 Mo. 477; *Lester v. State*, 9 Mo. 666.

*Nevada*. — *State v. Huff*, 11 Nev. 17.

*North Carolina*. — *State v. Haney*, 67 N. Car. 467; *State v. Shepherd*, 8 Ired. L. (N. Car.) 195; *State v. Baker*, 1 Jones L. (N. Car.) 267; *State v. Cherry*, 3 Murph. (N. Car.) 7; *State v. Orrell*, 1 Dev. L. (N. Car.) 139.

*South Carolina*. — *State v. Stewart*, 26 S. Car. 125; *State v. Huggins*, 12 Rich. L. (S. Car.) 402.

*Texas*. — *Edmondson v. State*, 41 Tex. 496; *O'Connell v. State*, 18 Tex. 343; *Hardin v. State*, 4 Tex. App. 355.

*Virginia*. — *Livingston v. Com.*, 14 Gratt. (Va.) 592; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Com. v. Ailstock*, 3 Gratt. (Va.) 620.

*Compare* *People v. Aro*, 6 Cal. 207; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *People v. Kelly*, 6 Cal. 210; *State v. Williams*, 30 La. Ann. 843.

The facts of time and place must be precisely and distinctly stated. They cannot be inferred, nor will the averment in the conclusion of the correct time and place cure this defect. On the contrary it will render it repugnant to the statement. *State v. Kennedy*, 8 Rob. (La.) 591.

"On or About" a Specified Date. — In *State v. Williams*, 13 Wash. 335, it is held that an information for murder is not invalid because it charges the act as having been committed "on or

about" a date specified, as it is provided in the code (2 Hill's Anno. Code Wash., § 1239) that the precise time at which the crime was committed need not be stated in the information.

Words "Or About" Surplusage. — Where an information for murder alleges that the offense was committed "on or about the 11th day of August, 1882," the words "or about" may be treated as surplusage, and an averment in the information as to the time is sufficiently certain and specific. *State v. Barnett*, 3 Kan. 250; *State v. Harp*, 31 Kan. 496; *Crim. Code of Kansas*, §§ 105, 110.

In the case of *State v. McCarthy*, 44 La. Ann. 323, it is held that in an indictment for murder which charged the offense to have been committed "on or about" a certain day, the words quoted may be rejected as surplusage, and the date specifically charged is considered to be the real one. See also *State v. Williams*, 30 La. Ann. 843; *State v. Waters*, 16 La. Ann. 401.

2. *Com. v. Barker*, 12 Cush. (Mass.) 186; *State v. Cherry*, 3 Murph. (N. Car.) 7. And see *Welch v. State*, 104 Ind. 347; *Woodsides v. State*, 2 How. (Miss.) 655; *State v. Taylor*, 21 Mo. 477; *State v. Stewart*, 26 S. Car. 125; *State v. Huggins*, 12 Rich. L. (S. Car.) 402. See generally article INDICTMENTS, INFORMATION, AND COMPLAINTS, *post*, this volume.

Time Referred to as "Then and There." — "Time as well as place ought, in general, not merely to be mentioned at the beginning of the indictment, but to be repeated to every issuable and triable fact; \* \* \* but after the time has been once named with certainty, it is afterwards sufficient to refer to it by the words 'then and there,' which have the same effect as if the day and year were actually repeated." 1 Chitty's Crim. Law, 219.

In the case of *State v. Sundheimer*, 93 Mo. 311, an indictment which charged an assault by shooting at a specified time and place sufficiently charged the time and place of giving the mortal wound by charging it to have been given "then and there." See also *Caldwell v. State*, 28 Tex. App. 566.

In an indictment for murder com-

**Pleading and Proof.** — Although necessary thus to set out the time, the proof need not conform in all particulars with the averment of the indictment as to the time of the act.<sup>1</sup>

**A Mere Clerical Error** in setting out the time, where it is one clearly apparent on the face of the indictment, and is not prejudicial to the accused, will not be cause for arrest of judgment.<sup>2</sup>

(2) *Of Death.* — The time at which the death occurred, as well as the date of the act of which it is the result, is one of the facts necessary to constitute the complete offense, and should therefore be set out in the indictment,<sup>3</sup> in order to make it appear that

mitted with an axe, the time and place of the offense having been once sufficiently alleged, it is unnecessary to aver that the defendant did "then and there" strike and give a mortal blow, etc. *Com. v. Barker*, 12 Cush. (Mass.) 186. See also *State v. Cherry*, 3 Murph. (N. Car.) 7.

1. *State v. Orrell*, 1 Dev. L. (N. Car.) 139; *People v. Jackson*, 111 N. Y. 362; *O'Connell v. State*, 18 Tex. 343. See also *State v. Kane*, 33 La. Ann. 1269; *State v. Polite*, 33 La. Ann. 1016; *Livingston v. Com.*, 14 Gratt. (Va.) 592; *People v. Kelly*, 6 Cal. 210.

According to all the authorities, some period of time when the crime was committed must be stated in the indictment, yet the same authorities state that it is entirely unimportant to confine the proofs of the commission of the crime to the day charged. All that is required is to show that the offense was committed prior to the filing of the bill and indictment. *State v. Orrell*, 1 Dev. L. (N. Car.) 139.

An indictment for murder alleged that the injury was inflicted on the 14th of March, 1856, and that the deceased died on the 19th of the same month. It was proved that the death injury was inflicted on the 8th of March, and that the death ensued on the 13th of the same month. The variance was held to be immaterial. *Livingston v. Com.*, 14 Gratt. (Va.) 592.

The fact that a homicide was committed on the twenty-ninth of the month, while the indictment charged its commission on the thirtieth, was held to be an unimportant variance. *People v. Jackson*, 111 N. Y. 362.

In the case of *State v. Polite*, 33 La. Ann. 1016, an appeal from the conviction for the murder was taken to the Supreme Court, and the sole ground relied on for the reversal of the sentence was that the indictment charged the

crime to have been committed March 19, 1880, while the evidence showed it to have been committed March 19, 1881. It was held that the court had no jurisdiction to review the evidence, as this would be trying the case as to the facts on appeal, but that in any event the variance was of no account.

2. **Error in Year.** — In the case of *State v. McDaniel*, 94 Mo. 301, the indictment, found in May, 1896, charged that the defendant assaulted and cut the deceased on December 25, 1886, and that deceased died on December 25, 1885. Under the *Missouri Rev. Stat.*, § 1821, providing that no indictment shall be deemed invalid, nor judgment thereon be arrested, for stating the offense to have been committed on a day subsequent to the finding of the indictment, it was held that as it was clear that the insertion of 1886 for 1885 was a clerical error, judgment on it would not be arrested.

**Error in Month.** — An indictment for murder stated that the mortal wound was inflicted on the 7th of November, 1845, and that the deceased languished until the 8th of November, in the year aforesaid, and then said, "on which said 8th day of May, in the year aforesaid, he died." It was held that the insertion of May for November was a mistake apparent on the indictment, and would not exclude proof of the death subsequent to the 7th of November or be cause for arresting the judgment. *Com. v. Ailstock*, 3 Gratt. (Va.) 620.

**Erroneous Spelling of Day of the Month.** — An indictment for murder which charges that the homicide was committed on the "twelfth day of August," instead of the twelfth day of August, is good. *State v. Shepherd*, 8 Ired. L. (N. Car.) 195.

3. *California.* — *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30;

the death occurred within a year and a day from the date of the infliction of the injury.<sup>1</sup> It is, however, a sufficient statement of such date to allege that the accused killed the deceased on a day specified, since it is implied from this that the death occurred on that day.<sup>2</sup> So, also, the date of death is sufficiently fixed by alleging after the averment of the time of the act that the deceased did "then and there die," or by the use of similar expressions.<sup>3</sup>

*People v. Sanford*, 43 Cal. 29; *People v. Aro*, 6 Cal. 207.

*Georgia*. — *Thomas v. State*, 71 Ga.

44. *Kentucky*. — *Jane v. Com.*, 3 Metc. (Ky.) 18.

*Louisiana*. — *State v. Hobbs*, 33 La. Ann. 226; *State v. Kennedy*, 8 Rob. (La.) 591.

*Maine*. — *State v. Conley*, 39 Me. 78.

*Minnesota*. — *State v. Ryan*, 13 Minn. 376.

*Missouri*. — *Lester v. State*, 9 Mo. 666; *State v. Sundheimer*, 93 Mo. 311; *State v. Ward*, 74 Mo. 253; *State v. Testerman*, 68 Mo. 408; *State v. Sides*, 64 Mo. 385; *State v. Mayfield*, 66 Mo. 125; *State v. Luke*, 104 Mo. 563; *State v. Lakey*, 65 Mo. 217; *State v. Reakey*, 1 Mo. App. 3; *State v. Snell*, 78 Mo. 240; *State v. Eaton*, 75 Mo. 586.

*Nevada*. — *State v. Huff*, 11 Nev. 17.

*North Carolina*. — *State v. Haney*, 67 N. Car. 467; *State v. Baker*, 1 Jones L. (N. Car.) 267.

*Texas*. — *Edmondson v. State*, 41 Tex. 497; *Cudd v. State*, 28 Tex. App. 124; *Hamby v. State*, 36 Tex. 523.

*Virginia*. — *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Com. v. Ailstock*, 3 Gratt. (Va.) 620; *Livingston v. Com.*, 14 Gratt. (Va.) 592.

*United States*. — *Ball v. U. S.*, 140 U. S. 118.

1. *State v. Huff*, 11 Nev. 17; *People v. Aro*, 6 Cal. 207; *Edmondson v. State*, 41 Tex. 497.

**Failure to State Year.** — In *State v. Mayfield*, 66 Mo. 125, an indictment which alleged that on the — day of May, 1875, the defendant shot C., and that C. died on the 3d day of May, was held to be fatally defective for omitting the year of the death.

In *Louisiana* an indictment for murder has been held not to be defective because it does not state the time at which the deceased died, when it states the day on which the wound which caused the death of said deceased was inflicted, and that the averment was sufficient if a number of days elapsed between the

infliction of the wound and the death. Under such averment it is competent for the state to prove at what time, in consequence of the blow, the deceased died. *State v. Hobbs*, 33 La. Ann. 226.

2. *Thomas v. State*, 71 Ga. 44; *State v. Ryan*, 13 Minn. 371; *Cudd v. State*, 28 Tex. App. 124; *Caldwell v. State*, 28 Tex. App. 566; *Jane v. Com.*, 3 Metc. (Ky.) 18; *State v. Huff*, 11 Nev. 17; *State v. Anderson*, 4 Nev. 265.

**"Did Kill and Murder."** — The allegation that on a certain day the defendant did "kill and murder" deceased is a sufficient allegation that deceased died on that day. *People v. Sanford*, 43 Cal. 29. See also *Jane v. Com.*, 3 Metc. (Ky.) 18; *Cudd v. State*, 28 Tex. App. 124.

3. *Woodside v. State*, 2 How. (Miss.) 665; *State v. Ward*, 74 Mo. 253; *State v. Luke*, 104 Mo. 563; *State v. Taylor*, 21 Mo. 477; *State v. Haney*, 67 N. Car. 467; *State v. Baker*, 1 Jones L. (N. Car.) 267; *State v. Huggins*, 12 Rich. L. (S. Car.) 402; *U. S. v. Ball*, 163 U. S. 662.

An indictment which does not state the time of the death, nor that it occurred within a year and a day from the time the wound was given, but uses the phrase "of which mortal wound the said J. H. then and there did languish and then and there did die," is not defective. *State v. Haney*, 67 N. Car. 467.

In the case of *U. S. v. Ball*, 163 U. S. 662, it was held that an indictment sufficiently alleges that a person shot by defendant died of the wound inflicted by him, and at the time and place at which the wound was inflicted, by alleging the infliction of a mortal wound upon such person, of which he "did languish, and languishing did then and there instantly die."

An allegation that the fatal blow was struck on a day certain, and that deceased languished one hour and then died, sufficiently sets out the date of the death. *State v. Luke*, 104 Mo. 563. See also *State v. Snell*, 78 Mo. 240.

Where this is not done, such words as "immediately died" or "instantly died" cannot supply the omission of the words "then and there."<sup>1</sup>

**Indictment Found within Year.**—According to some decisions, an indictment which charges that on a specified day the mortal wounds were inflicted, but does not allege the death to have been on a particular day, is sufficient when found and presented within one year from the date of the wounds. The fact that the indict-

**Insufficient Allegation of Time.**—

Where an indictment, after the usual averments, proceeds "of which mortal wound so given by," etc., "with the deadly weapon aforesaid," etc., "the said W. did then and there suffer and languish, and languishing did live, and a few hours after did die of the said mortal wound," the averment of time and place of death is insufficient, and the defect is not cured by a verdict. The words "then and there" immediately precede and refer to the words "languish, and languishing did live," and not to the allegation "and a few hours after did die." The use of "and" is insufficient to connect the time and place with the death. *State v. Kennedy*, 8 Rob. (La.) 59r.

1. *State v. Reakey*, 1 Mo. App. 3; *State v. Lakey*, 65 Mo. 217; *Lester v. State*, 9 Mo. 666; *State v. Morgan*, 85 N. Car. 58r; *State v. Baker*, 1 Jones L. (N. Car.) 267; *Hamby v. State*, 36 Tex. 523; *Reg. v. Pelham*, 8 Q. B. 959, 55 E. C. L. 959.

In the case of *State v. Testerman*, 68 Mo. 408, it was held that a count in the indictment alleging that of the wounds inflicted upon him the deceased "languished, and languishing did immediately die," was an insufficient allegation as to the time and place of the death of deceased.

In the case of *State v. Sides*, 64 Mo. 383, an indictment which charged that "of which said mortal wound the said M. did immediately languish, and languishing did die," was held defective in not specifically alleging when and how long after the wound the death occurred. This defect was held not to be cured by the statute of jeofails and to authorize the quashing of the indictment.

In 1 East P. C. 343, it is said: "The respective times of the wound and death are also required to be shown, in order that it may appear that the deceased died within a year and a day from the

stroke or other cause of death; in the computation of which the day on which the act was done shall be reckoned the first. This may be done either by stating that he died instantly of the wound, or that he languished of the same till the day mentioned, when he died of the said mortal wound." In speaking of this case the court, in *Lester v. State*, 9 Mo. 666, said: "From this observation, as well as from an examination of the precedents, it may be inferred that the word 'instantly' does not supply the place of 'then and there,' but is used to contradistinguish a case of death immediately succeeding the blow, and a case in which the death does not occur on the day the mortal blow was given. The statement of time and place is necessarily joined to either allegation. The only instance in which this has been omitted is in the case of *Rex v. Hindmarsh*, 2 Leach C. C. 569. The indictment in that case is inserted by Chitty among his precedents, and from the note in Russell (1 Russ. on Cr. 474) it seems not to have been objected to upon the trial. No question was made as to its sufficiency, but as it conflicts with the principles governing the constructions of indictments laid down by Hale, East, Bacon, and Chitty himself, in the same work in which it is copied, and in this respect is unsupported by any other precedent, we do not feel ourselves at liberty to admit its authority."

**Omission of "Then and There."**—In the case of *Hardin v. State*, 4 Tex. App. 355, it was held that the common-law requirement of an allegation that death resulted from the injury within a year and a day was held to be sufficiently complied with by the words "giving to the said W., then and there, two mortal wounds, of which mortal wounds so given as aforesaid the said W. did instantly die." The words "so," etc., obviate any need of repeating "then and there" before "instantly."

ment is so found and presented renders it certain that death must have occurred within one year.<sup>1</sup>

**Mere Clerical Mistakes** in stating the date of the death will not be fatal.<sup>2</sup>

**Pleading and Proof.** — The date of death need not be proved strictly as laid, but it will be sufficient if it be shown to have occurred within a year and a day of the date of the wound.<sup>3</sup>

**g. AVERMENT OF PLACE** — (1) *Of Act Causing Death.* — Since the only act which the defendant does towards causing the death is his dealing the fatal blow, the place where that is done is the

1. *Bowen v. State*, 1 Oregon 270; *Brassfield v. State*, 55 Ark. 556. In the latter case the court said: "In this case the indictment alleges that the fatal blow was struck October 25, 1890, and that death ensued therefrom, but there is no allegation of the date of the death. The demurrer to the indictment and the motion in arrest of judgment were both filed and acted upon within a year and a day of the time when the fatal blow is alleged to have been given, and the indictment charges that death had ensued therefrom before it was returned by the grand jury. To rule that it did not appear from the indictment that death had occurred within a year and a day from the alleged date of the fatal blow would be to hold that the court must divest itself of the knowledge of the day of the year in which it sat, and of which it was required to take judicial knowledge in order that the term of court might be held at the time fixed by law. That would be carrying the strictness of the rules of pleading to an unnecessary length. \* \* \* But the caption of the indictment informed the court, if that information under the circumstances was necessary, that it was returned at the February term, 1891, of the Marion Circuit Court, and we know, from the act fixing the terms for holding the courts in the circuit to which Marion county belongs, that the February term could not have continued until the 26th of October, 1891, which would have been the expiration of the year and day from the time the mortal wound is alleged to have been inflicted."

2. *State v. Eaton*, 75 Mo. 586. In this case it was said in the indictment that the wounding occurred August thirtieth and that the party wounded languished until September first, on which day of August of the same year

he died. The substitution of August for September was held to be a mere clerical mistake, and as such not fatal.

3. Where an indictment charged that a blow was given on the 27th of December and that the deceased then and there instantly died, and the evidence was that he lived for twenty days, it was held that the variance was not material. *State v. Baker*, 1 Jones L. (N. Car.) 267.

An indictment for murder charging the infliction of the wound on a certain day, and that the deceased "did then and there instantly die," is supported by showing that death ensued twelve hours after the shooting and on the same date. *State v. Ward*, 74 Mo. 253.

In the case of *Cudd v. State*, 28 Tex. App. 124, the court said that it is not an objection tenable on the ground of variance that the court admitted proof that although the mortal wound was inflicted on the day alleged in the indictment, the deceased did not in fact die on that day, but lingered and languished for several days thereafter before he died.

In *Livingston v. Com.*, 14 Gratt. (Va.) 592, the indictment alleged the injury to have been inflicted March 14, 1856, and the death to have occurred on the 19th of that month. It was proved that the injury was inflicted March 8th and that the death occurred on the 13th of the same month. Such variance was held to be immaterial.

**Meaning of "Then and There."** — The rule is that where one fact is alleged in the indictment with time and place, the words "then and there" subsequently used as to the occurrence of another fact refer to the same point of time, and necessarily import that the two were co-existent. *Palmer v. People*, 138 Ill. 356. See also *State v. Hurley*, 71 Me. 354.



place where he commits the crime,<sup>1</sup> and the indictment should clearly show in what county such act was committed,<sup>2</sup> unless the allegation of place be dispensed with by statute.<sup>3</sup> The state

1. See *supra*, II. *Jurisdiction*; State v. Bowen, 16 Kan. 475.

2. *California*. — People v. Robinson, 17 Cal. 363.

*Georgia*. — Studstill v. State, 7 Ga. 2; Dumas v. State, 62 Ga. 58.

*Illinois*. — Jackson v. People, 18 Ill. 269.

*Indiana*. — Cluck v. State, 40 Ind. 263.

*Kansas*. — State v. Bowen, 16 Kan. 475.

*Louisiana*. — State v. Smith, 38 La. Ann. 301; State v. Kennedy, 8 Rob. (La.) 591.

*Maine*. — State v. Wagner, 61 Me. 178.

*Massachusetts*. — Turns v. Com., 6 Met. (Mass.) 224.

*Minnesota*. — State v. Gessert, 21 Minn. 369.

*Missouri*. — State v. Waller, 88 Mo. 402.

*North Carolina*. — State v. Lamon, 3 Hawks (N. Car.) 175; State v. Adams, Mart. (N. Car.) 30.

*South Carolina*. — State v. Stewart, 26 S. Car. 125.

See generally as to laying venue, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume.

An information for murder is sufficient which charges the giving of the fatal blow in the county in which the prosecution is had and the fact of the ensuing death, although it fails to allege specifically in what county or state the death took place. State v. Bowen, 16 Kan. 475.

In the case of State v. Gessert, 21 Minn. 369, the indictment charged the defendant with committing the crime of murder, by feloniously, etc., inflicting upon D., etc., on August 28, 1874, in W. county, a stab or wound, of which, upon the same day, said D. died in the county of P. It was held that such indictment charged the commission of the offense in the county of W.

"In the County Aforesaid." — In the case of State v. Lamon, 3 Hawks (N. Car.) 175, an indictment for murder which stated that A. B., late of Bladen county, etc., "with force and arms in the county aforesaid," etc., was held to contain a sufficient description of the place where the murder was alleged to have been committed.

**Omission of the Word "County."** — In *Missouri* it has been held that the omission of the word "county," after the name of such county, is cured by section 1821 of the Revised Statutes. State v. Waller, 88 Mo. 402.

**Place Charged by Reference to Preceding Allegation.** — In State v. Stewart, 26 S. Car. 125, it was held that the time and place of the mortal wound were sufficiently charged in an indictment for murder which charged an assault by shooting at a certain time and place, and charging the mortal wound given "then and there."

Where, in an indictment for aiding, etc., the commission of a murder, there was no time and place to the averment of the aiding, etc., but time and place were alleged to the assault, stroke, and death, and it was then averred that the prisoner was then present aiding and abetting, it was held that the venue was sufficiently laid. State v. Taylor, 21 Mo. 477. See also *Woodside v. State*, 3 How. (Miss.) 655.

**"At" Equivalent to "In."** — In State v. Smith, 38 La. Ann. 301, it was held that where it is charged that the offense was committed at a certain point, the word "at" means "in."

**Omission of "There" after the Words "Then, and."** — The omission of the word "there" after the words "then and," in that part of the indictment which charges the felonious assault, is immaterial, the averment of the place being found in the same connection and being necessarily referred to. Jackson v. People, 18 Ill. 269.

**Averment of District.** — In the case of State v. Adams, Mart. (N. Car.) 30, it was held that in an indictment for murder the offense must be charged in the body of the bill to have been committed within the district over which the court has jurisdiction, and that it is not sufficient that the caption names the district. Thus, when the state was divided into districts, an indictment charging the offense to have been committed in Beaufort county, without adding "in the district of Newbern," was arrested.

3. *Noles v. State*, 24 Ala. 672. In this case it is held competent for the legislature, by statute, to dispense with

must, however, prove the venue as if it had been formally alleged in the indictment.<sup>1</sup>

**The Precise Locality** within the county at which the crime is committed need not be alleged.<sup>2</sup>

**Under Federal Statutes** an indictment for homicide must show that the act was committed in or upon some particular place or vessel within the jurisdiction of the federal courts.<sup>3</sup>

(2) *Of Death.*—The place where the death of the injured person occurred should also be set out in the indictment,<sup>4</sup> unless the

the averment, in an indictment for murder, that the offense was committed within the body of the county in which the indictment was found.

1. *Noles v. State*, 24 Ala. 672; *Thetstone v. State*, 32 Ark. 179.

**Presumption of Proof.**—In *Thetstone v. State*, 32 Ark. 179, the defendant was indicted for murder and convicted. The indictment did not state in the body in what county the offense was committed. The defendant moved in arrest of judgment for this omission alone, but filed no motion for new trial, nor preserved any bill of exceptions setting forth the evidence and the instructions of the court. It was held that it would be presumed, in the absence of any showing to the contrary, in favor of the Circuit Court, that it was proven on the trial that the offense was committed in the county where the indictment was found.

**Allegation Presumed to be True.**—An allegation that the killing was committed in the county of the indicting court is presumed to be true if not denied by plea in abatement. *State v. Outerbridge*, 82 N. Car. 617.

2. *People v. Robinson*, 17 Cal. 363; *Studstill v. State*, 7 Ga. 2.

It is sufficient for an indictment for murder to charge the offense to have been committed within the city and county of San Francisco, without stating the particular locality. *People v. Robinson*, 17 Cal. 363.

**Pleading and Proof—Judicial Notice.**—In the case of *Cluck v. State*, 40 Ind. 263, the indictment was found by the Marion Criminal Court, and charged that the crime was committed in Marion county, in which county the defendant was tried, and it was proved that the deceased was shot and killed in Indianapolis. It was held that the venue was sufficiently established, as the court would take judicial notice that Indianapolis was situated in Marion county.

3. An indictment against a captain of a steamboat, under Rev. Stat. U. S., § 5344, which alleges that the steamboat was at the time navigating the Chesapeake Bay between Baltimore and Annapolis, in substance alleges that the steamboat was being used on navigable waters of the United States. *U. S. v. Beacham*, 29 Fed. Rep. 284.

**Piratical Murder.**—Where the court has jurisdiction over the crime when committed on board a vessel having no nationality, the nationality need not be alleged, nor its possible foreign nationality negated. *U. S. v. Demarchi*, 5 Blatchf. (U. S.) 84.

**Nationality of Vessel.**—In an indictment for murder under section 8 of the Act of Congress, April 30, 1790, it is sufficient to allege that the crime was committed on a vessel owned by an American citizen, without alleging that the vessel was American. *U. S. v. Demarchi*, 5 Blatchf. (U. S.) 84.

4. *California.*—*People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32.

*Indiana.*—*Turpin v. State*, 80 Ind. 148; *Davidson v. State*, 135 Ind. 254.

*Louisiana.*—*State v. Kennedy*, 8 Rob. (La.) 591; *State v. Cummings*, 5 La. Ann. 330.

*Michigan.*—*Chapman v. People*, 39 Mich. 357.

*Mississippi.*—*Riggs v. State*, 26 Miss. 51.

*Missouri.*—*State v. Sundheimer*, 93 Mo. 311; *State v. Lakey*, 65 Mo. 217; *State v. Steele*, 65 Mo. 218; *State v. Testerman*, 68 Mo. 408; *State v. Luke*, 104 Mo. 563.

*South Carolina.*—*State v. Blakeney*, 33 S. Car. 111; *State v. Coleman*, 17 S. Car. 473.

*United States.*—*U. S. v. Ball*, 163 U. S. 662.

**Injury and Death in Different Places.**—In the case of *State v. Coleman*, 17 S. Car. 473, it was held that an indictment for murder that did not state where the

necessity of such averment is dispensed with by statute.<sup>1</sup>

**Need Not Be Repeated.** — As in the allegation of the time of death, the venue, when once alleged in the indictment, need not be repeated, but may be referred to by the use of "then and there."<sup>2</sup> Where, however, it is averred that the defendant at a specified time and place did then and there murder the deceased,

deceased died was bad as well at common law as under those statutes that provide for cases where the wound was inflicted in one jurisdiction and death ensued in another.

In *State v. Cummings*, 5 La. Ann. 330, it was held that the place of death must be stated, even where the mortal blow was given in one parish and the deceased died in another. In this case the court said: "Among the obvious reasons rendering it necessary to state the place of the death, it is necessary to enable the accused to defend himself by showing, if possible, that no death occurred at the place indicated, or that another person than the one to whom he gave the blow died there, or that the one to whom he gave the blow died from another cause."

**Averment in Conclusion Not Sufficient.** — Facts of time and place must be precisely and distinctly stated; they cannot be inferred. Nor will the averment, in the conclusion, of a correct time and place cure this defect. On the contrary, it will render it repugnant to the statement. *State v. Kennedy*, 8 Rob. (La.) 591.

**Defects Not Curable by Amendment.** — Where an indictment fails to state the place of death, this omission cannot be supplied by an amendment ordered by the judge, nor can the prisoner be tried under such amended indictment, for it would not be the bill found by the grand jury. *State v. Blakeney*, 33 S. Car. 111.

1. *State v. Baldwin*, 15 Wash. 15. In this case it was held that in an information for murder which alleges the time and place when the offense was committed, it is not necessary to allege also the place of death, under the Laws of 1891, p. 47, § 4, which provides for trial of criminal actions in the county where the offense was committed.

In the case of *Brassfield v. State*, 55 Ark. 556, an allegation of the place of death was held unnecessary in an indictment for murder under Mansf. (Ark.) Dig., § 2113, providing that where an indictment contains no state-

ment of the place where the offense was committed, it shall be considered as charged therein that it was committed within the jurisdiction of the court in which the grand jury was impaneled.

**Failure to Allege County or State.** — In *State v. Bowen*, 16 Kan. 475, an information for murder was held sufficient which charged the giving of the fatal blow in the county in which the prosecution was had and the fact of ensuing death, although it did not allege specifically in what county or state the death took place.

2. *Davidson v. State*, 135 Ind. 254; *Turpin v. State*, 80 Ind. 148; *State v. Luke*, 104 Mo. 563; *State v. Testerman*, 68 Mo. 408; *State v. Lakey*, 65 Mo. 217; *State v. Steeley*, 65 Mo. 218; *Riggs v. State*, 26 Miss. 51; *State v. Blakeney*, 33 S. Car. 111; *U. S. v. Ball*, 163 U. S. 662.

**"Did Then and There Feloniously Kill and Murder."** — Where an indictment alleged that a mortal wound was inflicted upon the deceased, "at Chesterfield, \* \* \* in the county and state aforesaid," from which wound the deceased "soon thereafter died," and then immediately proceeded to charge that the defendant did "then and there \* \* \* feloniously," etc., "kill and murder" the deceased, the place of death was sufficiently stated. *State v. Blakeney*, 33 S. Car. 111.

**Omission of Words "and There" Fatal.** — In *Riggs v. State*, 26 Miss. 51, the indictment for murder was regular in every respect and contained the proper charges of venue, up to the sentence, "of which said mortal wounds the said H. did then and there languish, and languishing did live for the space of about twenty hours, and did then die." It was held that the indictment did not sufficiently charge that the death occurred in the proper county, and that the omission of the words "and there" before "die" was fatal.

**"Did Instantly Die."** — An indictment for murder charging that from a mortal wound the deceased "did instantly die" does not state sufficiently the place

such averment will not be supported by evidence of a death at a later time and another place.<sup>1</sup>

*h.* AVERMENT OF DEATH — **Death Must Be Directly Alleged.** — The fact that the party for whose homicide the defendant is indicted is dead should be directly set out in the indictment, either by stating that the defendant killed the deceased,<sup>2</sup> or by the use of other words of similar import.<sup>3</sup>

"Murdered" Insufficient. — It is not, however, a sufficient compliance with this requirement to aver that the defendant "murdered" or "did murder" the deceased.<sup>4</sup>

*i.* AVERMENT THAT INJURY CAUSED DEATH. — It is also absolutely essential that an indictment for homicide should allege that the death resulted by reason of the injury inflicted by the defendant.<sup>5</sup> No particular form of words, how-

of the death. *State v. Lakey*, 65 Mo. 217.

"Did Immediately Die." — So, also, in *State v. Testerman*, 68 Mo. 408, it was held that the words "languished, and languishing did immediately die," insufficiently alleged the place of death.

1. *Chapman v. People*, 39 Mich. 357.

2. *People v. Sanford*, 43 Cal. 29; *People v. Alviso*, 55 Cal. 230; *Pierce v. State*, 21 Tex. App. 669; *Strickland v. State*, 19 Tex. App. 518; *State v. Thomas*, 32 La. Ann. 349; *State v. Anderson*, 4 Nev. 265.

In *State v. Day*, 4 Wash. 104, the court, in holding that the use of the word "killed" sufficiently averred the death of the deceased, said: "The allegation that the defendant killed the deceased is certainly in effect an averment that the latter died."

3. "Deprive of Life." — In the case of *Walker v. State*, 14 Tex. App. 609, the court held that in an indictment for homicide the words "deprive of life" are equivalent to the word "kill."

4. In the case of *Strickland v. State*, 19 Tex. App. 518, an indictment alleging that the accused did murder A. by shooting him with a gun was defective in that it did not charge that defendant killed A. See also *State v. Day*, 4 Wash. 104.

*Contra.* — In the case of *Bechtelheimer v. State*, 54 Ind. 128, it was held that the word "murdered" *ex vi termini* imports death. See also *Cordell v. State*, 22 Ind. 1.

**Conclusion of Law.** — "To allege that the accused murdered deceased is but a conclusion of law, which can be made by the court from the primary facts charged in the indictment, and

\* \* \* these primary facts, not the mere conclusions of law made therefrom, must be set forth in the indictment to make it sufficient." *Strickland v. State*, 19 Tex. App. 518.

5. *Alabama.* — *State v. Morea*, 2 Ala. 275.

*California.* — *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *People v. Lloyd*, 9 Cal. 55; *People v. Ybarra*, 17 Cal. 166.

*District of Columbia.* — *U. S. v. Barber*, (D. C.) 19 Wash. L. Rep. 418.

*Florida.* — *Brown v. State*, 18 Fla. 472.

*Indiana.* — *Littell v. State*, 133 Ind. 577; *West v. State*, 48 Ind. 483; *Wood v. State*, 92 Ind. 270. See also *Veatch v. State*, 56 Ind. 584; *Meiers v. State*, 56 Ind. 336; *Bechtelheimer v. State*, 54 Ind. 128; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 380, note 1.

*Louisiana.* — *State v. McCoy*, 8 Rob. (La.) 545, 41 Am. Dec. 301.

*Maine.* — *State v. Conley*, 39 Me. 78. *Massachusetts.* — *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Com. v. Fox*, 7 Gray (Mass.) 585.

*Missouri.* — *State v. Sundheimer*, 93 Mo. 311.

*Montana.* — *Territory v. Godas*, 8 Mont. 347.

*Nevada.* — *State v. Harrington*, 9 Nev. 91.

*New York.* — *People v. Wilson*, 3 N. Y. Park. Cr. Rep. (Westchester Oyer & T. Ct.) 199.

*North Carolina.* — *State v. Covington*, 117 N. Car. 834; *State v. Morgan*, 85 N. Car. 581; *State v. Rinehart*, 75 N. Car. 58.

*Pennsylvania.* — *Lutz v. Com.*, 29 Pa. St. 441.

ever, is necessary.<sup>1</sup>

**Death Resulting from Wound.** — It is proper, where a wound is the cause of death, to allege that the death resulted from the wound and not from the stroke.<sup>2</sup>

**j. DESCRIPTION OF DECEASED** — (1) *Generally.* — It is no longer necessary for the indictment to allege that the deceased was "in the peace of the state,"<sup>3</sup> nor that he was "a reasonable

*South Carolina.* — State v. Wimberly, 3 McCord L. (S. Car.) 190.

*Texas.* — Edmondson v. State, 41 Tex. 497; Tickle v. State, 6 Tex. App. 623.

*England.* — Reg. v. Sandys, 1 C. & M. 345, 41 E. C. L. 191, 2 Moo. C. C. 227; Reg. v. Ellis, 2 C. & K. 470, 61 E. C. L. 470; 1 Stark. Cr. Pl. 93.

"It must be averred that the wound or bruise was mortal; and finally, the adequacy of the means to produce death must be further shown by a direct averment that the party died of the stroke or poisoning; and this cannot be implied by any implication or intention whatever." 1 Stark. Cr. Pl. 93.

**Where Several Blows Are Given.** — "Where several blows have been given or different kinds of poison administered," it may be alleged generally that the party died "of the said several blows so struck or of the poisons so administered." 1 Stark. Cr. Pl. 93.

**1. Sufficient Allegations.** — An indictment which alleged the infliction of a mortal wound, "of which mortal wound he \* \* \* then and there languished, and afterwards, to wit, on," etc., "languishing, died," was held sufficiently to charge that the death proceeded from the wound. Tickle v. State, 6 Tex. App. 623.

An indictment alleging that the defendant killed one S. by then and there stabbing shows that the death of S. resulted from the stabbing by the defendant. Wood v. State, 92 Ind. 269. See also Veatch v. State, 56 Ind. 584; Meiers v. State, 56 Ind. 336.

An indictment for murder which charges that the defendant, by means stated, inflicted "a mortal injury, to wit, a fracture three inches long on the head of" A., "of which said mortal injury or fracture the said" A. "then and there died," sufficiently shows what caused the death of the deceased. West v. State, 48 Ind. 483.

An indictment for murder in the first degree is not objectionable because it alleges that there were inflicted upon

deceased "mortal injuries and a mortal sickness," of which he died, etc., instead of a "wound" or "bruise." Territory v. Godas, 8 Mont. 347.

**Insufficient Averment.** — In an indictment for murder by throwing A. W. into a canal the concluding averment that "the said A. W. in the canal aforesaid, with the water aforesaid, was then and there mortally choked, suffocated, and drowned," is nothing more than the usual allegation that the injury by the accused was of a homicidal character, adapted and intended to effect death, and is not in substance an allegation that she then and there died by the means of said homicidal act. Nor is it sufficient that in the conclusion of the indictment it is averred, "And so the grand jurors \* \* \* do say that the said F. B., her, the said A. W., in the manner and by the means aforesaid, \* \* \* feloniously \* \* \* did kill and murder, against the form of," etc., for this part of an indictment is considered as containing only conclusions of law concerning the effect of the preceding allegations of fact, and cannot operate to supply defects in the statement of facts. U. S. v. Barber, 20 D. C. 79.

**2. People v. Lloyd**, 9 Cal. 54; State v. Conley, 39 Me. 78; State v. Wimberly, 3 McCord L. (S. Car.) 190.

Where it is alleged that the defendant, with a dangerous weapon, struck and beat, giving mortal wounds of which the person died, it is unnecessary to add the words "by the stroke or strokes aforesaid." State v. Conley, 39 Me. 78.

**"Of Which Said Mortal Sickness," etc.** — In an indictment for murder by poisoning, it is sufficient, after alleging the administering of the deadly poison and the mortal sickness occasioned thereby, to aver, "of which said mortal sickness and distemper the said E. S. \* \* \* died." Reg. v. Sandys, 1 C. & M. 345, 41 E. C. L. 191.

**3. Dumas v. State**, 63 Ga. 600; Com. v. Murphy, 11 Cush. (Mass.) 472.

creature in being" <sup>1</sup> or "a human being." <sup>2</sup>

Where the Deceased Was an Officer, his official character need not be set out in the indictment, but may be proved upon trial. <sup>3</sup>

Name of Deceased. — The indictment must set out the name of the deceased, if such name be known. <sup>4</sup>

In England. — It is not held in England that the averment of the murdered party's being in the peace of God, king, or queen is necessary. On the contrary, it was decided long since that the omission of this averment is no ground of exception to an indictment for murder. See Heydon's Case, 4 Coke 41*b*; 2 Hale P. C. 186; 2 Hawk. P. C., c. 25, § 73; 3 Chitty's Cr. Law 733; Com. v. Murphy, 11 Cush. (Mass.) 473.

1. Wade v. State, 23 Tex. App. 308; Perryman v. State, 36 Tex. 321; Bohannon v. State, 14 Tex. App. 271; Ogden v. State, 15 Tex. App. 454; Bean v. State, 17 Tex. App. 60.

**Alleging Reasonable Creature—Peculiar Name.** — An indictment for murder alleged that defendant killed "Smutty My Darling." This was held to be sufficient, the question whether the deceased was a "reasonable creature in being" being a matter of proof and not of pleading, and it being immaterial that the name of the deceased was a peculiar one. Wade v. State, 23 Tex. App. 308.

2. Reed v. State, 16 Ark. 499; People v. McNulty, 93 Cal. 427; Palmer v. People, 138 Ill. 356; Merrick v. State, 63 Ind. 327; State v. Stanley, 33 Iowa 526; State v. Smith, 38 La. Ann. 301; Ogden v. State, 15 Tex. App. 454; Bohannon v. State, 14 Tex. App. 271; State v. Day, 4 Wash. 104.

**Fact Implied from Name.** — Where the indictment sets out the name of the deceased, this sufficiently implies that the deceased was a human being. Palmer v. People, 138 Ill. 356; State v. Smith, 38 La. Ann. 301.

**Indian.** — In the case of Reed v. State, 16 Ark. 499, it was held sufficient to charge that the deceased was a "Wyandott Indian, whose name is unknown to the grand jury," without averring that the deceased was a human being.

3. Boyd v. State, 17 Ga. 194; Wright v. State, 18 Ga. 383; State v. Green, 66 Mo. 631. In the case last cited the court said: "In the case of Boyd v. State, 17 Ga. 194, where the defendant was indicted for murder in killing an

officer while executing a warrant for his arrest, it was held that it was unnecessary to allege in the indictment charging the offense that the deceased was an officer, acting in the discharge of his duty when killed, and that under an indictment in the ordinary form the peace warrant which the officer was attempting to execute, as well as all the other evidence tending to establish the official character of deceased, was admissible. The same doctrine is laid down in 3 Chitty's Cr. Law 172, that when the indictment is for the murder of an officer, or in any case where the circumstances are complicated, it will not be necessary to set out any of the details, and that the indictment in such cases will be sufficient if it contains the general requisites of an indictment for murder."

4. Page v. State, 61 Ala. 16; Moynahan v. People, 3 Colo. 367; Dias v. State, 7 Blackf. (Ind.) 20; Wall v. State, 51 Ind. 453; State v. Pike, 65 Me. 111; State v. Pemberton, 30 Mo. 376; State v. Gardiner, Wright (Ohio) 392; Boyd v. State, 7 Coldw. (Tenn.) 69; Henry v. State, 7 Tex. App. 388; Brown v. Com., 86 Va. 466. See generally the article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume; and article NAMES.

"An indictment for murder must be so certain as to the party against whom the offense was committed that the prisoner will know and understand who it is he is charged with having killed." Page v. State, 61 Ala. 16.

**Referring to Deceased by Christian Name.** — Where the deceased person has been once described by his full Christian name and surname, it will suffice to refer to him afterwards by the Christian name only. Moynahan v. People, 3 Colo. 367; State v. Pike, 65 Me. 111. In the latter case the person killed was first named in the indictment "Margaret E. Pike," but was subsequently styled "the said Margaret," and this was held sufficient, since there was no other person mentioned in the indictment, of the same Christian name, to whom the words "the said" could refer.

**Name by Which Commonly Known.** — It is, however, a sufficient compliance with this requirement to set out the name by which the deceased was commonly known, although it be shown not to be his right name.<sup>1</sup>

**Place of Averring Name.** — If the name of the deceased is contained in the averment of the assault or infliction of the injury, its omission in the averment of death is immaterial,<sup>2</sup> but it must be stated in the conclusion.<sup>3</sup> This is in order that the defendant

**Only First Name Given.** — Where the party killed was a slave it has been held sufficient to set out only the first name, since it is a fact known to the court that such persons usually had but one name. *Boyd v. State*, 7 Coldw. (Tenn.) 69.

**Omission of Middle Name.** — In *California* it is held that an error in or omission of the middle name is not material, on the ground that the middle name is not in reality a part of the deceased's name. *People v. Lockwood*, 6 Cal. 205.

**Designation by Initials.** — In *Brown v. Com.*, 86 Va. 466, it was held that in an indictment for murder it was sufficient to designate the deceased by the initials of his name. See also *State v. Henderson*, 68 N. Car. 348.

1. *Alabama*. — *Aaron v. State*, 1 Ala. Sel. Cas. 12; *Page v. State*, 61 Ala. 16. *California*. — *People v. Lockwood*, 6 Cal. 205; *People v. Freeland*, 6 Cal. 96.

*Colorado*. — *Moynahan v. People*, 3 Colo. 367.

*Georgia*. — *Mitchum v. State*, 11 Ga. 615.

*Illinois*. — *Penrod v. People*, 89 Ill. 150.

*Kansas*. — *State v. Witt*, 34 Kan. 488.

*Kentucky*. — *Kriel v. Com.*, 5 Bush (Ky.) 362.

*Massachusetts*. — *Com. v. Desmar-teau*, 16 Gray (Mass.) 1.

*New York*. — *O'Brien v. People*, 48 Barb. (N. Y.) 274.

*North Carolina*. — *State v. Angel*, 7 Ired. L. (N. Car.) 27; *State v. Bell*, 65 N. Car. 313.

*Ohio*. — *State v. Gardiner*, Wright (Ohio) 392.

*Tennessee*. — *Rutherford v. State*, 11 Lea (Tenn.) 31; *Boyd v. State*, 14 Lea (Tenn.) 161.

*Texas*. — *Rothschild v. State*, 7 Tex. App. 519; *Hunter v. State*, 8 Tex. App. 75.

*Wisconsin*. — *State v. Lincoln*, 17 Wis. 579.

*England*. — *Rex v. Norton*, R. & R. C. C. 510; *Reg. v. Berriman*, 6 Cox C. C. 388; *Rex v. —*, 6 C. & P. 408, 25 E. C. L. 460.

See generally upon this subject article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume.

"Where a party is usually known by one name as well as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name." *Timms v. State*, 4 Coldw. (Tenn.) 138.

In the trial for murder of William Redus there was evidence that his true name was William "Reder," but that he was known and often called "Redus." The court charged that if the jury so found the fact, it was immaterial whether "Redus" was the true name or not. *Hunter v. State*, 8 Tex. App. 75.

**True Name a Question for Jury.** — In the case of *State v. Angel*, 7 Ired. L. (N. Car.) 27, where the prisoner's counsel objected that the name of the deceased as used in the indictment was not his true name, it was held that this was a fact to be tried by the jury.

2. *Alford v. Com.*, 84 Ky. 623.

**Blank in Subsequent Allegation.** — An indictment reciting that the accused, with malice aforethought, did kill Frank Wheeler by wounding him with a knife, "from which said cutting and wounding the said — — did then and there die," was held to be good, the blank name being immaterial, since it was apparent that Frank Wheeler was referred to. *Alford v. Com.*, 84 Ky. 623. See also *State v. Brabson*, 38 La. Ann. 144.

3. *Dias v. State*, 7 Blackf. (Ind.) 20; *State v. Pemberton*, 30 Mo. 376.

**Insufficient Designation.** — An indictment which charges an assault and stabbing of one H. D., whereof he died, and concluding, "and so the jurors \* \* \* do say that the said C. H. P., in manner and form and by

may plead a former jeopardy to another indictment for the homicide of the same person.<sup>1</sup>

**Pleading and Proof.** — The allegation in the indictment as to the name and description of the deceased must be supported by the evidence, and a failure in this particular will constitute a variance.<sup>2</sup> It must be shown that the Christian name of the person killed was either his real name or one by which he was commonly called.<sup>3</sup>

**Idem Sonans.** — Where, however, the name set out in the indictment and the name established by the evidence are *idem sonans*, that is, if they may be sounded alike, a variance in spelling will not be material.<sup>4</sup>

the means aforesaid, feloniously \* \* \* did kill and murder," is bad as not designating the person murdered. State v. Pemberton, 30 Mo. 376.

1. State v. Brabson, 38 La. Ann. 144.

2. Moynahan v. People, 3 Colo. 367; Mitchum v. State, 11 Ga. 615; Shepherd v. People, 72 Ill. 480; Davis v. People, 19 Ill. 74; Penrod v. People, 89 Ill. 150; Rutherford v. State, 11 Lea (Tenn.) 31; Perry v. State, 4 Tex. App. 566; Milontree v. State, 30 Tex. App. 151; State v. Lincoln, 17 Wis. 579.

**Separating the Surname.** — In Moynahan v. People, 3 Colo. 367, an indictment for the murder of "Patrick Fitz Patrick" was held not to be supported by proof of the killing of "Patrick Fitzpatrick," although two allegations following such designation described the deceased as "the said Patrick Fitzpatrick."

**Failure to Prove Christian Name.** — On the trial of a party indicted for the murder of one "Robert Kain" the evidence failed to show that the person killed was of that name, the witnesses calling him "Kain" only, without giving any Christian name. This variance was held to be fatal. Penrod v. People, 89 Ill. 150.

**Proving Initials of Name.** — Where an indictment charged that William R. Morris was murdered by the prisoner, and the proof was that W. R. Morris was slain, it was held that the proof of identity was left to the jury, and that a verdict of guilty found by them ought not to be disturbed. Mitchum v. State, 11 Ga. 615.

**Unnecessary Averments.** — If an indictment describes the deceased with unnecessary particularity, all the circumstances of the description must be proved, since they are essential to the

identity. Felix v. State, 18 Ala. 720; 1 Greenl. on Evidence, § 65.

Thus, where an indictment for murder described the deceased as "a Wyandott Indian," the description is material, and the race of the deceased must be proved as alleged. Reed v. State, 16 Ark. 499.

**Proof of Identity Not Restricted to Proof of Name.** — Where the indictment is for the murder of a person described by his Christian name and surname, if the evidence shows the killing of a man described only by his surname, though it be the same surname, there is a fatal variance; but the proof of identity is not necessarily restricted to proof of the name, but may rest upon other particulars, as, for instance, the person's occupation, he being the only person of such occupation named in the place. Shepherd v. People, 72 Ill. 480. See also Kriel v. Com., 5 Bush (Ky.) 364.

3. State v. Lincoln, 17 Wis. 579. See also State v. Dudley, 7 Wis. 664; State v. Kroscher, 24 Wis. 64; State v. Kube, 20 Wis. 217.

**Full Name Need Not Be Proved.** — A failure of the witnesses, upon the trial for murder of a particular individual, to give the full name of the person as set out in the indictment, is not material after verdict if the name or description as given by the witness corresponds as far as it goes with the name mentioned in the indictment, it sufficiently appearing that there was no contest over the name or identity of the person. Rutherford v. State, 11 Lea (Tenn.) 31. See also Joyce v. State, 2 Swan (Tenn.) 667; Stuart v. State, 1 Baxt. (Tenn.) 178; Scott v. State, 7 Lea (Tenn.) 232.

4. See article NAMES for a treatment of this subject.



(2) *Name Unknown*. — If the name of the deceased be unknown to the grand jury, an indictment which states this to be the fact will be sufficient.<sup>1</sup> The allegation that the name of the deceased is to the grand jury unknown is material and must be proved.<sup>2</sup>

**Infants**. — The necessity for thus describing the deceased often arises in indictments for the murder of a bastard child,<sup>3</sup> or of a

1. *Alabama*. — *Reese v. State*, 90 Ala. 624; *Tempe v. State*, 40 Ala. 350; *Bryant v. State*, 36 Ala. 270.

*Arkansas*. — *Edmonds v. State*, 34 Ark. 720; *Reed v. State*, 16 Ark. 499.

*Indiana*. — *Wall v. State*, 51 Ind. 453.

*Louisiana*. — *State v. Richmond*, 42 La. Ann. 299.

*Maine*. — *State v. Morrissey*, 70 Me. 401.

*Texas*. — *Henry v. State*, 7 Tex. App. 388; *Puryear v. State*, 28 Tex. App. 73; *Rothschild v. State*, 7 Tex. App. 519; *Williams v. State*, 3 Tex. App. 123.

*Wyoming*. — *Trumble v. Territory*, 3 Wyoming 280.

And see in general article INDICTMENTS, INFORMATION, AND COMPLAINTS, *post*, this volume.

In the case of *Reed v. State*, 16 Ark. 499, an indictment for the murder of "a certain Wyandott Indian, whose name is unknown to the grand jury," was held valid and sufficiently descriptive of the deceased.

**Christian Name Unknown**. — An indictment charging that the defendant killed "— Butler, whose Christian name is to the grand jury unknown," is sufficient. *Bryant v. State*, 36 Ala. 270. See also *Williams v. State*, 3 Tex. App. 123.

**Sex Need Not Be Stated**. — In an indictment for the murder of an infant, it is not indispensable that the sex of the murdered child be stated, even though its name be unknown. *State v. Morrissey*, 70 Me. 401.

**Additional Averment of Supposed Name**. — Although an indictment which charges the murder of a man "whose name is to this grand jury unknown" is sufficient unless it is shown that the name was in fact known to the grand jury, yet the sufficiency of such an indictment is not affected by the further averment that "said man, so killed, was supposed to be named C. Mehan." *Reese v. State*, 90 Ala. 624. See also *Boyd v. State*, 14 Lea (Tenn.) 161, in which it was held that there may be a count stating the name of the de-

ceased and another stating the name to be to the jury unknown.

2. *Reed v. State*, 16 Ark. 499; *Reese v. State*, 90 Ala. 624.

In the case of *Edmonds v. State*, 34 Ark. 720, it was held that an indictment is not bad on demurrer, or in arrest of judgment, because it states that the surname of the party killed is to the grand jury unknown; but that such allegation is material and must be proved by the state on the trial, and also that the grand jury made due inquiry to ascertain the name.

In the case of *Trumble v. Territory*, 3 Wyoming 280, it was held that defendant could not, on appeal from a conviction, object to the indictment because it charged him with the murder of a person to the grand jury unknown, on the ground that the grand jury might have ascertained the name of the deceased, where evidence offered by the prosecution that it was impossible for the grand jury to obtain such name from its witnesses was excluded on defendant's objection.

3. **Murder of Bastard**. — An indictment for killing a bastard child alleged the deceased to be a "certain female child, whose name to the jurors was unknown." The deceased was twelve days old. It was not suggested that it had been baptized, but the prisoner, its mother, had said that she should like to have the child named Mary Anne, and on two occasions afterwards called the child by such name. The indictment was held sufficient. *Rex v. Smith*, 6 C. & P. 151, 25 E. C. L. 327.

**Describing Bastard by Mother's Surname**. — An indictment charged the murder of "Eliza Waters." It appeared that the deceased was the illegitimate child of the prisoner, whose name was Ellen Waters, and a witness said on the trial: "The child was called Eliza. I took it to be baptized, and said it was Eleanor Waters' child." It was held that this was not sufficient proof that the surname of the deceased was Waters. *Rex v. Waters*, 7 C. & P. 250, 32 E. C. L. 503. See also *Reg.*

child that is so young as to have acquired no name, either by baptism or usage.<sup>1</sup>

**k. AVERMENT OF DEFENDANT'S SANITY.** — An indictment for homicide need not allege that the accused is of sound mind,<sup>2</sup> nor that he is "of sound memory and discretion,"<sup>3</sup> these being merely matters of defense.<sup>4</sup>

**l. HOMICIDE COMMITTED IN PERPETRATION OF ANOTHER FELONY.** — Where homicide is committed in the perpetration of, or attempt to perpetrate, another felony, if the indictment avers facts which constitute murder in the first degree, it will be sufficient to sustain a conviction upon proof that the killing was thus committed in the perpetration of another offense, although such fact is not averred in the indictment.<sup>5</sup> Where, however, the

*v. Stroud*, 1 C. & K. 187, 47 E. C. L. 187.

**Killing on Day of Birth.** — An indictment for killing a bastard child on the day of its birth need not state the name, nor that it had no name, nor that its name was unknown to the jurors. *Reg. v. Willis*, 1 C. & K. 722, 47 E. C. L. 722.

**Where Christian Name Is Known.** — Where the Christian name of the illegitimate child is known, though not the surname, an indictment alleging that the name was to the jurors unknown will not be sustained. *Reg. v. Stroud*, 1 C. & K. 187, 47 E. C. L. 187.

**1. "Infant Child, Name to the Jury Unknown."** — In *Tempe v. State*, 40 Ala. 350, it was held that the words, "infant child, name unknown to the grand jury," are a sufficient description in an indictment of a human being upon whom murder may be committed.

**"Not Baptized."** — A child "not named" is a proper description in an indictment for killing a child that has acquired no name either by baptism or usage. "Not baptized" would be insufficient. *Reg. v. Waters*, 2 C. & K. 864, 61 E. C. L. 864. See also *Reg. v. Biss*, 8 C. & P. 773, 34 E. C. L. 630.

**2. *Fahnestock v. State*, 23 Ind. 231.** In this case the court said: "The only objection urged to the indictment is that it does not aver that the defendant is a 'person of sound mind.' These words are found in the section of the statute defining the crime of murder in the first degree, and it is urged that they constitute a part of the statutory definition of the crime, and must therefore be averred in the indictment. They do not, properly speaking, constitute a part of the

definition of the crime, but rather of the person capable of committing it. The crime consists in the killing of a human being, purposely and with premeditated malice. There must be a purpose or definite design to destroy life, actuated by a malicious motive. The act must be premeditated, or thought of and determined upon, before its commission. These ingredients can only exist where there is a mind with reflective faculties, capable of thought and consistent reason, to form designs and conclusions; in other words, it requires a person of sound mind to be capable of the acts that constitute the crime. The law presumes every person who has arrived at the years of discretion to be of sound mind, and hence it is not necessary that the state should prove that fact to justify a conviction. If, in fact, the accused is not of sound mind, it is a legitimate matter for proof in defense, but need not be averred in the indictment."

**3. *Dumas v. State*, 63 Ga. 600; *Jerry v. State*, 1 Blackf. (Ind.) 395; *Snell v. State*, 50 Ind. 516; *Dillon v. State*, 9 Ind. 408.**

**4. *Fahnestock v. State*, 23 Ind. 231.**

**5. *State v. Johnson*, 72 Iowa 393; *State v. Meyers*, 99 Mo. 107; *State v. Hopkirk*, 84 Mo. 278; *State v. Green*, 66 Mo. 631; *State v. Worrell*, 25 Mo. 205; *Titus v. State*, 49 N. J. L. 36; *Cox v. People*, 80 N. Y. 500; *People v. Willett*, 102 N. Y. 251; *People v. Giblin*, 115 N. Y. 196; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415; *Mitchell v. State*, 1 Tex. App. 194.**

**Want of Design to Effect Death.** — Under the *New York* statute which makes the killing murder in the first degree if perpetrated without any de-

indictment does charge the killing to have been thus committed, and makes the commission of the offense the basis of the charge, it must be pleaded with the same formality and particularity as though the defendant were charged solely with the crime in the perpetration of which the homicide was committed.<sup>1</sup> To aver that the homicide was committed in the perpetration of, or attempt to perpetrate, a certain offense, without setting out the acts of the defendant upon such occasion, is to state a mere conclusion of law.<sup>2</sup>

*m. SPECIFICATION OF DEGREE.* — An indictment for murder need not specify the degree of the offense with which the defendant is charged,<sup>3</sup> since such degree is really a conclusion to be

sign to effect death by the person engaged in the commission of the felony, the indictment need not allege that there was no such design, since the only object of those words in the statute is to dispense with the necessity of proving the design. *Dolan v. People*, 64 N. Y. 485.

**Surplusage.** — Under the *Missouri* statute providing that murder committed in the perpetration of robbery, etc., shall be deemed murder in the first degree, it is held that the usual form of indictment will be sufficient, without regard to the manner of the commission of the crime, and that so much of the indictment as charges the murder to have been committed in the perpetration of robbery is surplusage. *State v. Meyers*, 99 Mo. 107.

1. *Titus v. State*, 49 N. J. L. 36; *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108; *Dolan v. People*, 64 N. Y. 485; *People v. Willett*, 102 N. Y. 251.

In *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108, it is held that the indictment charging murder to have been committed while the accused was engaged in the commission of a felony must describe the felony and state substantial facts showing that the accused was engaged in the commission thereof when he committed the murder charged.

**Murder in Committing Rape.** — An indictment for murder charged that the defendant, at a stated time and place, "in and upon one S. \* \* \* did commit rape, and in attempting to commit rape, and in committing rape in and upon her, the said S., did kill the said S., contrary," etc. This was held to be fundamentally defective, for if it was necessary to show a rape

as one of the constituents of the offense of murder, such crime should have been pleaded with the same formality as is requisite when it forms the sole basis of an indictment. *Titus v. State*, 49 N. J. L. 36, 9 Crim. L. Mag. 353.

**Murder in Commission of Grand Larceny.** — An indictment for murder in the first degree alleged to have been committed while defendant was engaged in the commission of grand larceny averred that the defendant "did feloniously steal, take, and carry away" certain property, which was specifically described, and its value stated at a sum which was more than twenty-five dollars, and its ownership was also stated. It was held that the counts contained a sufficient averment of the crime of grand larceny. *People v. Willett*, 102 N. Y. 251.

**Murder in Perpetration of Robbery.** — Where the deceased was killed by the derauling of a train of cars occasioned by the act of defendant, and defendant after such derailment robbed certain parties on said train, and the indictment alleged such facts, it was held that such indictment was not uncertain, and that it sufficiently charged a murder committed in the perpetration of robbery. *Williams v. State*, 30 Tex. App. 354.

2. *Titus v. State*, 49 N. J. L. 36. See also cases cited in the preceding note.

3. *California.* — *People v. King*, 27 Cal. 507; *People v. Dolan*, 9 Cal. 576; *People v. Lloyd*, 9 Cal. 54; *People v. Vance*, 21 Cal. 400.

*Michigan.* — *Cargen v. People*, 39 Mich. 549; *Sneed v. People*, 38 Mich. 248.

*Minnesota.* — *State v. Dumphey*, 4 Minn. 438; *State v. Ryan*, 13 Minn. 370; *State v. Lautenschlager*, 22 Minn. 514.

drawn by the jury from the facts averred and proved.<sup>1</sup>

**Surplusage.** — The indictment will not, however, be held bad for the reason that it does designate the degree of the offense, since such allegation may be treated as surplusage.<sup>2</sup>

**Manslaughter and Murder.** — Where the defendant is charged in the indictment with the crime of manslaughter, but such indictment

*Montana.* — Territory *v.* Stears, 2 Mont. 327; Territory *v.* Johnson, 9 Mont. 30.

*New Jersey.* — Graves *v.* State, 45 N. J. L. 203.

*New Mexico.* — Territory *v.* O'Donnell, 4 N. Mex. 66.

*New York.* — Cox *v.* People, 19 Hun (N. Y.) 430.

*Oregon.* — State *v.* Marple, 15 Oregon 205.

*Pennsylvania.* — White *v.* Com., 6 Binn. (Pa.) 179.

*Tennessee.* — Williams *v.* State, 3 Heisk. (Tenn.) 37; Alexander *v.* State, 3 Heisk. (Tenn.) 475.

*Virginia.* — Wicks *v.* Com., 2 Va. Cas. 387; Com. *v.* Miller, 1 Va. Cas. 310.

*Washington.* — Leschi *v.* Territory, 1 Wash. Ter. 23.

*West Virginia.* — State *v.* Schnelle, 24 W. Va. 767.

*Wisconsin.* — Hogan *v.* State, 30 Wis. 428.

*United States.* — Davis *v.* Utah, 151 U. S. 262.

**The Indictment Must Set Out the Facts** constituting the crime of murder, but after having done so it is not necessary to aver that the defendant was guilty of murder in the first degree. Alexander *v.* State, 3 Heisk. (Tenn.) 475.

In Davis *v.* Utah, 151 U. S. 262, it is held that, under a statute defining "murder" as it is defined at common law, and establishing degrees of the crime, it is sufficient to allege facts showing a murder, without indicating in terms the degree of the crime, leaving that to be determined by the jury, or by the judge in case of confession.

**Essential Descriptive Words Sufficient.** — In an indictment for murder in the first degree it is not necessary to charge in terms "murder in the first degree," but it will be sufficient if the descriptive words essential to the offense are used. Williams *v.* State, 3 Heisk. (Tenn.) 37. See also Hogan *v.* State, 30 Wis. 428.

**Distinguishing Circumstances.** — In Leschi *v.* Territory, 1 Wash. Ter. 13, it is held that peculiar circumstances

distinguishing murder in the first degree need not be set out in the indictment.

**Contra**, as holding that the degree of the offense must be set out in the indictment, see State *v.* Hamlin, 47 Conn. 117; State *v.* Smith, 38 Conn. 398; Smith *v.* State, 50 Conn. 193. See also Fitzgerald *v.* People, 49 Barb. (N. Y.) 122.

In Connecticut, under the statute providing that "in all indictments for murder the degree of the crime charged shall be alleged," it is held that murder in the first degree may be charged in two ways, either by alleging that the murder was committed wilfully, deliberately, and premeditatedly, or by adding to the common-law indictment the averment that it was murder in the first degree. State *v.* Hamlin, 47 Conn. 95. In this case the court said: "Where the indictment charges the crime to have been committed by the defendants feloniously, wilfully, deliberately, premeditatedly, and of their malice aforethought, \* \* \* it is equivalent to an allegation in an indictment in the common-law form that the crime charged therein is murder in the first degree, and is therefore sufficient." See also Smith *v.* State, 50 Conn. 193, in which the court said: "As the degree of the crime depends upon the degree or kind of malice, an allegation that the offense charged is murder in the first degree necessarily charges that the offense was committed deliberately and with premeditation, and *vice versa*."

1. Davis *v.* Utah, 151 U. S. 262; State *v.* Schnelle, 24 W. Va. 767. See also cases cited in the preceding note.

2. People *v.* King, 27 Cal. 507; People *v.* Vance, 21 Cal. 400; People *v.* Nichol, 34 Cal. 211; People *v.* Dolan, 9 Cal. 576.

**Designation to Be Disregarded.** — "If the grand jury undertake to designate the degree, such designation is to be disregarded. The trial jury may, notwithstanding [the fact that the indictment charges murder in the second

states facts constituting the crime of murder, the defendant cannot complain of the error, it being favorable to him.<sup>1</sup>

*n.* CONCLUSION. — As to the proper conclusion of indictments for homicide at common law and under the statute, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS. For the necessary averments in the conclusion, as, for instance, the averment of malice aforethought, deliberation, premeditation, etc., see *supra*, V. 4. *a.* Intent.

**5. Joinder of Counts** — *a.* CHARGING DIFFERENT MODES OF DEATH. — Where the mode of the death or the means causing it are uncertain, the indictment should contain as many counts as may be necessary to set out inconsistent modes of death or the different means supposed to have been used.<sup>2</sup> The object of this is fully to meet all the evidence which may be produced on the trial.<sup>3</sup> Where this is done, the indictment charges but a single

degree], find the defendant guilty in the first degree, if, in their judgment, the testimony is sufficient." *People v. Nichol*, 34 Cal. 211.

1. *Camp v. State*, 25 Ga. 689.

2. *Indiana*. — *Joy v. State*, 14 Ind. 139; *Brown v. State*, 105 Ind. 385; *Hudson v. State*, 1 Blackf. (Ind.) 317; *Merrick v. State*, 63 Ind. 327.

*Iowa*. — *State v. Dillon*, 74 Iowa 653.

*Louisiana*. — *State v. Johnson*, 10 La. Ann. 456.

*Massachusetts*. — *Com. v. Desmarteau*, 16 Gray (Mass.) 1; *Com. v. Thompson*, 159 Mass. 56.

*Michigan*. — *People v. McDowell*, 63 Mich. 229.

*Missouri*. — *State v. Blan*, 7 Mo. App. 582.

*New Jersey*. — *Hunter v. State*, 40 N. J. L. 495.

*New York*. — *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108; *Lanergan v. People*, 39 N. Y. 39; *People v. Buchanan*, 145 N. Y. 1.

*South Carolina*. — *State v. Norton*, 28 S. Car. 572.

*Texas*. — *Gonzales v. State*, 5 Tex. App. 584; *Dalton v. State*, 4 Tex. App. 333; *Dill v. State*, 1 Tex. App. 279.

*Virginia*. — *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Smith v. Com.*, 21 Gratt. (Va.) 809.

*England*. — *Rex v. Hindmarsh*, 2 Leach C. C. 569.

"It is a well-settled principle of criminal pleading and practice that several modes of death, inconsistent with each other, may be set out in the same indictment. This grows out of the very necessity of the case. The indictment

is but the charge or accusation made by the grand jury with as much certainty and precision as the evidence before them will warrant. In many cases the mode of death is uncertain, while the homicide is beyond question. Every cautious pleader, therefore, will insert as many counts as will be necessary to provide for every possible contingency in the evidence. If the mode of death is uncertain, he may and ought to state it in different counts, in every possible form, to correspond with the evidence at the trial as to the mode of death." *Smith v. Com.*, 21 Gratt. (Va.) 811.

An indictment for murder is not bad because it charges the commission of the offense in separate counts in different ways; the charge in the second count resumes that of the first. Nor will the indictment be affected because the proof establishes the commission of the crime by other means than thus charged. *People v. Buchanan*, 145 N. Y. 28.

**Death by Burning and Beating.** — In the case of *Joy v. State*, 14 Ind. 139, it was held that counts alleging the murder to have been committed by burning, by beating, and by both burning and beating, might be joined.

3. *Smith v. Com.*, 21 Gratt. (Va.) 809; *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108; *Rex v. Hindmarsh*, 2 Leach C. C. 569.

"To a person unskilled and unpracticed in legal proceedings it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document..

offense,<sup>1</sup> and the state cannot be required to elect upon which count the defendant shall be tried.<sup>2</sup> In some states it is provided by statute that the different means or instruments may be averred either in separate counts or in the alternative in the same count.<sup>3</sup>

*b. CHARGING DIFFERENT OFFENSES.*—An indictment for homicide may, in different counts, charge the offense committed to have been murder and manslaughter,<sup>4</sup> and the prosecution

But it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts, and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined." *Com. v. Webster*, 5 Cush. (Mass.) 321.

1. *Hunter v. State*, 40 N. J. L. 495; *Donnelly v. State*, 26 N. J. L. 463, 601; *Gonzales v. State*, 5 Tex. App. 584; *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108.

"Each several count, in a well-drawn indictment, imports, according to its terms, a charge of a distinct offense, and there is no interdependence exhibited, in any wise, between the several counts. Thus, in charging a homicide, one count may lay the killing to have been done with an axe; another may allege that the instrument used was a knife, and a third may describe it as a sword. The act of killing is thus differentiated by descriptive *indicia*, so that, read literally, such counts are always incongruous, but their literal sense is not their legal sense. They are regarded in law as charging in substance the same offense,

the incidents only being varied for the technical purpose of harmonizing, even in details, the described crime with the possible proofs." *Beasley, C. J.*, in *Hunter v. State*, 40 N. J. L. 495.

2. *Joy v. State*, 14 Ind. 139; *Merrick v. State*, 63 Ind. 327; *Lanergan v. People*, 39 N. Y. 39; *State v. Johnson*, 10 La. Ann. 456; *Gonzales v. State*, 5 Tex. App. 584; *State v. Morton*, 28 S. Car. 572.

3. *Hornsby v. State*, 94 Ala. 55; *Jackson v. State*, 74 Ala. 26; *Kilgore v. State*, 74 Ala. 1; *Phillips v. State*, 68 Ala. 469.

**The Purpose of Such Statutes** is to dispense with a multiplicity of counts by permitting one by alternative averments of different offenses to serve the purpose of several counts. It follows that each alternative averment must present an indictable offense or the indictment is insufficient, as at common law a separate count not presenting an indictable offense will be bad. *Hornsby v. State*, 94 Ala. 55. See also *Horton v. State*, 53 Ala. 493.

**Striking or Choking.**—In the case of *Wilson v. State*, 84 Ala. 426, it was held that an indictment alleging the commission of a murder by striking in the head or by choking with a cord is good.

4. *Henry v. State*, 33 Ala. 389; *People v. Sessions*, 58 Mich. 594; *People v. McCarthy*, 110 N. Y. 309; *Kane v. Com.*, 109 Pa. St. 541; *Com. v. Bilderback*, 2 Pars. Eq. Cas. (Pa.) 447.

**Averment of Former Conviction.**—A count of manslaughter may properly be joined to a count of murder, with an averment that the prisoner had previously been convicted of manslaughter, where it is sought to impose, in case the prisoner is found guilty of manslaughter only, the double punishment provided by statute for a second conviction of manslaughter. *Kane v. Com.*, 109 Pa. St. 541.

**Involuntary Manslaughter—Felonious Homicide.**—A count for involuntary manslaughter may be joined in an indictment for felonious homicide. *Com.*

cannot ordinarily be put to its election as to the count upon which it will proceed.<sup>1</sup>

c. CHARGING AS PRINCIPAL AND AS ACCESSORY. — Where it is doubtful whether the defendant was principal or accessory in the commission of the homicide, he may be charged in one count of the indictment as principal and in another as accessory.<sup>2</sup> The same rule will obtain where there are two or more defendants, and one count may charge all as principals, and another may charge a part as principals and the others as accessories before the fact.<sup>3</sup> Such indictment does not charge two offenses, nor are the counts inconsistent.<sup>4</sup>

6. Indictment for Two or More Homicides by the Same Act. — An indictment for homicide may charge the killing of two or more persons by the same act, in a single count, without violating the rule against duplicity.<sup>5</sup> The same reason may exist for charging

*v. Bilderback*, 2 Pars. Eq. Cas. (Pa.) 447.

1. Charging Different Degrees. — In *People v. McCarthy*, 110 N. Y. 309, two of the counts in the indictment charged manslaughter in the first degree, and another count charged manslaughter in the second degree; only one act of killing, however, was charged. It was held, under the N. Y. Code Crim. Pro., § 279, which allows one act constituting different crimes to be charged in the different counts, that the prosecution would not be required to elect on which count it would proceed.

As Ground for Quashing Indictment. — In *People v. Sessions*, 58 Mich. 594, the defendant was bound over on a charge of murder, and information subsequently filed charged in the first count murder, and in the second count the statutory crime of manslaughter by causing death by abortion. It was held that a motion to quash the second count was properly refused.

2. *State v. Hamlin*, 47 Conn. 95; *People v. Valencia*, 43 Cal. 552. Compare *Simms v. State*, 10 Tex. App. 131. And see article ACCESSORIES, vol. 1, p. 71.

In *Simms v. State*, 10 Tex. App. 131, the first count of the indictment for the murder of one S. charged the defendant as a principal offender, and the second charged that one P. was the principal offender and the defendant an accomplice. When the state closed its evidence in chief the defense moved that the prosecution be required to elect between the counts. In view of the rule that a party indicted as a principal can-

not be convicted as an accomplice, and *vice versa*, as well as on account of differences in the rules of evidence applicable to such diverse prosecutions. It was held that the motion should have been sustained.

3. *State v. Hamlin*, 47 Conn. 95; *Josephine v. State*, 39 Miss. 615.

See, however, *People v. Ah Hop*, 1 Idaho 698, wherein it was held that when the defendants, five in number, were indicted in one count as principals in the murder, and in another count four of them were indicted as accessories before the fact, the latter might be rejected as surplusage.

4. *State v. Hamlin*, 47 Conn. 95.

5. *Chivarrio v. State*, 15 Tex. App. 330; *Rucker v. State*, 7 Tex. App. 549; *Womack v. State*, 7 Coldw. (Tenn.) 508; *Kannon v. State*, 10 Lea (Tenn.) 386; *Forrest v. State*, 13 Lea (Tenn.) 103; *Fowler v. State*, 3 Heisk. (Tenn.) 154. But see the case of *Com. v. Starr*, 36 Pittsb. Leg. J. 334, in which it was held that a count in an indictment for manslaughter charging the killing of two persons is bad.

In *Clem v. State*, 42 Ind. 420, it was held that where two or more were killed by one and the same act, and the defendant was indicted for killing one of them, after a conviction or acquittal thereof he cannot be indicted for killing the other. In this case the court said: "If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the state cannot indict the guilty party for killing one of the persons, and after a con-

in a single count the killing of several persons, as for including in one count for larceny the whole of a number of articles stolen.<sup>1</sup>

**Distinct Offenses.** — Where, however, it appears from the testimony that the killing was by separate acts, though done at the same time, or with an intention to kill one and not both, the acts are two distinct offenses, and the defendant may require the state to elect for which offense it will proceed to try him.<sup>2</sup> Where this is not done, the objection on the ground of duplicity is too late after verdict and judgment, and it cannot be made the subject of a motion in arrest of judgment.<sup>3</sup>

### 7. Indictment of Accessories and Principals in the Second Degree—

**a. PRINCIPALS IN SECOND DEGREE.** — An indictment for murder which charges the defendant with having been the actual perpetrator of the crime will sustain a conviction if it appears from the evidence that he was a principal in the second degree,

viction or acquittal indict him for the killing of the other; for the state cannot divide that which constitutes but one crime, and make the different parts of it the bases of separate prosecutions. But when the state has prosecuted the accused for one part of the crime, she cannot again prosecute him for the other or remaining part of it."

But see *People v. Majors*, 65 Cal. 138, in which it was held that the murder of two persons by the same act constitutes two offenses, for each of which a separate prosecution will lie, and a conviction or acquittal in one case does not bar the prosecution in the other.

1. *Womack v. State*, 7 Coldw. (Tenn.) 508.

2. *Kannon v. State*, 10 Lea (Tenn.) 386.

"In order that two acts of felonious killing may constitute a single offense of murder, something more is necessary than that they should have been committed upon the same occasion or in the progress of the same affray. Without attempting to state an abstract proposition which shall serve as a test for other cases, it is sufficient now to say that if the physical acts of assault and killing are distinct, and the intention to kill one is an intention formed and existing distinct from and independently of the intention to kill the other, the two acts cannot constitute a single offense of murder." *Womack v. State*, 7 Coldw. (Tenn.) 508.

"If the evidence introduced upon the trial develop the fact that the murder of each was by a separate act, although in the same transaction and near the same time, or that there was a premedi-

tated intention to kill one of them and no intention at all to kill the other, the offenses would be distinct, and the state could be required to elect for which offense it would proceed to try the defendant." *Kannon v. State*, 10 Lea (Tenn.) 386.

The refusal by the court to require the election at any time before the jury were charged would, it has been held, be error. *Kannon v. State*, 10 Lea (Tenn.) 386. See also *Womack v. State*, 7 Coldw. (Tenn.) 508.

3. *Forrest v. State*, 13 Lea (Tenn.) 103. In this case the prisoner, being indicted on a single count for the murder of two persons named, went to trial upon the merits, and, when the testimony developed the fact that the killing of each of the two persons was by a separate blow in the same transaction, made no objection to the evidence nor moved the court to compel the state to elect for which killing it would proceed. It was held that the objection of duplicity comes too late after verdict and judgment, and that a motion in arrest of judgment would be of no avail.

In the case of *Kannon v. State*, 10 Lea (Tenn.) 386, the defendant was indicted for the murder of his wife and infant child as one act, and was found guilty of murder in the first degree as charged in the indictment, the bill of exceptions showing either that the murder of each was a separate act or that the killing was unintentional as to the child. It was held that the defendant was entitled to a separate trial for each offense although no application was made during the trial to require the state to elect for which offense it would proceed.



that is, that he was present aiding and abetting in the killing,<sup>1</sup> since the act is considered in law to be the act of all persons participating in the commission of the offense.<sup>2</sup>

*b. ACCESSORIES BEFORE THE FACT.*—It is generally held that the distinction between principal and accessory is material, and that one indicted as principal in the commission of homicide cannot be convicted as accessory before the fact, but must be indicted as an accessory before the fact.<sup>3</sup> In some jurisdictions,

1. *Brister v. State*, 26 Ala. 107; *People v. Ah Fat*, 48 Cal. 61; *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58; *Spies v. People*, 122 Ill. 1; *Thompson v. Com.*, 1 Metc. (Ky.) 13; *Com. v. Chapman*, 11 Cush. (Mass.) 422; *State v. Payton*, 90 Mo. 220. \* See also *Raiford v. State*, 59 Ala. 106; *People v. Outeveras*, 48 Cal. 19; *State v. Cockman*, 2 Winst. L. (N. Car.) 95; *State v. Fleay*, 2 Brev. (S. Car.) 338; *State v. Anthony*, 1 McCord L. (S. Car.) 285; *Hawley v. Com.*, 75 Va. 847; *State v. Cameron*, 2 Chand. (Wis.) 172; *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207. And see in general article ACCESSORIES, vol. 1, p. 66.

**Two Defendants—One Mortal Wound.**—An indictment charging two defendants with murder stated that with guns, etc., they shot deceased, giving to him "one mortal wound." It was held that there was no inconsistency, for both defendants were equally responsible. *State v. Payton*, 90 Mo. 220.

**Perpetrator Unknown.**—In an indictment against several for murder, some of the counts charged the defendants with having advised, encouraged, aided and abetted a particular person named in the perpetration of the crime, and evidence was introduced to show that the particular person named did perpetrate the crime. Other counts charged the defendants with having advised, encouraged, aided and abetted an unknown person in the commission of the crime, and proof was given which tended to show that the perpetrator of the crime was an unknown person. In this condition of the pleadings and the proofs, it was not required of the trial court that it should so direct the jury as to restrict them to the consideration of the case on the theory that the crime was committed by the particular person named, and to omit any reference to the other theory that it was perpetrated by an unknown person. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 9 Crim. L. Mag. 829.

**Murder by Rioters.**—Where a murder is committed by a number of persons engaged in a riot, an indictment against two only of the rioters, charging that the mortal injury was inflicted by the prisoners, will be sustained by proof that it was inflicted by others of the rioters, whether they are known or unknown. *State v. Jenkins*, 14 Rich. L. (S. Car.) 215. See also *Mackalley's Case*, 9 Coke 67*b*; *Sissinghurst's Case*, 1 Hale P. C. 462.

2. *Brister v. State*, 26 Ala. 107; *State v. Jenkins*, 14 Rich. L. (S. Car.) 215.

Thus where the indictment charges that A gave the mortal blow and that B and C were present aiding and abetting, while the evidence shows that B struck the blow and that A and C were present aiding and abetting, such variance is not material, for the blow is adjudged in law to be the stroke of only one of them. *Brister v. State*, 26 Ala. 107. See also *State v. Cockman*, 2 Winst. L. (N. Car.) 95.

3. See article ACCESSORIES AND THE LIKE, vol. 1, p. 68; *Walrath v. State*, 8 Neb. 80. See also *State v. Houston*, 19 Mo. 211.

**Accessories—Illinois.**—Under the statute of Illinois, the man who, "not being present, aiding, abetting, or assisting, hath advised, encouraged, aided, or abetted the perpetration of a crime," may be considered as the principal in the commission of the crime, may be indicted as principal, and may be punished as such. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with committing the crime as principal. Then if upon the trial the proof shows that the person charged aided, abetted, assisted, advised, or encouraged the perpetration of the crime, the charge that he committed it as principal is established against him. It would make no difference whether the proof

however, the distinction between principals and accessories before the fact is expressly abolished.<sup>1</sup> Where this is the case an accessory before the fact in the commission of a homicide may be indicted and tried as a principal in the first degree.<sup>2</sup>

**Charging with Assisting, etc., and as Accessory.**—An indictment which charges that the defendant assisted and abetted the killing, and also charges him with being an accessory before the fact, is fatally inconsistent. Such an indictment charges the defendant with being both absent and present at the same time.<sup>3</sup>

**8. Joint Indictment**—*a. WHO MAY BE JOINTLY INDICTED.*—Where two or more parties have participated in the homicide they may be jointly indicted in one count for the commission of the crime.<sup>4</sup>

**Particular Acts.**—It is not necessary in such indictment to set out the particular acts of each of the participants separately.<sup>5</sup>

showed that he so aided and abetted a known or an unknown principal. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 9 Crim. L. Mag. 829.

An indictment charging S. H. with inciting, etc., S. H. to a murder, instead of W. S., thus charging him with inciting himself, is a fatal mistake. *State v. Houston*, 19 Mo. 211.

1. See article ACCESSORIES AND THE LIKE, vol. 1, p. 69; California Penal Code, §§ 31, 971.

2. *People v. Outeveras*, 48 Cal. 19; *Campbell v. Com.*, 84 Pa. St. 187; *Brandt v. Com.*, 94 Pa. St. 290; *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58.

**May Allege Matter According to the Facts.**—In *State v. Payton*, 90 Mo. 220, it is held that, although the distinction is abolished, the accessory may still be treated as such, and that the indictment may either charge the accessory as a principal or allege the matter according to the facts and charge him as accessory.

3. *State v. Sales*, 30 La. Ann. 916.

4. *State v. Zeibart*, 40 Iowa 169; *Mask v. State*, 32 Miss. 405; *State v. Payton*, 90 Mo. 220; *State v. Arden*, 1 Bay (S. Car.) 487; *State v. Bradley*, 9 Rich. L. (S. Car.) 168; *Hampton v. State*, 45 Tex. 154. See also *State v. Conley*, 39 Me. 78; *State v. Johnson*, 37 Minn. 493; *State v. Blan*, 69 Mo. 317; *Bixbee v. State*, 6 Ohio 86; *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; *Hash v. Com.*, 88 Va. 177; *St. Clair v. U. S.*, 154 U. S. 134; *U. S. v. Ball*, 163 U. S. 662; *U. S. v. White*, 4 Mason (U. S.) 158.

An indictment against two or more persons may charge the act done by

them collectively. *State v. Johnson*, 37 Minn. 493.

**The Word "Jointly"** need not be used in describing the offense. *Hash v. Com.*, 88 Va. 177.

**"Acted Together"—Surplusage.**—In *Watson v. State*, 28 Tex. App. 34, it was held that the words "acted together," in an indictment which charged that the defendant and another acted together in murdering deceased, were surplusage and not descriptive of the offense, and that it was proper to charge that defendant was guilty if he, "acting by himself or acting together or with" such other person, killed the deceased.

**Charging Offense as Committed "of His Malice Aforethought."**—In *State v. Jones*, 45 La. Ann. 1454, the indictment charged that two persons, on one D., "of his malice aforethought did make an assault on him, the said D., unlawfully, feloniously, and of his malice aforethought, did then and there kill and murder." Such indictment was held bad, since, according to grammatical construction, the word "his," in both of the instances in which it is used as above shown, would refer to the nearest antecedent, to wit, the deceased.

5. *State v. Payton*, 90 Mo. 220; *State v. Blan*, 69 Mo. 317; *Thompson v. Com.*, 1 Metc. (Ky.) 15; *Williams v. State*, 42 Tex. 392.

In the case of *State v. Payton*, 90 Mo. 220, the indictment, after alleging an assault, proceeded to state that the defendants, with rifle guns, loaded with powder and leaden balls, "him, the

Should it, however, be attempted to set out specially the particular acts done or part performed by them respectively, and the facts so alleged as to some of them are insufficient, the indictment as to them should be quashed.<sup>1</sup>

**b. TRIAL UNDER JOINT INDICTMENT.**—Under a joint indictment one defendant alone may be tried,<sup>2</sup> or all of them may be tried, and one may be convicted of the crime of the degree charged and the other of the lower degree of crime,<sup>3</sup> or one defendant may be convicted and the other may be acquitted.<sup>4</sup>

**Separate Trial Not a Matter of Right.**—Defendants jointly indicted for murder are not, as a matter of right, entitled to a separate trial upon request. It is a matter of discretion, to be judged by the court under all the circumstances of the case.<sup>5</sup>

**9. Conviction of a Degree Lower than That Charged**—Generally.—Since in murder, as in the case of other analogous crimes, the greater offense includes the less,<sup>6</sup> an indictment sufficient to sus-

said C. M., feloniously," etc., "by means of the powder and balls aforesaid, did shoot, penetrate, and wound, and thereby then and there give to him, said C. M., one mortal wound of the width," etc. Such indictment was held sufficient, the court saying: "There can be no doubt but the defendants were properly included in the same indictment, and both properly charged as principals." See also *State v. Dalton*, 27 Mo. 14.

1. *Williams v. State*, 42 Tex. 392. See also *Johnson v. State*, 1 Tex. App. 130; *Davis v. State*, 2 Tex. App. 184.

In *Williams v. State*, 42 Tex. 392, the court said: "It has been repeatedly held that it is not necessary to allege in the indictment the facts relied upon to show the defendant to be a principal, although the offense with which he is charged may not have been actually committed by him. But if he is a principal offender by reason of the part performed by him in the commission of the offense, he may be convicted under an indictment charging him directly with its actual commission. If, however, the pleader, instead of proceeding under a general indictment, prefers to do so under a special bill charging each of the defendants with the particular acts done or part performed by them respectively, should the facts alleged as to some of them be insufficient to show their guilt, the indictment as to them must be held bad."

2. *State v. Bradley*, 9 Rich. L. (S. Car.) 168.

3. *State v. Arden*, 1 Bay. (S. Car.) 487; *Mask v. State*, 32 Miss. 405.

4. *Hampton v. State*, 45 Tex. 154. In this case the judgment was reversed for the reason that the trial court refused to charge the jury that where several defendants are tried together the jury may convict such of them as they deem guilty and acquit the others.

5. *U. S. v. White*, 4 Mason (U. S.) 158; *U. S. v. Ball*, 163 U. S. 662; *Redman v. State*, 1 Blackf. (Ind.) 431; *State v. Conley*, 39 Me. 78; *Bixbee v. State*, 6 Ohio 86.

**Court May Suggest Separate Trial.**—In *Shular v. State*, 105 Ind. 289, the court said: "It is a mistake to suppose that one jointly indicted with another has a right to a joint trial; on the contrary, at common law the prosecution might demand separate trials, and under our statute any defendant may demand that a separate trial be awarded him. The court, when justice requires it, may suggest in express words the propriety of separate trials."

In *Illinois*, where two persons were indicted for murder it was held that they should be separately tried, where, under the circumstances, evidence competent against only one would be very damaging against the other. *White v. People*, 81 Ill. 333.

**Several Right of Challenge.**—In *U. S. v. White*, 4 Mason (U. S.) 158, it was held that the right of a separate trial is not a necessary result of the several right of challenge, if the prisoner chooses to claim it.

6. *State v. Dowd*, 19 Conn. 388; *State*

tain a conviction of murder in the first degree will be sufficient to sustain a conviction of murder in any lower degree.<sup>1</sup>

*v. Huber*, 8 Kan. 447; *Giskie v. State*, 7. Wis. 612.

1. *Alabama*. — *Noles v. State*, 24 Ala. 689; *Sylvester v. State*, 72 Ala. 201.

*Arkansas*. — *McPherson v. State*, 29 Ark. 225; *McAdams v. State*, 25 Ark. 405; *Allen v. State*, 37 Ark. 433.

*California*. — *People v. Dolan*, 9 Cal. 576.

*Connecticut*. — *State v. Dowd*, 19 Conn. 388; *State v. Smith*, 38 Conn. 398.

*Florida*. — *Potsdamer v. State*, 17 Fla. 895.

*Iowa*. — *State v. Baldwin*, 79 Iowa 714.

*Kansas*. — *State v. Huber*, 8 Kan. 447.

*Kentucky*. — *Buckner v. Com.*, 14 Bush (Ky.) 601; *Conner v. Com.*, 13 Bush (Ky.) 714.

*Maryland*. — *Davis v. State*, 39 Md. 355.

*Massachusetts*. — *Com. v. Herty*, 109 Mass. 348.

*Michigan*. — *People v. Doe*, 1 Mich. 451.

*Minnesota*. — *State v. Stokely*, 16 Minn. 282; *State v. Lessing*, 16 Minn. 75.

*Missouri*. — *McGee v. State*, 8 Mo. 495; *State v. Dieckman*, 11 Mo. App. 538; *State v. Gabriel*, 88 Mo. 631; *State v. Sloan*, 47 Mo. 604.

*Montana*. — *Territory v. Stears*, 2 Mont. 324; *State v. Northrup*, 13 Mont. 538.

*New Mexico*. — *Tenorio v. Territory*, 1 N. Mex. 279.

*New York*. — *McNevens v. People*, 61 Barb. (N. Y.) 307; *Keefe v. People*, 40 N. Y. 348.

*Ohio*. — *Heller v. State*, 23 Ohio St. 582.

*Oregon*. — *State v. Grant*, 7 Oregon 414; *State v. Wintzingerode*, 9 Oregon 153.

*Virginia*. — *Livingston v. Com.*, 14 Gratt. (Va.) 592; *Cluverius v. Com.*, 81 Va. 787.

*Wisconsin*. — *Giskie v. State*, 71 Wis. 612.

In *Davis v. State*, 39 Md. 355, it was held that when a person is indicted for murder in the technical language of the common law he is charged with a crime which in its proper sense includes all circumstances of aggravation, and as all minor degrees are included in the major, he is liable to be convicted

of the inferior as well as of the higher grades of that offense.

"Under an indictment charging murder the trial jury are required to designate the degree of guilt, and may find any offense included in the charge, and they have equally this privilege if the indictment charge murder in the first degree, as the offense of murder in the second degree and manslaughter are necessarily included in it." *People v. Dolan*, 9 Cal. 584.

**Indictment in the First Degree — Prosecution for Lower Offense.** — Under Rev. Stat. *Missouri*, 1889, § 3949, providing that upon an indictment for any offense consisting of different degrees the jury may find the accused not guilty of the offense charged, and may find him guilty of any inferior degree of such offense, a person indicted for murder in the first degree may, by permission of the court, be prosecuted for murder in the second degree alone. *State v. Talmage*, 107 Mo. 543.

**Murder by Poisoning — Conviction in Second Degree.** — Under an indictment for committing murder by poisoning, the jury may find the accused guilty of murder in the second degree. *State v. Dowd*, 19 Conn. 392. In this case the court said: "In most of the cases mentioned in the statute as constituting the crime of murder in the first degree, the lesser crime is manifestly included. Thus if the charge were that the murder was committed by the accused while lying in wait, the jury might find that it was not so committed, and convict him only of the lesser offense."

\* \* \* Now if the same rule applies to a case where the charge is for murder by poisoning, then the conviction, in this case, was legal. The language of the statute strongly favors such a construction. It provides that murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, shall be murder in the first degree, thereby implying that in all cases the crime must be the result of a wilful, deliberate, and premeditated act. Hence if any case can be supposed where murder may be committed by means of poison, and not be the result of such an act, then a conviction of murder in the second degree may be legal."

**Voluntary Manslaughter.**—So, also, under an indictment for murder the defendant may be convicted of voluntary manslaughter,<sup>1</sup> although there is no count for manslaughter in the indictment.<sup>2</sup>

**Involuntary Manslaughter.**—There can, however, as a rule, be no conviction of involuntary manslaughter unless the indictment distinctly charges that degree of the offense.<sup>3</sup>

1. *Arkansas*.—McPherson v. State, 29 Ark. 225.

*California*.—People v. Dolan, 9 Cal. 576.

*Colorado*.—Packer v. People, 8 Colo. 361.

*Georgia*.—Reynolds v. State, 1 Ga. 222.

*Indiana*.—Carrick v. State, 18 Ind. 409; Dukes v. State, 11 Ind. 557, 71 Am. Dec. 370; Goff v. Prime, 26 Ind. 196.

*Iowa*.—State v. Gordon, 3 Iowa 410; State v. White, 45 Iowa 325; State v. Tweedy, 11 Iowa 350.

*Kansas*.—Roy v. State, 2 Kan. 405; State v. Huber, 8 Kan. 447.

*Kentucky*.—Buckner v. Com., 14 Bush (Ky.) 601; Conner v. Com., 13 Bush (Ky.) 714; Patterson v. Com., (Ky. 1887) 5 S. W. Rep. 765.

*Louisiana*.—State v. Salter, 48 La. Ann. 197.

*Mississippi*.—King v. State, 5 How. (Miss.) 730.

*Missouri*.—State v. Sloan, 47 Mo. 604; Plummer v. State, 6 Mo. 231; Watson v. State, 5 Mo. 497.

*New York*.—People v. McDonnell, 92 N. Y. 657.

*Oregon*.—State v. Grant, 7 Oregon 414.

*South Carolina*.—State v. Putnam, 18 S. Car. 175.

*Tennessee*.—Burnett v. State, 14 Lea (Tenn.) 439.

*Texas*.—Peterson v. State, 12 Tex. App. 650.

*Virginia*.—Livingston v. Com., 14 Gratt. (Va.) 592.

*Washington*.—White v. Territory, 3 Wash. Ter. 397.

*United States*.—U. S. v. Meagher, 37 Fed. Rep. 875.

In Roy v. State, 2 Kan. 405, it was held that a charge of murder in an indictment necessarily included the crime of manslaughter in the third degree; that a person so charged might be found guilty of manslaughter; that the indictment gave notice to the accused of the charge of the crime of which he was found guilty; and that the substantive

offense is the wrongful killing of a human being, and the attendant facts determine the grade of the crime.

In *Louisiana* an indictment for murder will sustain a conviction for manslaughter under the statutes (La. Rev. Stat., §§ 784, 785) providing that whoever commits wilful murder shall, on conviction, suffer death, and also providing that there shall be no crime under the name of murder in the second degree; but that on trial for murder the jury may find the defendant guilty of manslaughter. State v. Salter, 48 La. Ann. 197.

In *Colorado* it is held that where, after the finding of an indictment for murder, the change in the law made the offense similar to that charged manslaughter only, the act containing no saving clause, the trial for manslaughter could be had under such indictment. Packer v. People, 8 Colo. 361.

**Jury May Negative Averment of Malice.**—In State v. Dowd, 19 Conn. 392, the court said: "Upon an indictment for murder, the jury may negative the averment that the act was done with malice aforethought, and convict of the crime of manslaughter." See also State v. Nichols, 8 Conn. 496; Rex v. Hollingberry, 4 B. & C. 329, 10 E. C. L. 346; Rex v. Hunt, 2 Campb. 583.

**Death from Disease Superinduced.**—In Burnett v. State, 14 Lea (Tenn.) 439, under an indictment charging murder by blows, the defendant was convicted of manslaughter on evidence showing that the death was caused by pleuropneumonia superinduced by the wounds and blows inflicted by him.

2. Reynolds v. State, 1 Ga. 229.

3. Bruner v. State, 58 Ind. 159; Brown v. State, 110 Ind. 486; Com. v. Bilderback, 2 Pars. Eq. Cas. (Pa.) 447; Walters v. Com., 44 Pa. St. 135. In this case the court said: "When the officers of the commonwealth shall be of opinion that a homicide is but manslaughter, and the degree is doubtful, the statute allows an indictment, charging the offense both as voluntary and

**Assault with Intent.** — An indictment for murder will also sustain a conviction of assault with intent to murder,<sup>1</sup> where the indictment embraces the charge of assault.<sup>2</sup>

**Effect of Conviction in Lower Degree.** — Where the indictment charges

involuntary, or either. But it is necessary, in order to sustain a conviction for involuntary manslaughter, that it be distinctly charged as such. Since the case of *Com. v. Gable* [7 S. & R. (Pa.) 423] it must be charged as a misdemeanor, and is therefore not proper to form a count in an indictment for felonious homicide, excepting in the case of an indictment for voluntary manslaughter, where it may be joined by force of the statute."

*Contra.* — *Buckner v. Com.*, 14 Bush (Ky.) 601; *Conner v. Com.*, 13 Bush (Ky.) 714. See also *Reynolds v. State*, 1 Ga. 222.

**Killing by Wilfully Striking, etc.** — In *Kentucky* it was held that the statutory offense of killing by wilfully striking, etc., is not included in the crime of murder, and is not a degree of the offense of homicide, and therefore an indictment for homicide will not sustain the conviction of such statutory offense; but the defendant may be convicted of either of the degrees of manslaughter. *Conner v. Com.*, 13 Bush (Ky.) 714.

The defendant may be guilty of involuntary manslaughter without being guilty of such statutory offense, but not conversely. *Buckner v. Com.*, 14 Bush (Ky.) 601. In this case the court said: "Where the indictment is for murder, the accused may be convicted of any degree of homicide as fixed by the common law, viz., murder, voluntary manslaughter, or involuntary manslaughter; but under such indictment he cannot be convicted of the crime defined and denounced by the statute. The indictment and trial for murder is an election to proceed for a common-law homicide, and the trial must be conducted as if the statutory offense had not been created."

1. *Peterson v. State*, 12 Tex. App. 650. In this case the court held: "In murder there is always an assault to commit murder. When an indictment charges murder, it necessarily embraces an assault to commit murder. The Code of Criminal Procedure, art. 714, provides that murder includes all the lesser degrees of culpable homicide, and also an assault with intent to com-

mit murder. It appears to us that this article of the code is a conclusive answer to the position assumed by the learned counsel for defendant. We have carefully examined the authorities cited by them upon this question, and we do not think they conflict with the conclusion we have arrived at; and that is that in charging murder all the elements which make the offense of assault with intent to murder are necessarily included."

**Maliciously Wounding.** — If, on a trial for murder or manslaughter, there be any evidence that the wound was not in itself dangerous, and that death resulted from the improper treatment, or from disease contracted subsequently, and not resulting from the wound, the jury must be so instructed, and may find the accused guilty of maliciously wounding under the Ky. Gen. Stat., c. 29, art. 6, § 2, or of wounding in sudden affray under art. 17. *Bush v. Com.*, 78 Ky. 268.

2. *Scott v. State*, 60 Miss. 268. In this case the court said: "Our statutory indictment for murder does not embrace in words a charge of an assault, nor is an assault necessarily included in an indictment for murder, since murder may be committed without the commission of an assault, as by laying poison or digging a pitfall. The point is distinctly presented and decided in the case cited *supra* [*Moore v. State*, 59 Miss. 25]. When the draftsman of an indictment adopts the statutory form of an indictment for murder, he must add a count for assault and battery if he desires to fall back upon the lesser offense if the party should be acquitted of the greater."

In *Moore v. State*, 59 Miss. 25, cited in the foregoing case, it was held that "where an indictment for murder or manslaughter charges an assault and battery or an assault, the verdict may be for either according to the proof; but under an indictment for murder or manslaughter \* \* \* it is not allowable to render a verdict for an assault and battery, or an assault, neither of which is charged in terms by the indictment or necessarily included in the offense charged."

murder and the defendant is convicted of a lower offense, the verdict is an acquittal of any higher offense,<sup>1</sup> and the defendant cannot, in a new trial, be tried for a higher offense.<sup>2</sup>

**VI. SERVICE OF INDICTMENT ON DEFENDANT** — *Necessity For.* — It is provided by statute in certain states that one indicted for homicide is entitled to the service upon him of a copy of the indictment before arraignment.<sup>3</sup> In other states it is held that such copy must be served before the trial.<sup>4</sup>

**Waiver.** — The defendant must, however, object to the omission of service before the trial. By going to trial without objection he waives service and cannot move in arrest of judgment on the ground of the omission.<sup>5</sup>

**VII. ARRAIGNMENT** — *Necessity of.* — In homicide, as in the case of other crimes, the defendant should be arraigned in the trial court, so that he may have an opportunity to plead to the indictment.<sup>6</sup> In the case of a capital offense, the arraignment cannot be waived by the defendant.<sup>7</sup>

**VIII. PLEAS** — For a full treatment of the pleas to the indictment in all criminal cases, see the articles ARRAIGNMENT AND PLEA, vol. 2, p. 760; FORMER CONVICTION OR ACQUITTAL, vol. 9, p. 630.

**IX. TRIAL.** — See, for a treatment of this subject, articles JURIES and TRIAL; as to continuances, see article CONTINUANCES, vol. 4, p. 822.

1. *State v. Ross*, 34 Ark. 376; *Packer v. People*, 8 Colo. 361; *Barnet v. People*, 54 Ill. 325; *Conner v. Com.*, 13 Bush (Ky.) 714; *State v. Lessing*, 16 Minn. 75; *Cheek v. State*, 4 Tex. App. 444.

2. *State v. Ross*, 34 Ark. 376; *Packer v. People*, 8 Colo. 361; *Brennan v. People*, 15 Ill. 511.

3. *Minich v. People*, 8 Colo. 440. In this case the court held that since the statute in *Colorado* requires that a defendant charged with a felony shall be furnished, prior to his arraignment, with a copy of the indictment, the omission to read the indictment at the time of his arraignment, the other requisites being complied with, and his attorney in his presence expressly waiving such reading, is not error.

**Names of Witnesses and Jurors.** — As to serving defendant with these, see articles INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *post*, this volume; JURY.

4. *Scott v. State*, 37 Ala. 117; *McCoy v. State*, 46 Ark. 141; *Fouts v. State*, 8 Ohio St. 98; *State v. Winningham*, 10 Rich. L. (S. Car.) 257; *Johnson v. State*, 4 Tex. App. 268.

Where a prisoner under an indictment

for murder wishes to avail himself of the omission to furnish him with a copy of the indictment "at least twelve hours before the trial," he must declare it by motion before trial or interpose it as an objection to being put on trial, and must show the omission on record by bill of exceptions. *Fouts v. State*, 8 Ohio St. 98.

**Clerical Error.** — In *Johnson v. State*, 4 Tex. App. 268, it was held that an objection that, in the served copy of an indictment for murder, the word "name" in the former introductory clause was written "same" was frivolous, and that the copy was correct within the requirement of the statute.

5. *McCoy v. State*, 46 Ark. 141.

6. *State v. Barnes*, 59 Mo. 154; *Elick v. Territory*, 1 Wash. Ter. 136; *Opinion of Justices*, 9 Allen (Mass.) 585; *Steagald v. State*, 22 Tex. App. 464; *Nolen v. State*, 8 Tex. App. 585.

7. *Pringle v. State*, 2 Tex. App. 300; *Smith v. State*, 1 Tex. App. 408; *Early v. State*, 1 Tex. App. 248; *Holden v. State*, 1 Tex. App. 225; *Elick v. Territory*, 1 Wash. Ter. 136. See generally article ARRAIGNMENT AND PLEA, vol. 2, p. 760.

**X. ARGUMENTS OF COUNSEL.** — As to the rules governing the arguments of counsel for the prosecution or defense, the right of the court to limit their length, and what properly forms a part of such arguments, see article ARGUMENTS OF COUNSEL, vol. 2, p. 698.

**XI. INSTRUCTIONS — 1. Questions Necessary to Be Submitted —**

*a. DEGREE IN GENERAL.* — On the trial of one indicted for felonious homicide, it is the duty of the court in its charge to the jury to give the law defining the offense with which he is charged, and, if the evidence adduced authorize it (but not otherwise), the law defining the different degrees of homicide inferior to the degree with which the defendant is charged, so far as the evidence will authorize or is applicable to such degrees.<sup>1</sup> If, however, there is no evidence which might authorize a verdict for a lower grade of the offense than that charged in the indictment, such charge should not be given.<sup>2</sup>

*b. DEGREE OF MURDER.* — Where, upon the trial of an indictment for murder in the first degree, it appears clearly from the evidence that the homicide was of no lower degree than that charged, there is no necessity for an instruction to the jury as to any lower grade of the crime,<sup>3</sup> since in such cases the evidence

1. *Washington v. State*, 36 Ga. 222; *Crawford v. State*, 12 Ga. 142; *State v. Turlington*, 102 Mo. 642; *State v. Palmer*, 88 Mo. 568; *Parish v. State*, 18 Neb. 405; *Territory v. Nichols*, 3 N. Mex. 76; *Fitzgerrold v. People*, 37 N. Y. 413; *Nelson v. State*, 2 Swan (Tenn.) 237; *Lindsay v. State*, 36 Tex. 337; *Blocker v. State*, 27 Tex. App. 16.

**Charging Erroneously or Insufficiently.**

— While it is true generally that a failure to charge fully, when there is no essential point omitted or wrongfully charged, is not error, unless it should appear that the court was asked for further instructions, still upon the trial of a capital offense it is error if the court (although expounding the law correctly so far as the charge goes) omits to instruct the jury fully and explicitly upon the legal effect of all the circumstances developed on the trial which would tend to determine the character or degree of the prisoner's guilt. *Nelson v. State*, 2 Swan (Tenn.) 237.

In *Lindsay v. State*, 36 Tex. 337, it was held that if, on the trial of an indictment for homicide, facts appear which are common alike to murder in the first and second degrees and to manslaughter, the court should instruct the jury as to the different degrees of murder and also as to manslaughter.

**Presumption that Instructions Were Given.** — In a court of error it will be presumed that the judge, upon the trial, properly explained to the jury the different degrees of homicide, and that the verdict is in accordance with the evidence, unless there be some objection on the record. *Fitzgerrold v. People*, 37 N. Y. 413.

2. *Washington v. State*, 36 Ga. 222; *Crawford v. State*, 12 Ga. 142; *State v. Stoekli*, 71 Mo. 559; *State v. Kilgore*, 70 Mo. 546; *State v. Edwards*, 70 Mo. 480; *Lindsay v. State*, 36 Tex. 337; *Daniels v. State*, 24 Tex. 389.

It is error to instruct the jury as to murder in the second degree, when, under the facts shown by the evidence, if defendant committed the homicide at all he is guilty of murder in the first degree and of no other grade of homicide. *State v. Stoekli*, 71 Mo. 559.

3. *California*. — *People v. Hurtado*, 63 Cal. 288.

*Kansas*. — *State v. Estep*, 44 Kan. 572.

*Kentucky*. — *Wood v. Com.*, (Ky. 1888) 7 S. W. Rep. 391.

*Missouri*. — *State v. Wilson*, 88 Mo. 13; *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, 74 Mo. 247; *State v. Ellis*, 74 Mo. 207; *State v. Wieners*, 66 Mo. 13; *State v. Phillips*, 24 Mo. 475; *State v. Patterson*, 73 Mo. 695; *State v. Fair-*



either proves murder in the first degree or proves nothing.<sup>1</sup>

**Doubt as to Degree.** — Where, however, there is a doubt as to the degree of the crime, and there is any evidence which, if true, tends to reduce the homicide to murder in the second degree, the court should also instruct the jury as to the law of murder in

*Iamb*, 121 Mo. 137; *State v. Smith*, 114 Mo. 406; *State v. Palmer*, 88 Mo. 568; *State v. Byrne*, 24 Mo. 151; *State v. Elliott*, 90 Mo. 350; *State v. Hopper*, 71 Mo. 425; *State v. Turlington*, 102 Mo. 642; *State v. Rose*, 92 Mo. 201; *State v. Henson*, 106 Mo. 66; *State v. Howard*, 102 Mo. 142.

*New Mexico.* — *Territory v. Baker*, 4 N. Mex. 117; *Thomason v. Territory*, 4 N. Mex. 150; *Anderson v. Territory*, 4 N. Mex. 108.

*Oregon.* — *State v. Garrand*, 5 Oregon 216; *State v. Whitney*, 7 Oregon 386.

*Pennsylvania.* — *Green v. Com.*, 83 Pa. St. 75.

*Texas.* — *May v. State*, 22 Tex. App. 595; *Washington v. State*, 1 Tex. App. 647; *Holden v. State*, 1 Tex. App. 225; *O'Connell v. State*, 18 Tex. 343; *Ringo v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 73; *Davis v. State*, 28 Tex. App. 542; *Smith v. State*, 15 Tex. App. 139; *Gilly v. State*, 15 Tex. App. 287; *White v. State*, 30 Tex. App. 652; *Williams v. State*, 30 Tex. App. 354; *Caldwell v. State*, 28 Tex. App. 566; *Walker v. State*, 28 Tex. App. 503; *McLeod v. State*, 31 Tex. Crim. Rep. 331; *Simmons v. State*, 23 Tex. App. 653; *Mendez v. State*, (Tex. App. 1891) 16 S. W. Rep. 766; *Blackwell v. State*, 29 Tex. App. 194; *Hughes v. State*, 29 Tex. App. 565.

*Washington.* — *Smith v. U. S.*, 1 Wash. Ter. 262; *McAllister v. Territory*, 1 Wash. Ter. 360.

The trial court should in no case indicate an opinion as to what the facts establish; but in properly giving the law the court must of necessity determine whether there is any evidence at all justifying a particular instruction. *Jones v. State*, 52 Ark. 345.

**Evidence Showing Assassination.** — On a trial for murder, where all of the evidence is to the effect that the killing was assassination of the deceased, at night, by his fireside, committed by some one who shot him through a crack in his house, the failure of the court to charge the jury except as to murder in the first degree is not error. *Jones v. State*, 52 Ark. 345.

**Killing by Lying in Wait.** — Where

the circumstances show beyond all question that the homicide was committed by lying in wait, the court need not instruct the jury as to the different degrees of the crime of murder. *State v. Byrne*, 24 Mo. 151.

An instruction on a trial for murder that if the jury believe the defendant did not intend to kill the deceased, but only to do him great bodily harm, the offense will only be murder in the second degree is properly refused where the evidence shows that the homicide was the result of long-settled and deadly hate, that repeated threats had been made by the defendant against the deceased, and that the attack was made covertly and was stopped with difficulty. *State v. Brown*, 119 Mo. 527. See also *White v. State*, 30 Tex. App. 652.

**Killing in Perpetration of Robbery.** — Under the *Texas* Penal Code, making murder committed while perpetrating a robbery *per se* murder in the first degree, where the evidence shows the murder to have been committed in the perpetration of robbery it is proper to refuse a request to charge upon murder in the second degree. *Williams v. State*, 30 Tex. App. 354.

**No Evidence to Establish Defense of Insanity.** — Where, on a trial for murder, the defense was insanity and delirium tremens, but there was no evidence of temporary insanity from the recent use of ardent spirits, nor of delirium tremens producing settled insanity, it is not error to refuse to charge as to murder in the second degree. *McLeod v. State*, 31 Tex. Crim. Rep. 331.

1. *Faulkner v. Territory*, 6 N. Mex. 464.

**Evidence Showing No Excuse or Justification.** — On a trial for murder, it being clearly proven that the defendant killed deceased intentionally, that there was no excuse for the killing, that the provocation given by the deceased was slight, and that deceased apologized to the defendant for it, it was held that it was not a case requiring instructions to be given to the jury defining murder in the second degree, and, there being no complaints against the instruc-

such lower degree.<sup>1</sup> This is true even where the only evidence which would tend thus to reduce the degree of the offense is given by the defendant himself.<sup>2</sup>

**Unnecessary Instruction.** — If, however, the court does instruct upon the law of murder in the second degree, and the evidence does

tions in regard to murder in the first degree given by the trial court, the judgment of conviction was affirmed. *State v. Wieners*, 66 Mo. 13.

1. *Holden v. State*, 1 Tex. App. 225; *Hardy v. State*, 31 Tex. Crim. Rep. 289; *Jones v. State*, 29 Tex. App. 338; *State v. Young*, 99 Mo. 666; *State v. Palmer*, 88 Mo. 568; *State v. Fairlamb*, 121 Mo. 137; *State v. O'Hara*, 92 Mo. 59; *State v. Jackson*, 96 Mo. 200; *Faulkner v. Territory*, 6 N. Mex. 464.

If the judge is in doubt as to which degree is established by the evidence, then he should charge the law relative to the less as well as to the greater degree. *Holden v. State*, 1 Tex. App. 225.

In *Missouri*, murder in the second degree embraces all cases of murder at common law in which there is no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute; and in such cases, where there is any evidence which would tend to show that the killing is with malice aforethought, but without deliberation, the jury should be instructed as to the law of murder in the second degree. *State v. O'Hara*, 92 Mo. 59.

**Evidence Entitling to Such Instruction.** — In *State v. Fairlamb*, 121 Mo. 137, it is held that evidence that one indicted for murder in the first degree went to the place where the deceased was, after night-fall, having provided himself with a gun for purposes of protection, and that he seemed to be in good humor until the firing of the shot, when he seemed to the witness to become somewhat angry, tends to show a want of deliberation, and is sufficient to entitle the accused to an instruction upon the law as to murder in the second degree, which instruction should be given by the court, whether requested or not.

In *Blocher v. State*, 27 Tex. App. 16, the only evidence of express malice consisted of the weapons used and the manner of using them. The defendant was accompanied by another person also armed, and the two followed

the deceased to the place of killing and immediately after the killing fled precipitately. It was held that, upon such evidence, the court should not omit to charge upon the law of murder in the second degree.

2. *State v. Banks*, 73 Mo. 592. See also *State v. Partlow*, 90 Mo. 608; *State v. Wensell*, 98 Mo. 137.

In *State v. Banks*, 73 Mo. 592, the court, in holding to this effect, said: "In the present instance the defendant had testified to a state of facts which, if true, clearly exonerated him from the charge of murder in the first degree and fixed his offense at a lower grade of homicide; and it belongs not to the judicial province to assume that his testimony is either improbable or untrue. So far as concerned the fixing of a basis for an instruction for such lower grade of crime, his testimony was to be taken as true, as much so as if testified by the most reliable and veracious witness, neither biased by interest nor prompted by fear of punishment. If it be said that this view of the law will be taken advantage of by those who are put on trial for their lives, it is only necessary to say that a witness in a criminal cause is competent, under the law, to testify to all the facts in issue; that the duty of the court to properly instruct the jury remains as heretofore, and that considerations of the inconveniences resulting from those accused being permitted to testify in their own behalf are considerations appropriately addressed not to those who enforce, but to those who make, the law. Had any other witness than the defendant himself testified that the killing was accidental, and had the testimony of such witness been at variance with that of every other witness in the case, no one could doubt the impropriety of refusing an instruction based upon the testimony of such witness. If such refusal would be improper in an instance like the one just cited, then improper also in every instance where testimony of a similar purport and effect is elicited, even from the defendant himself."

not warrant such instruction, this fact will not be ground for reversal where the verdict is for murder in the first degree and does not show that such verdict is unjust to the defendant. In such a case the unnecessary instruction could not operate unfavorably to the defendant.<sup>1</sup> Nor will the fact that such instructions, unnecessarily given, are incorrect be a ground for reversing the judgment, where the error could not be prejudicial to the defendant.<sup>2</sup>

Upon the Second Trial of a Defendant who on his former trial was convicted of murder in the second degree, it is unnecessary for the court to instruct the jury as to the degrees of malice, since such former conviction was an acquittal of the higher degree of the offense;<sup>3</sup> and it is proper for the court on the second trial to state such fact to the jury.<sup>4</sup> In such cases it is proper for the

1. *State v. Talbott*, 73 Mo. 347; *State v. Ellis*, 74 Mo. 207. Compare *State v. Phillips*, 24 Mo. 475, wherein A, B, and C were jointly indicted for the murder of D, A as principal in the first degree, the actual perpetrator, B and C as aiders and abettors. A was put upon his trial first and acquitted; upon the trial of B and C the court, after instructing the jury as to the law of murder in the first degree, gave the following instruction: If the jury "believe from the evidence that A wilfully shot and killed the deceased without premeditation or without the intention to consummate by his act the death of the deceased, and that B and C were then and there present aiding, abetting, and assisting A to do the aforesaid act, without premeditation or malice aforethought on their part, then you will find the defendants guilty of murder in the second degree," and assess their punishment, etc. It was held that this instruction was misleading and erroneous. The court, in passing upon this objection, said: "As the case was not one for an instruction on the law concerning murder in the second degree, and as the defendants were tried for murder in the first degree, it may be thought that the defendants were not prejudiced by such instruction. This idea cannot be sustained. We cannot say whether the defendants should have been found guilty of murder as charged or not. The jury was improperly led away from that issue by an instruction which induced their conviction of the crime of murder in the second degree. They complain of that conviction, and have a right to have the judgment reversed if it has

been obtained by undue means. But the instruction is erroneous in itself, even had the case been one for an instruction on the law of murder in the second degree. The jury were told that the defendants might be guilty of murder in the second degree without malice aforethought. Malice aforethought may be malice express or implied. So to say there may be murder without malice aforethought is to say there may be murder without malice. Now there can be no murder in any degree without malice aforethought, express or implied. The instruction is in its terms inconsistent with itself."

2. *State v. Ellis*, 74 Mo. 207. See also *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, 74 Mo. 247; *State v. Erb*, 74 Mo. 199.

3. *Pharr v. State*, 10 Tex. App. 485.

4. *Pharr v. State*, 10 Tex. App. 485. In this case it was held that although the Texas Code Crim. Pro. inhibits, in an argument upon a second trial, any allusion to a former conviction, it does not prohibit a reference in the charge of the court to a former acquittal of higher grades of the offense charged in the indictment, and that it was not error, therefore, for the district judge, in his charge to the jury on the second trial of a defendant charged with murder, to state that the defendant had been acquitted of murder in the first degree, and that, therefore, there was no occasion for him to explain to the jury the difference between the two degrees of malice.

See also *West v. State*, 7 Tex. App. 150, in which it was said, with reference to the duty of the judge in such cases: "He should have informed

judge to instruct the jury, in appropriate language, that they should not consider the subject of murder in the first degree.<sup>1</sup>

*c. MANSLAUGHTER* — (1) *Voluntary*. — It is not error for the court to fail or omit to charge as to the law applicable to manslaughter where, upon the trial of one indicted for murder, there is nothing in the evidence adduced which will tend to reduce the homicide from murder to manslaughter.<sup>2</sup> Thus, for instance, where there is no evidence tending to show that the killing was done in the heat of passion, it is unnecessary to instruct the jury as to the law of the lower offense.<sup>3</sup>

the jury in some appropriate language that they would not consider the subject of murder in the first degree, or that they would not consider any higher grade of offense than murder in the second degree, without saying in effect that the defendant had already been once convicted of murder in the second degree."

1. *Pharr v. State*, 10 Tex. App. 485.

2. *California*. — *People v. King*, 27 Cal. 507; *People v. Estrado*, 49 Cal. 171; *People v. Lee Gam*, 69 Cal. 552.

*Colorado*. — *Kelly v. People*, 17 Colo. 130.

*Georgia*. — *Lewis v. State*, 90 Ga. 95; *Jackson v. State*, 88 Ga. 784; *Teal v. State*, 22 Ga. 75; *Dozier v. State*, 26 Ga. 156; *Rockmore v. State*, 93 Ga. 123; *Gardner v. State*, 90 Ga. 310.

*Illinois*. — *Dacey v. People*, 116 Ill. 555.

*Iowa*. — *State v. Johnson*, 8 Iowa 525; *State v. Perigo*, 80 Iowa 37.

*Kentucky*. — *Turner v. Com.*, 89 Ky. 78.

*Missouri*. — *State v. Downs*, 91 Mo. 19; *State v. McCollum*, 119 Mo. 469; *State v. Umble*, 115 Mo. 452; *State v. Rose*, 92 Mo. 201.

*New Mexico*. — *Territory v. Baker*, 4 N. Mex. 117.

*North Carolina*. — *State v. Miller*, 112 N. Car. 878.

*Oregon*. — *State v. Garrand*, 5 Oregon 216; *State v. Whitney*, 7 Oregon 386.

*Pennsylvania*. — *Com. v. Crossmire*, 156 Pa. St. 304; *Clark v. Com.*, 123 Pa. St. 555.

*Texas*. — *Brooks v. State*, 24 Tex. App. 274; *Brown v. State*, 32 Tex. Crim. Rep. 119; *Jones v. State*, 22 Tex. App. 324; *Williams v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 793; *Vela v. State*, 33 Tex. Crim. Rep. 322; *Lafferty v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 507; *Jackson v. State*, 30 Tex. App. 664; *Reyons v.*

*State*, 33 Tex. Crim. Rep. 143; *Wolforth v. State*, 31 Tex. Crim. Rep. 387; *Angus v. State*, 29 Tex. App. 52; *Ayres v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 396; *Lum v. State*, 11 Tex. App. 483; *Hill v. State*, 11 Tex. App. 456.

*Washington*. — *McAllister v. Territory*, 1 Wash. Ter. 366; *Smith v. U. S.*, 1 Wash. Ter. 262.

**Illustrations — No Evidence Entitling to Instructions.** — In *State v. Downs*, 91 Mo. 19, the evidence showed that the deceased and defendant's son had an altercation, and that defendant, without warning, stepped up behind deceased and struck him the fatal blow. It was held that defendant was not entitled to an instruction upon the law of manslaughter in the first degree.

In *Jackson v. State*, 30 Tex. App. 664, it appeared from the evidence that deceased had previously threatened defendant, but it was not shown by the evidence that the deceased, at the time of the homicide, was about to execute his threats, or that he attempted to draw a weapon. It was held that a charge as to threats or manslaughter was properly refused.

An instruction on the subject of manslaughter was held in *Reyons v. State*, 33 Tex. Crim. Rep. 143, not to be required where it appeared from the evidence that the deceased was killed by the defendant when the latter knew that the deceased and his son had seized a third person to prevent his murdering another, and that they were holding such third person to prevent his killing either the fourth person or themselves.

3. *People v. Estrado*, 49 Cal. 171. See also *Dozier v. State*, 26 Ga. 156; *Teal v. State*, 22 Ga. 75; *State v. Rose*, 92 Mo. 201.

**Killing by Lying in Wait.** — Where it appears from the evidence that the de-

**Charge Not to Consider Lower Offense.** — If there is no conflict of evidence upon this point, the court may instruct the jury that there is no evidence reducing the crime to manslaughter, and that they cannot consider the question of such lower grade of the crime.<sup>1</sup>

**Murder or Justifiable Homicide.** — Where the evidence shows that the killing either was murder or was justifiable, the court need not charge as to the law applicable to manslaughter.<sup>2</sup>

**In Cases of Doubt.** — Where, however, on the trial, there is any evidence, however weak, which is sufficient to render it doubtful whether the crime is murder or manslaughter, and which tends to reduce it to manslaughter, the court should instruct as to the law applicable to the lower offense.<sup>3</sup>

defendant was lying in wait and killed the deceased, there will be no ground for an instruction for manslaughter or self-defense although it is shown that the defendant had, at a former time, been threatened and assaulted with a deadly weapon by the deceased. *Turner v. Com.*, 89 Ky. 78.

In *Clark v. Com.*, 123 Pa. St. 555, it was held that where the evidence shows that the killing was committed while lying in wait to rob the deceased, it is not error to omit instructions on the law of voluntary manslaughter.

1. *State v. Garrand*, 5 Oregon 216; *State v. Whitney*, 7 Oregon 386; *People v. King*, 27 Cal. 507; *Jackson v. State*, 88 Ga. 784; *State v. Miller*, 112 N. Car. 878; *State v. Hildreth*, 9 Ired. L. (N. Car.) 429; *Smith v. U. S.*, 1 Wash. Ter. 262.

**Withholding Instructions from Jury.** — In *Smith v. U. S.*, 1 Wash. Ter. 262, the district judge withheld from the jury instructions relative to manslaughter, telling the jury, however, that if, having deliberated, they desired instructions on that subject, the court would so instruct them. This was held not to be error.

2. *Futch v. State*, 90 Ga. 472; *State v. Lewis*, 118 Mo. 79; *State v. Wilson*, 86 Mo. 520; *Self v. State*, 28 Tex. App. 398; *Maxwell v. State*, 31 Tex. Crim. Rep. 119.

Where the evidence shows that the homicide is either murder in the first or second degree, or else was committed in self-defense, no instruction for murder need be given. *State v. Lewis*, 118 Mo. 79.

3. *California*. — *People v. Lamb*, 17 Cal. 323.

*Georgia*. — *Jackson v. State*, 76 Ga. 473.

*Illinois*. — *Belt v. People*, 97 Ill. 461.

*Iowa*. — *State v. Perigo*, 80 Iowa 37.

*Kentucky*. — *Donnellan v. Com.*, 7 Bush (Ky.) 679; *Coffman v. Com.*, 10 Bush (Ky.) 497; *Petty v. Com.*, (Ky. 1891) 15 S. W. Rep. 1059; *Hinkle v. Com.*, (Ky. 1889) 11 S. W. Rep. 778; *Massie v. Com.*, (Ky. 1894) 24 S. W. Rep. 611; *Bowlin v. Com.*, 94 Ky. 391; *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164.

*Michigan*. — *People v. Palmer*, 96 Mich. 580.

*Missouri*. — *State v. Wilson*, 98 Mo. 440; *State v. Elliott*, 98 Mo. 150; *State v. Crabtree*, 111 Mo. 136; *State v. Partlow*, 90 Mo. 608; *State v. Turlington*, 102 Mo. 642.

*Montana*. — *Territory v. Manton*, 8 Mont. 95.

*Texas*. — *Franklin v. State*, 30 Tex. App. 628; *Leggett v. State*, 21 Tex. App. 382; *Tow v. State*, 22 Tex. App. 175; *Ross v. State*, 23 Tex. App. 689; *Harris v. State*, (Tex. App. 1890) 15 S. W. Rep. 172; *Arrellano v. State*, 24 Tex. App. 43; *Adams v. State*, (Tex. App. 1892) 19 S. W. Rep. 907; *Johnson v. State*, 22 Tex. App. 206; *Liskoski v. State*, 23 Tex. App. 165.

"The charge of the court must make a pertinent application of the law covering every theory arising out of the evidence; \* \* \* the duty is not dependent upon the court's judgment of the strength or weakness of the testimony supporting the theory, it being the prerogative of the jury to pass upon the probative force of the testimony." *Liskoski v. State*, 23 Tex. App. 165.

**Illustrations.** — An indictment which charges murder by reason of the prisoner's wilful failure to prevent his wife perishing from the cold necessarily embraces manslaughter, and in such a case manslaughter should be defined

Where Such Instructions Are Not Requested, the court should of its own motion charge the jury as to the law of manslaughter, where there is evidence justifying it,<sup>1</sup> and a failure so to instruct has been held to constitute reversible error.<sup>2</sup>

Any Evidence, However Slight, that the deceased was killed by the defendant in the heat of passion, or in the course of a sudden quarrel, is sufficient to entitle the defendant to instructions as to the law of manslaughter.<sup>3</sup>

to the jury. *Territory v. Manton*, 8 Mont. 95.

In *Ross v. State*, 23 Tex. App. 689, the evidence tended to show that, at the time of the killing, the defendant's wife was with the deceased, that the defendant had previously endeavored to have the deceased arrested for adultery, and that the deceased had endeavored to assault the defendant with an iron rod. It was held that the jury should have been instructed as to manslaughter.

In *State v. Crabtree*, 111 Mo. 136, the evidence showed that the deceased was shot by the defendant in the course of a scuffle between the two. The evidence produced by the state tended to show that, without provocation, the defendant shot the deceased in the back. The testimony of the defendant, however, tended to show a shooting in self-defense. A failure to instruct the jury in regard to manslaughter was held reversible error.

In *Tow v. State*, 22 Tex. App. 175, it appeared that the contest resulting in the killing was provoked by the defendant by his going to a house where he had been forbidden to come; but the evidence also tended to show that his going was with no intention to kill or seriously harm any one, but merely to talk with his wife, who was then at the house. The evidence also tended to show that the prearranged attack was made upon the defendant by the deceased and another. It was held that an instruction as to manslaughter should have been given.

In *People v. Palmer*, 96 Mich. 580, it was held that the jury should be charged as to the law of manslaughter where there was evidence on the trial that the first shot was fired by the deceased, and that the defendant procured the gun with which the shooting was done, for the purpose of hunting and without the intention of using it against the deceased.

**When No Witness Saw the Homicide Committed.** — In *Kentucky* it is held that when no witness saw the homicide committed, or the parties on the occasion when the killing occurred, the law applicable to murder, manslaughter, and self-defense should be given in order to meet any state of facts which the jury may find from the circumstances to have existed. *Rutherford v. Com.*, 13 Bush (Ky.) 608.

1. *State v. Crabtree*, 111 Mo. 136; *Leggett v. State*, 21 Tex. App. 382; *Tow v. State*, 22 Tex. App. 175; *Liskoski v. State*, 23 Tex. App. 165; *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164.

In the case of *State v. Crabtree*, 111 Mo. 136, the court said: "If deceased struck defendant with his club, and afterwards and during the struggle defendant drew his pistol and shot while in a heat of passion produced by the assault of the deceased, but not under such circumstances as justified him on the ground of self-defense, he was guilty of manslaughter of the fourth degree, even though he intended to kill. \* \* \* The facts would have justified the jury in finding defendant guilty of this degree of manslaughter, and the court ought of its own motion to have so instructed."

2. *Ross v. State*, 23 Tex. App. 689. See also *State v. Crabtree*, 111 Mo. 136; *Leggett v. State*, 21 Tex. App. 382; *Tow v. State*, 22 Tex. App. 175; *Liskoski v. State*, 23 Tex. App. 165; *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164.

3. *State v. Elliott*, 98 Mo. 150; *State v. Wilson*, 98 Mo. 440; *Hinkle v. Com.*, (Ky. 1889) 11 S. W. Rep. 778; *Petty v. Com.*, (Ky. 1891) 15 S. W. Rep. 1059; *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164; *Franklin v. State*, 30 Tex. App. 628.

In *State v. Elliott*, 98 Mo. 150, the defendant testified that when he struck the deceased he was not intending to

**Degrees of Manslaughter.** — Where, from the evidence, instructions as to manslaughter are proper, the court should give such instructions as to the degrees of that offense as the evidence tends to support.<sup>1</sup>

**Definition of Crime.** — Where the court instructs the jury that upon the evidence they may convict the defendant of manslaughter, the instructions should define such crime.<sup>2</sup>

**Excluding Verdict of Murder.** — Where it appears to the court that in no aspect of the testimony, and under no inference that may be fairly drawn therefrom, is a prisoner guilty of murder, the court may instruct the jury that they must not return a verdict for any higher offense than manslaughter, just as it would be the duty of the court to instruct in a proper case that no sufficient evidence has been offered to excuse or mitigate the killing.<sup>3</sup>

(2) **Involuntary.** — Where, upon the trial for murder, there is no evidence to indicate that the killing was not voluntary, it is not proper to instruct as to the law applicable to involuntary manslaughter.<sup>4</sup> To give such instructions would be to call the

kill him, but was hot and gave him the fatal blow while the deceased was making an attack upon him with a knife. It was held that an instruction upon manslaughter should have been given.

In *State v. Wilson*, 98 Mo. 440, it appeared from the evidence that the defendant, in the heat of passion, during an altercation with the deceased, struck him with a hoe handle which he had in his hands at the time. Such evidence was held to entitle the defendant to an instruction as to manslaughter in the third degree, under the *Missouri* statute defining manslaughter as an involuntary killing in the heat of passion, and to an instruction in the fourth degree, which the same statute defines as "the involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion."

**Evidence of Quarrel Preceding the Killing.** — In *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164, where there were no witnesses to a homicide, but the evidence showed that there was loud and angry quarreling between the parties just before the killing, this evidence was held to call for a charge as to voluntary manslaughter.

1. *State v. Estep*, 44 Kan. 572; *State v. Stiltz*, 97 Mo. 20; *State v. Grote*, 109 Mo. 345; *State v. Clemons*, 51 Iowa 274.

**Evidence Justifying Instruction as to Fourth Degree.** — In *State v. Stiltz*, 97

Mo. 20, it was held that where the defendant testified that the fatal shot was fired by him in self-defense while the deceased was advancing to attack him, instructions as to manslaughter in the fourth degree should be given.

**Omission to Instruct as to One Degree, Conviction for Lower.** — Where the defendant has been convicted of manslaughter in the fourth degree it is no ground of complaint that the court failed to instruct as to manslaughter in the third degree. *State v. Grote*, 109 Mo. 345.

2. *State v. Sloan*, 47 Mo. 604.

**Erroneous Definition — When Immaterial.** — In *People v. Swift*, 66 Cal. 348, it was held not to be reversible error that the court gave an erroneous definition as to the distinction between manslaughter and murder, when the verdict was manslaughter. In such case the defendant could not have been injured by the erroneous instruction.

3. *State v. Miller*, 112 N. Car. 878.

In *People v. Lamb*, 17 Cal. 323, the court held that it is not error to instruct the jury that if they believe from the evidence that the defendant killed the deceased without malice, either express or implied, and without any mixture of deliberation, this is manslaughter, and they should return a verdict to that effect.

4. *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164; *Jackson v. State*, 91 Ga. 271; *Willis v. State*, 93 Ga. 208; *Whitaker v. State*, 79 Ga. 87; *Davis v. Peo-*

attention of the jury to a principle of law not applicable to the facts, and would tend to confuse rather than enlighten them as to the real issue.<sup>1</sup> Where, however, under an indictment for murder or manslaughter, there is any evidence whatever upon which the jury might find the existence of facts constituting involuntary manslaughter, the court should instruct as to the law in regard to it.<sup>2</sup>

**d. JUSTIFICATION OR EXCUSE.**—Where, upon the trial, the accused sets up, by way of defense, self-defense or other legal excuse or justification for the killing, and the evidence clearly raises such issue, the court should instruct the jury as to the law relating to excusable or justifiable homicide.<sup>3</sup> A failure to give

ple, 114 Ill. 86; *Thomas v. Com.*, 14 Ky. L. Rep. 288.

In *Willis v. State*, 93 Ga. 208, the court held that it is not error to refuse a charge on the law of involuntary manslaughter in the commission of a lawful act, in the absence of any evidence rendering such charge applicable or relevant, and the court having fully charged the jury that it was their duty to acquit defendant if they should find that the homicide resulted from accident, misfortune, or misadventure.

**Evidence Showing Murder or Voluntary Manslaughter.**—In *Davis v. People*, 114 Ill. 86, it appeared from the evidence that the crime was either murder or voluntary manslaughter, and it was held that the omission to define involuntary manslaughter was not assignable as error.

1. *Davis v. People*, 114 Ill. 86.

2. *Bush v. Com.*, 78 Ky. 268; *Jackson v. State*, 76 Ga. 473; *Davis v. State*, 10 Ga. 101; *Holder v. State*, 5 Ga. 441. Compare *McWhirt's Case*, 3 Gratt. (Va.) 566.

In *Davis v. State*, 10 Ga. 101, the trial court stated that it "was unnecessary for the court to charge as to involuntary manslaughter, as, from the evidence, it was either murder, voluntary manslaughter, or justifiable homicide." This instruction was assigned as error. The Supreme Court, in passing upon this assignment of error, said: "The court below ought, in our judgment, in view of the facts disclosed by this record, to have given to the jury the definition of murder, of voluntary manslaughter, of involuntary manslaughter in the commission of an unlawful act, of involuntary manslaughter in the commission of a law-

ful act, without due caution and circumspection, and also the definition of justifiable homicide, and then to have left the jury to determine under which grade or definition the evidence showed the defendant to be guilty, or whether the evidence made out a case of justifiable homicide."

**Evidence Raising a Doubt Sufficient.**—In *Jackson v. State*, 76 Ga. 473, it was held that any evidence, however slight, which may raise a doubt as to the defendant's intention to kill would entitle him to a charge upon involuntary manslaughter.

**Accidental or Negligent Homicide.**—Where there is any evidence tending to show that the killing was accidental, the jury should be instructed as to the law in relation to accidental killing. *State v. Hartzell*, 58 Iowa 520; *State v. Wright*, 40 La. Ann. 589. See also *Lewis v. State*, 96 Ala. 6; *State v. Wilson*, 104 N. Car. 868. So, also, where there are facts that show that the offense was negligent homicide. *Curtis v. State*, 22 Tex. App. 227; *McConnell v. State*, 22 Tex. App. 354.

**Where There Are Two Counts in an Indictment**, the first charging voluntary manslaughter and the second charging involuntary manslaughter, and there is no evidence tending to justify the conclusion that the defendant intended to kill the deceased, an instruction which in effect withdraws the first count from the consideration of the jury is not erroneous. *Brown v. State*, 110 Ind. 486.

3. *Alabama*.—*Gibson v. State*, 89 Ala. 121.

*California*.—*People v. Adams*, 85 Cal. 231.

*Georgia*.—*Hinch v. State*, 25 Ga. 699; *Butler v. State*, 92 Ga. 601.



such instruction is reversible error.<sup>1</sup>

**Where There Is No Evidence Presenting the Question of Self-defense** or tending to show that the killing was done under other circumstances

*Idaho*. — *People v. Walter*, 1 Idaho 386.

*Illinois*. — *Steinmeyer v. People*, 95 Ill. 383.

*Kentucky*. — *Moore v. Com.*, 7 Bush (Ky.) 193; *Munday v. Com.*, 81 Ky. 233; *Sullivan v. Com.*, (Ky. 1892) 18 S. W. Rep. 530; *Hilton v. Com.*, (Ky. 1890) 12 S. W. Rep. 1062; *Bates v. Com.*, (Ky. 1892) 19 S. W. Rep. 928; *Oakley v. Com.*, (Ky. 1889) 11 S. W. Rep. 72; *Lancaster v. Com.*, (Ky. 1887) 4 S. W. Rep. 320; *Massie v. Com.*, 15 Ky. L. Rep. 562; *Riley v. Com.*, 94 Ky. 266.

*Louisiana*. — *State v. St. Geme*, 31 La. Ann. 302.

*Michigan*. — *Baker v. People*, 40 Mich. 411.

*Missouri*. — *State v. Sneed*, 91 Mo. 552; *State v. Stephens*, 96 Mo. 637.

*North Carolina*. — *State v. Miller*, 1 Dev. & B. L. (N. Car.) 500.

*Tennessee*. — *Potter v. State*, 85 Tenn. 88; *Quarles v. State*, 1 Sneed (Tenn.) 407.

*Texas*. — *McConnell v. State*, 22 Tex. App. 354; *Elliston v. State*, 10 Tex. App. 361; *McLaughlin v. State*, 10 Tex. App. 340; *Short v. State*, 15 Tex. App. 370; *Tillery v. State*, 24 Tex. App. 251; *Reagan v. State*, (Tex. App. 1890) 13 S. W. Rep. 1009; *Woodring v. State*, 33 Tex. Crim. Rep. 26; *Snell v. State*, 29 Tex. App. 236; *Bean v. State*, 25 Tex. App. 346; *Butler v. State*, 33 Tex. Crim. Rep. 232; *Skaggs v. State*, 31 Tex. Crim. Rep. 563; *Cahn v. State*, 27 Tex. App. 709.

*Washington*. — *Leonard v. Territory*, 2 Wash. Ter. 381.

**Evidence Entitling to Instructions.** — Where, upon a trial for murder, the evidence shows that the defendant sought the deceased for the purpose of clearing up a slander upon the character of himself and his family which the deceased had circulated, and that while the two were traveling together they quarreled violently, and just before the shooting the deceased turned in his saddle, applied a vile epithet to the defendant, and threw his hand behind him as if to draw a weapon, the defendant is entitled to an instruction on the law of self-defense. *Massie v. Com.*, 15 Ky. L. Rep. 562.

In *Moore v. Com.*, 7 Bush (Ky.) 191,

an instruction was held erroneous because it "virtually excluded from the jury the consideration of any grounds of self-defense, and substantially defined the homicide \* \* \* to be either murder or voluntary manslaughter, although there was evidence before the jury conducing to prove that at the time of the killing the deceased was in the act of assaulting the defendant."

In a trial for homicide, evidence which shows that the deceased, in the course of a struggle with the defendant's brother, attempted to get a club, which was secured by the defendant, who struck or attempted to strike him, calls for an instruction on the issue of self-defense. *Snell v. State*, 29 Tex. App. 236.

In *Bean v. State*, 25 Tex. App. 346, it was shown by the evidence that a third person was present at the fight, and that such third person used a weapon in his hands to ward off both defendant and the deceased, and made a hostile demonstration towards defendant. It was held that the court should charge as to defendant's right of self-defense as to two assailants.

The jury should be instructed to the effect that the fact that the accused provoked the assault by opprobrious words will not deprive him of the right of self-defense if assaulted by the deceased with a deadly weapon, and in a manner apparently threatening his life, where such facts appear from the evidence. *Butler v. State*, 92 Ga. 601.

**Where Defendant Testifies that Killing Was Accidental.** — In *State v. Stephens*, 96 Mo. 637, it was held that it was error for the court to refuse instructions on the theory of self-defense because of the fact that the defendant testified that the shooting was accidental.

**Instructions as to Threats.** — Where the issue is that of self-defense, and it appears in evidence that threats have been made against the defendant by the deceased, the instruction relating to the threats should form part of the instruction as to the law of self-defense. To make the two instructions separately is error. *Tillery v. State*, 24 Tex. App. 251.

1. *Munday v. Com.*, 81 Ky. 233;

which would excuse or justify it, the court may properly omit or refuse to instruct the jury as to excusable or justifiable homicide.<sup>1</sup>

Short *v.* State, 15 Tex. App. 370. In the latter case it was held that a conviction of murder will not be sustained where evidence introduced by the defendant fairly raised the issue of self-defense and the court failed to charge fully and accurately the law upon such point.

1. *Alabama*. — Taylor *v.* State, 48 Ala. 180; Waller *v.* State, 89 Ala. 79; Mattison *v.* State, 55 Ala. 224; Ford *v.* State, 71 Ala. 385.

*California*. — People *v.* Gatewood, 20 Cal. 146.

*Florida*. — Brown *v.* State, 18 Fla. 472.

*Georgia*. — Ramsey *v.* State, 92 Ga. 53; Whitaker *v.* State, 79 Ga. 87; Ozburn *v.* State, 87 Ga. 173.

*Indiana*. — Jarrell *v.* State, 58 Ind. 293.

*Kentucky*. — Combs *v.* Com., (Ky. 1888) 9 S. W. Rep. 655.

*Louisiana*. — State *v.* Mitchell, 41 La. Ann. 1073; State *v.* Salter, 48 La. Ann. 197.

*Missouri*. — State *v.* Sneed, 91 Mo. 552; State *v.* Wilson, 98 Mo. 440; State *v.* Kloss, 117 Mo. 591; State *v.* McCollum, 119 Mo. 469; State *v.* Parker, 106 Mo. 217; State *v.* Crawford, 115 Mo. 620.

*New Mexico*. — Thomason *v.* Territory, 4 N. Mex. 150; Territory *v.* Baker, 4 N. Mex. 117.

*Tennessee*. — Honeycutt *v.* State, 8 Baxt. (Tenn.) 371.

*Texas*. — Varnell *v.* State, 26 Tex. App. 56; Allen *v.* State, 24 Tex. App. 216; Miller *v.* State, 27 Tex. App. 63; Sherar *v.* State, 30 Tex. App. 349; Cavil *v.* State, (Tex. Crim. App. 1894) 25 S. W. Rep. 628; White *v.* State, 23 Tex. App. 154; Cook *v.* State, 22 Tex. App. 511; Hooper *v.* State, 29 Tex. App. 614; Warren *v.* State, 31 Tex. Crim. Rep. 573; Boyd *v.* State, 28 Tex. App. 37.

*Virginia*. — Hodges *v.* Com., 89 Va. 265.

*United States*. — U. S. *v.* Armstrong, 2 Curt. (U. S.) 446.

#### **Evidence Not Entitling to Instruction.**

— Where, from all the evidence, it appears that no one was assaulting or pursuing the defendant, who drew a revolver and fired upon and killed the deceased, there is no occasion for an

instruction on the law of self-defense. State *v.* Crawford, 115 Mo. 620.

Where, according to the testimony, the accused, after leaving a saloon in which he had previously quarreled with the deceased, armed himself, returned, and stood waiting with his pistol drawn for the deceased to come out, and as soon as the door of the saloon opened fired and killed a third party, who had by accident gotten in the way, no instruction as to self-defense should be given. Warren *v.* State, 31 Tex. Crim. Rep. 573.

In Waller *v.* State, 89 Ala. 79, it appeared that the defendant, on approaching the house in which deceased was, heard the latter cursing and abusing him, and replied in like words, but continued to advance, having his gun in his hand, and that the deceased immediately arose and started towards the door with his gun, and both parties fired as soon as he reached the door. It was held that charges requested, invoking the doctrine of self-defense, but ignoring the question of fault in bringing on the difficulty, and limiting the doctrine of retreat to the time when the deceased appeared at the door, were properly refused.

In State *v.* Mitchell, 41 La. Ann. 1073, it appeared from bills of exceptions taken by the accused himself that, at the time of killing, the deceased was fleeing from the defendant. It was held no error to refuse to instruct upon the law of self-defense.

In State *v.* Kloss, 117 Mo. 591, the evidence showed that the defendant knocked the deceased down, and upon some one calling out that he was getting his pistol, jumped upon him and kicked him to death, without looking to see if he was getting the weapon. No instructions as to self-defense were held to be required.

**Defense of Others.** — Instructions as to the right of the defendant to kill in the necessary defense of others need not be given where no evidence tends to show such fact. State *v.* Parker, 106 Mo. 217; Mattison *v.* State, 55 Ala. 224.

Thus, in State *v.* Parker, 106 Mo. 217, the defendant asked for instructions based upon the theory that the deceased was killed by the defendant in the necessary and proper defense of

*e. COMPETENCY AND WEIGHT OF EVIDENCE — Generally. —* Where, upon a trial for homicide, some part of the testimony has an artificial importance given to it by law, or where a certain degree of weight is attached to a certain species of evidence, it is the duty of the court to charge upon such legal présumptions and degrees of weight.<sup>1</sup>

*Circumstantial Evidence. —* Thus where the testimony is entirely circumstantial, the defendant, if he desires it, is entitled to have the jury fully and clearly instructed as to what the law means by a reasonable doubt.<sup>2</sup> Where, however, the fact of killing by the prisoner is proved by the evidence, it is proper for the court to refuse to instruct as to the nature and application of the rules as to circumstantial evidence.<sup>3</sup> See also article INSTRUCTIONS.

*f. AS TO FORM OF VERDICT. —* While it is not essential to the sufficiency of the charge that it should instruct the jury in the forms of the different verdicts which they may render, when such instructions are given they should embrace every verdict which, from the evidence, might be rendered in the case, since a failure to do so might possibly convey to the minds of the jury some impression as to the opinion of the court as to which of several

the son of the latter; there was, however, no evidence that the deceased was at the time assaulting or attacking the son. It was held that such instructions were properly refused.

*Defense of Property. —* So, also, a charge requested that it is justifiable for one to repel forcibly an attack upon his person, habitation, or property, is properly refused where there is no evidence presenting the question as to the defense of habitation or property. *Ramsey v. State*, 92 Ga. 53.

*Imaginary Danger. —* If, from the evidence, there was any danger to the defendant, and such danger was real and not apparent, it is unnecessary for the court to charge upon the question of apparent or imaginary danger. *White v. State*, 23 Tex. App. 154; *Cavil v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 628.

1. *Brown v. State*, 23 Tex. 195. In this case the court said: "The jury are the exclusive judges of the weight to be given to every part of the testimony, whether for or against the prisoner, unless some part of the testimony has an artificial importance given to it by law, as the act of killing, unexplained, raises the presumption of the existence of another fact — a malicious intent in the mind of the slayer; or unless a certain degree of weight is

attached to a certain species of evidence, as that 'a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed.' \* \* \*

It is the duty of the court to instruct the jury upon these legal présumptions and degrees of weight, in particular testimony constituting exceptions to the general rule; not because they may be in consonance with enlightened reason and experience, but because they are prescribed as rules of law, pertaining to the weight of evidence. So far only is the court required to enlighten the jury upon the weight to be given to the testimony."

And see in general upon this subject, article INSTRUCTIONS.

2. *People v. Lachanais*, 32 Cal. 434; *Sharpe v. State*, 17 Tex. App. 486; *Puryear v. State*, 28 Tex. App. 73.

Thus, in *Surrell v. State*, 29 Tex. App. 321, where the evidence showed that the deceased had been cut with a knife, and a knife belonging to the defendant had been found close by, though the cutting had not been witnessed, it was held that an instruction as to the law of circumstantial evidence was proper.

3. *McDaniel v. State*, 8 Smed. & M. (Miss.) 401.

verdicts should properly be rendered by them.<sup>1</sup> It is, of course, no error to omit to give a form of verdict in case of a conviction only of a lower degree where there is no evidence reducing the homicide to such a degree.<sup>2</sup> See also article INSTRUCTIONS.

**g. ASSESSMENT OF PUNISHMENT.**—Where it is the duty of the jury to assess the punishment for homicide, or where they may do so, the court should instruct them as to the punishment which they may properly assess for all grades of homicide for any of which they have the right to find the defendant guilty.<sup>3</sup> See also article INSTRUCTIONS.

**2. Sufficient and Correct Forms of Instruction.**—The forms in which instructions upon trials for homicide may be given vary with each case and depend entirely upon the circumstances of

**Unnecessary Where Killing Is Admitted.**—Where the killing is admitted by the prisoner, an instruction on the law of circumstantial evidence is of course unnecessary. *Self v. State*, 28 Tex. App. 398; *Johnson v. State*, 28 Tex. App. 17.

1. *Williams v. State*, 24 Tex. App. 637. See also *People v. Ah Gee Yung*, 86 Cal. 144; *Dacey v. People*, 116 Ill. 555; *Smith v. People*, 142 Ill. 117; *Giles v. State*, 23 Tex. App. 285. And see in general article INSTRUCTIONS.

2. *Dacey v. People*, 116 Ill. 555. In this case it was held that instructions as to the form of the verdict were not erroneous because of the omission to give a form of verdict in case of a conviction of manslaughter only, where there was no evidence reducing the offense to manslaughter.

**Oral Instructions as to Form of Verdict.**—In *Smith v. People*, 142 Ill. 117, the court, having charged in writing as to the form of verdict for murder, charged orally as to the form upon conviction of manslaughter. The defendant complained of this on the ground that the form of the verdict for murder being in writing, and that for manslaughter being oral, the jury would be liable to disregard or attach less importance to the latter than the former, and would be impressed with the idea that the court regarded the case as one of murder rather than of manslaughter. It was held, however, that, though it was irregular to instruct the jury orally on any feature of the case unless by agreement, it was not reversible error to give the form of the verdict as to the lesser offense orally.

3. *Marshall v. State*, 33 Tex. 664; *Williams v. State*, 24 Tex. App. 637;

*Giles v. State*, 23 Tex. App. 281; *Phelps v. State*, 75 Ga. 571; *Brannigan v. People*, 3 Utah 488; *Lowery v. Howard*, 103 Ind. 440. And see in general article INSTRUCTIONS.

**Right to Commute Death Penalty.**—In *Texas*, where the jury have the power to commute the death penalty to imprisonment at hard labor for life, it is the duty of the court, on the trial of one accused of murder, to instruct the jury that they have such power; and if this instruction is omitted and the accused convicted of murder in the first degree, the case will be reversed and remanded. *Marshall v. State*, 33 Tex. 664.

**Punishment Incorrectly Stated.**—In *Williams v. State*, 24 Tex. App. 637, it was held that where the minimum punishment for manslaughter is two years in the penitentiary, and the court instructs that three years is the minimum, such charge is fundamental error.

**Effect of Instruction Where Jury Does Not Fix Punishment.**—In *State v. Peffers*, 80 Iowa 580, the court, on a trial for murder, defined murder of the first and second degrees, giving the punishment for each, and then defined manslaughter, adding, "and is punishable by imprisonment in the penitentiary not exceeding eight years," but omitting the other words of the statute, "and by fine not exceeding one thousand dollars." The jury found the defendant guilty of murder in the second degree. It was held that, since it was not the province of the jury to determine defendant's punishment for the crime of which they found him guilty, nor for any lower grade of offense, had they found him guilty of it, the omission was in no way prejudicial.

the case in question. As a general rule, however, it may be said that the instructions, as to their language and as to the form and connection in which they are given, should not be misleading to the jury,<sup>1</sup> but should be clear and intelligible and not liable to be misinterpreted.

**3. Necessity for Written Instructions.**—Where it is provided by statute that the instructions in a trial for homicide shall be in

1. This is the general rule applicable to all instruction, for a full treatment of which see the article INSTRUCTIONS. As illustrating this rule in homicide cases, see the following authorities:

*Alabama.*—Brown *v.* State, 83 Ala. 33; Amos *v.* State, 83 Ala. 1; Williams *v.* State, 81 Ala. 1; Fallin *v.* State, 83 Ala. 5; Gunter *v.* State, 10 Crim. L. Mag. 428; Hampton *v.* State, 45 Ala. 82; Dill *v.* State, 25 Ala. 15; Felix *v.* State, 18 Ala. 720; Pierson *v.* State, 12 Ala. 149.

*Arkansas.*—Howard *v.* State, 34 Ark. 433; Atkins *v.* State, 16 Ark. 568.

*California.*—People *v.* Williams, 75 Cal. 306; People *v.* Giancoli, 74 Cal. 642; People *v.* Gonzales, 71 Cal. 569; People *v.* Welch, 49 Cal. 177; People *v.* Best, 39 Cal. 690; People *v.* Moore, 8 Cal. 90; People *v.* Quincy, 8 Cal. 89.

*Colorado.*—Redus *v.* People, 10 Colo. 208.

*Georgia.*—Blackman *v.* State, 10 Crim. L. Mag. 71; Edwards *v.* State, 53 Ga. 428; Pressley *v.* State, 19 Ga. 192; Anderson *v.* State, 14 Ga. 709; Holder *v.* State, 5 Ga. 441; Monroe *v.* State, 5 Ga. 85.

*Illinois.*—Crews *v.* People, 120 Ill. 317; Spies *v.* People, 122 Ill. 1, 3 Am. St. Rep. 320, 9 Crim. L. Mag. 829; Gainey *v.* People, 97 Ill. 270, 37 Am. Rep. 109; Alexander *v.* People, 96 Ill. 96; Barnett *v.* People, 54 Ill. 325; Maher *v.* People, 24 Ill. 241.

*Indiana.*—Mayfield *v.* State, 110 Ind. 591; Wade *v.* State, 71 Ind. 535; Jackman *v.* State, 71 Ind. 149; Snyder *v.* State, 59 Ind. 105; Kingen *v.* State, 45 Ind. 519; Bland *v.* State, 2 Ind. 608.

*Iowa.*—State *v.* Donnelly, 69 Iowa 705, 58 Am. Rep. 234; State *v.* Mahan, 68 Iowa 304; State *v.* McCormick, 27 Iowa 402; State *v.* Johnson, 8 Iowa 525, 74 Am. Dec. 321; State *v.* Gillick, 7 Iowa 287.

*Kansas.*—State *v.* Baldwin, 36 Kan. 1.

*Kentucky.*—Radford *v.* Com., (Ky. 1887) 5 S. W. Rep. 343; Coffman *v.* Com., 10 Bush (Ky.) 495; Williams *v.*

Com., 9 Bush (Ky.) 274; Smith *v.* Com., 1 Duv. (Ky.) 224; Jane *v.* Com., 2 Metc. (Ky.) 30.

*Louisiana.*—State *v.* Ricks, 32 La. Ann. 1098.

*Michigan.*—Nye *v.* People, 35 Mich. 16; Burden *v.* People, 26 Mich. 162; Maher *v.* People, 10 Mich. 212.

*Mississippi.*—Glenn *v.* State, 64 Miss. 724; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62; Mask *v.* State, 36 Miss. 77; Boles *v.* State, 9 Smed. & M. (Miss.) 284; McDaniel *v.* State, 8 Smed. & M. (Miss.) 401.

*Missouri.*—State *v.* Walker, 98 Mo. 95; State *v.* Leabo, 89 Mo. 247; State *v.* Brooks, 94 Mo. 121; State *v.* Hayes, 89 Mo. 262; State *v.* Ellis, 74 Mo. 207; State *v.* Edwards, 71 Mo. 312; State *v.* Dearing, 65 Mo. 530; State *v.* Byrne, 24 Mo. 151; State *v.* Dillihunt, 18 Mo. 331.

*Nebraska.*—Schlencker *v.* State, 9 Neb. 300.

*Nevada.*—State *v.* St. Clair, 16 Nev. 207; State *v.* Frazer, 14 Nev. 210; State *v.* Hutchinson, 7 Nev. 53.

*New Jersey.*—Smith *v.* State, 41 N. J. L. 370.

*New York.*—McNevin *v.* People, 61 Barb. (N. Y.) 307; Pfomer *v.* People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 558; Stephens *v.* People, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 396; People *v.* Quin, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 340.

*North Carolina.*—State *v.* Floyd, 6 Jones L. (N. Car.) 392; State *v.* Simons, 6 Jones L. (N. Car.) 21; State *v.* Harrison, 5 Jones L. (N. Car.) 115; State *v.* Owen, Phil. L. (N. Car.) 425.

*Ohio.*—Beaudien *v.* State, 8 Ohio St. 634; Robbins *v.* State, 8 Ohio St. 131; Stewart *v.* State, 1 Ohio St. 66.

*Pennsylvania.*—Lane *v.* Com., 59 Pa. St. 371; Kilpatrick *v.* Com., 31 Pa. St. 198; Small *v.* Com., 91 Pa. St. 304.

*South Carolina.*—State *v.* Jacobs, 28 S. Car. 29; State *v.* Coleman, 20 S. Car. 441; State *v.* Stark, 1 Strobb. L. (S. Car.) 479.

writing, a compliance with such requirement is presumed in the absence of evidence to the contrary, and the record need not show affirmatively that the charge to the jury was in writing.<sup>1</sup>

**XII. VERDICT — 1. When and How Rendered.** — The verdict in a homicide case must be rendered at some time during the term at which the case is tried,<sup>2</sup> and in open court.<sup>3</sup> The verdict may be received and the jury discharged on Sunday.<sup>4</sup> See, for a general discussion of these questions, article VERDICT.

**2. Form — a. GENERALLY.** — The verdict of the prisoner's guilt must be direct and positive. The court is not authorized or justified to "reason" to an inferred verdict of guilty against the defendant.<sup>5</sup> Should the jury return an informal, insensible, or repugnant verdict, or one not responsive to the issue submitted,

*Tennessee.* — *Rea v. State*, 8 Lea (Tenn.) 356.

*Texas.* — *Anderson v. State*, 31 Tex. 440; *Monroe v. State*, 23 Tex. 210, 76 Am. Dec. 58; *Brown v. State*, 23 Tex. 195; *Barron v. State*, 23 Tex. App. 462; *McCullough v. State*, 23 Tex. App. 620; *Hill v. State*, 11 Tex. App. 456; *Holmes v. State*, 11 Tex. App. 223; *Greta v. State*, 9 Tex. App. 429; *Harrison v. State*, 9 Tex. App. 407; *Murray v. State*, 1 Tex. App. 417.

*Wisconsin.* — *Dickerson v. State*, 48 Wis. 288; *Roman v. State*, 41 Wis. 312.

**1.** *People v. Chung Lit*, 17 Cal. 321. See generally, upon this subject, article INSTRUCTIONS.

**Such Statutory Requirements** would seem to refer only to the instruction as to the law of the case, and not to a mere direction by the court as to a matter of form. *People v. Bonney*, 19 Cal. 446. In this case it was urged by the appellant that the court erred in telling the jury orally to return, when they brought in a general verdict of guilty, and to find in what degree, or "the degree." It was claimed that this direction was a charge, and ought to have been in writing. It was held by the Supreme Court, however, that this was not a charge, and that the answer of the jury was not a finding but a failure to find. "The duty of the jury remained undischarged. They were still under the control of the court. The court did not direct them as to the law of the case; it only told them that they must act — that they, in other words, must find a verdict on the issue, which was whether the defendant was guilty, and if guilty, in what degree. This was no more a charge than if the court, immediately

after the argument, had told them to retire and consider of their verdict."

**2.** *Morgan v. State*, 12 Ind. 448. In this case the judge adjourned the court at six P. M. until noon of the next day, which was in the next term, placing no reason for such adjournment on the record. It was held that the judge had no right so to adjourn under the statute; therefore, the order was not a good adjournment till the next day, but only operated as an adjournment *sine die*. The verdict received on the next day from a jury which was out when the court adjourned was not received during the term, and was therefore a nullity.

**3.** *State v. McKinney*, 31 Kan. 570.

**Verdict Received After Adjournment for the Night.** — Although it is required by statute that the verdict shall be rendered in open court, such verdict will not be set aside because received after an adjournment for the night, the judge, officers of the court, defendant, and his counsel being present, and the polling of the jury having been demanded by defendant through his counsel. *State v. McKinney*, 31 Kan. 570.

**4.** *Meece v. Com.*, 78 Ky. 586. In this case it was held that a judgment of conviction rendered on a regular court day will not be invalidated because the verdict was found on Sunday.

**5.** *State v. Johnson*, 46 La. Ann. 5. In this case the verdict, consisting of the single word "manslaughter" written on the indictment, was held to be fatally defective, and not to be cured by polling the jury, when the only question asked on such polling was, "Is manslaughter your verdict?"

they may be directed by the court to reconsider it and to present a verdict in proper form.<sup>1</sup>

**6. SPECIFYING THE DEGREE.** — Where the defendant is tried upon an indictment for murder in the first degree, a verdict of guilty must specify the degree of the crime of which he is convicted.<sup>2</sup> This is also necessary where the murder is charged to have been committed by means of poison.<sup>3</sup>

**Where the Verdict Fails to Specify the Degree** of the crime, according to

1. *Grant v. State*, 33 Fla. 292. See also article VERDICT.

In doing this, however, the court should use great caution and not intimate to the jury the kind of verdict, in substance, that should be returned. *Grant v. State*, 33 Fla. 292.

2. *Alabama*. — *Dover v. State*, 75 Ala. 40; *Storey v. State*, 71 Ala. 329; *Kendall v. State*, 65 Ala. 492; *Murphy v. State*, 45 Ala. 32; *Johnson v. State*, 17 Ala. 618; *Cobia v. State*, 16 Ala. 781; *Robertson v. State*, 42 Ala. 509; *Hall v. State*, 40 Ala. 698; *Noles v. State*, 24 Ala. 672.

*Arkansas*. — *Ford v. State*, 34 Ark. 649; *Neville v. State*, 26 Ark. 614; *Trammell v. State*, 26 Ark. 534; *Allen v. State*, 26 Ark. 333; *Thompson v. State*, 26 Ark. 323; *Carpenter v. State*, 58 Ark. 233; *McAdams v. State*, 25 Ark. 405.

*California*. — *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38; *People v. Noll*, 20 Cal. 164; *People v. O'Neil*, 78 Cal. 388; *People v. Vance*, 21 Cal. 400; *People v. Goslaw*, 73 Cal. 324.

*Colorado*. — *Kearney v. People*, 11 Colo. 258.

*Connecticut*. — *State v. Dowd*, 19 Conn. 388; *State v. Hamlin*, 47 Conn. 95.

*Florida*. — *Potsdamer v. State*, 17 Fla. 895.

*Indiana*. — *Kennedy v. State*, 6 Ind. 485.

*Iowa*. — *State v. Moran*, 7 Iowa 236.

*Kansas*. — *State v. Huber*, 8 Kan. 447.

*Kentucky*. — *Hays v. Com.*, (Ky. 1890) 14 S. W. Rep. 833.

*Maine*. — *State v. Cleveland*, 58 Me. 564.

*Maryland*. — *Ford v. State*, 12 Md. 514.

*Michigan*. — *Tully v. People*, 6 Mich. 273; *People v. Hall*, 48 Mich. 482.

*Missouri*. — *State v. Upton*, 20 Mo. 397; *State v. Montgomery* 98 Mo. 399; *State v. Jackson*, 99 Mo. 60.

*Montana*. — *Territory v. Young*, 5

Mont. 244; *Territory v. Stears*, 2 Mont. 324; *Territory v. Johnson*, 9 Mont. 30. *Nebraska*. — *Parrish v. State*, 18 Neb. 405.

*Nevada*. — *State v. Rover*, 10 Nev. 388; *State v. Millain*, 3 Nev. 409.

*New Jersey*. — *Graves v. State*, 45 N. J. L. 206.

*North Carolina*. — *State v. Gilchrist*, 113 N. Car. 673.

*Ohio*. — *Parks v. State*, 3 Ohio St. 101; *Dick v. State*, 3 Ohio St. 89; *State v. Gardiner*, *Wright (Ohio)* 392.

*Oregon*. — *State v. Wintzingerode*, 9 Oregon 153.

*Pennsylvania*. — *White v. Com.*, 6 Binn. (Pa.) 179; *Rhodes v. Com.*, 48 Pa. St. 396; *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *Lane v. Com.*, 59 Pa. St. 371; *Shaffner v. Com.*, 72 Pa. St. 60; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415.

*Tennessee*. — *McPherson v. State*, 9 Yerg. (Tenn.) 279; *Kirby v. State*, 7 Yerg. (Tenn.) 259; *Turner v. State*, 3 Heisk. (Tenn.) 452.

*Texas*. — *Slaughter v. State*, 24 Tex. 410; *Armstead v. State*, 22 Tex. App. 51; *Dubose v. State*, 13 Tex. App. 418; *Krebs v. State*, 3 Tex. App. 348; *Colbath v. State*, 2 Tex. App. 391; *Zwicker v. State*, 27 Tex. App. 539; *Johnson v. State*, 30 Tex. App. 419.

*Virginia*. — *Briggs v. Com.*, 82 Va. 564.

See also *Dover v. State*, 75 Ala. 40; *McGuffie v. State*, 17 Ga. 497; *State v. Potter*, 16 Kan. 80; *Com. v. Herty*, 109 Mass. 348; *State v. Ryan*, 13 Minn. 370. *Compare People v. March*, 6 Cal. 543; *Revel v. State*, 26 Ga. 275; *Kennedy v. State*, 6 Ind. 485; *State v. Weese*, 53 Iowa 92; *Bilansky v. State*, 3 Minn. 427; *Territory v. Yarberrry*, 2 N. Mex. 391; *Territory v. Romine*, 2 N. Mex. 114; *People v. Rugg*, 98 N. Y. 537; *Buster v. State*, 42 Tex. 315; *Leschi v. Territory*, 1 Wash. Ter. 22.

3. *Kendall v. State*, 65 Ala. 492; *Johnson v. State*, 17 Ala. 618; *Robbins v. State*, 8 Ohio St. 132; *Lane v. Com.*, 59 Pa. St. 371.

the weight of authority, it will not be sufficient to support a judgment of conviction, but the court must grant a new trial.<sup>1</sup>

**Guilty as Charged.** — It will not be sufficient for the verdict to state that the defendant is guilty as charged in the indictment,<sup>2</sup> nor

1. *Alabama*. — *Dover v. State*, 75 Ala. 40; *Storey v. State*, 71 Ala. 329; *Kendall v. State*, 65 Ala. 492; *Murphy v. State*, 45 Ala. 32; *Johnson v. State*, 17 Ala. 618; *Cobia v. State*, 16 Ala. 781; *Edgar v. State*, 43 Ala. 312; *Robertson v. State*, 42 Ala. 509; *Weatherford v. State*, 43 Ala. 319; *Hall v. State*, 40 Ala. 698; *Noles v. State*, 24 Ala. 672.

*Arkansas*. — *Ford v. State*, 34 Ark. 649; *Neville v. State*, 26 Ark. 614; *Trammell v. State*, 26 Ark. 534; *Allen v. State*, 26 Ark. 333; *Carpenter v. State*, 58 Ark. 233; *Thompson v. State*, 26 Ark. 323; *McAdams v. State*, 25 Ark. 405.

*California*. — *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38; *People v. Noll*, 20 Cal. 164; *People v. O'Neil*, 78 Cal. 388; *People v. Vance*, 21 Cal. 400; *People v. Goslaw*, 73 Cal. 324.

*Colorado*. — *Kearney v. People*, 11 Colo. 258.

*Connecticut*. — *State v. Dowd*, 19 Conn. 388; *State v. Hamlin*, 47 Conn. 95.

*Florida*. — *Potsdamer v. State*, 17 Fla. 895.

*Indiana*. — *Kennedy v. State*, 6 Ind. 485.

*Iowa*. — *State v. Moran*, 7 Iowa 236.

*Kansas*. — *State v. Huber*, 8 Kan. 447.

*Kentucky*. — *Hays v. Com.*, (Ky. 1890) 14 S. W. Rep. 833.

*Maine*. — *State v. Cleveland*, 58 Me. 564.

*Maryland*. — *Ford v. State*, 12 Md. 514.

*Michigan*. — *Tully v. People*, 6 Mich. 273; *People v. Hall*, 48 Mich. 482.

*Missouri*. — *State v. Upton*, 20 Mo. 397; *State v. Montgomery*, 98 Mo. 399; *State v. Jackson*, 99 Mo. 60.

*Montana*. — *Territory v. Stears*, 2 Mont. 324; *Territory v. Johnson*, 9 Mont. 30.

*Nebraska*. — *Parrish v. State*, 18 Neb. 405.

*Nevada*. — *State v. Rover*, 10 Nev. 388; *State v. Millain*, 3 Nev. 409.

*New Jersey*. — *Graves v. State*, 45 N. J. L. 206.

*North Carolina*. — *State v. Gilchrist*, 113 N. Car. 673.

*Ohio*. — *Parks v. State*, 3 Ohio St.

101; *State v. Gardiner, Wright* (Ohio) 392; *Dick v. State*, 3 Ohio St. 89.

*Pennsylvania*. — *White v. Com.*, 6 Binn. (Pa.) 179; *Rhodes v. Com.*, 48 Pa. St. 396; *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *Lane v. Com.*, 59 Pa. St. 371; *Shaffner v. Com.*, 72 Pa. St. 60; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415.

*Tennessee*. — *McPherson v. State*, 9 Yerg. (Tenn.) 279; *Kirby v. State*, 7 Yerg. (Tenn.) 259; *Turner v. State*, 3 Heisk. (Tenn.) 452.

*Texas*. — *Colbath v. State*, 2 Tex. App. 391; *Isbell v. State*, 31 Tex. 138; *Armstead v. State*, 22 Tex. App. 51; *Slaughter v. State*, 24 Tex. 410; *Dubose v. State*, 13 Tex. App. 418; *Cockrum v. State*, 24 Tex. 394; *Krebs v. State*, 3 Tex. App. 348; *Burrell v. State*, 16 Tex. 147; *Zwicker v. State*, 27 Tex. App. 539; *Johnson v. State*, 30 Tex. App. 419.

*Virginia*. — *Briggs v. Com.*, 82 Va. 564.

*Wisconsin*. — *Hogan v. State*, 30 Wis. 428.

2. *People v. Campbell*, 40 Cal. 129; *Kirby v. State*, 7 Yerg. (Tenn.) 259; *Colbath v. State*, 2 Tex. App. 391.

In *Buster v. State*, 42 Tex. 315, the verdict was as follows: "We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment to be hung by the neck until dead." It was held that this was insufficient to support a judgment.

On the trial of an indictment charging the crime of murder in the first degree in the descriptive words of the statute, a verdict of "guilty in manner and form as he stands charged in said indictment," is insufficient, for the indictment would have supported a verdict for murder in the second degree, or for manslaughter. Therefore, such verdict does not ascertain the degree of the crime, which it is required to do by statute. *Dick v. State*, 3 Ohio St. 89. In this case the court said: "It would be unsafe to allow the jury to ascertain the degree of the crime by a reference to the form of the indictment, as they are not so familiar with the technical form in which the crime is sometimes charged in the indictment as to distinguish easily the requisites of a



that he is "guilty of the murder whereof he stands indicted;"<sup>1</sup> nor will a general verdict of "guilty" be sufficient.<sup>2</sup>

**Some Decisions, However,** hold that where from the language of the indictment it is evident that the defendant was intended to be charged with murder in the first degree, a verdict which states that the jury find the prisoner "guilty," "guilty as charged in the indictment," or "guilty in manner and form as charged in the indictment," will support a judgment of conviction for murder in the first degree.<sup>3</sup>

**Conviction of Lesser Crime.**—In some states it is held that the finding of the degree of the crime is necessary only where the jury convict the prisoner of a lesser crime than that charged.<sup>4</sup> Where, however, the indictment does not contain the averments requisite to constitute murder in the first degree, a verdict of "guilty in manner and form as he stands indicted" will sustain a judgment of conviction only for a lesser degree.<sup>5</sup>

charge of one degree of homicide from that of another."

**Amendment of Verdict.**—Where a jury, in a case of murder in the second degree, returned a verdict as follows: "We, the jury, find the defendant guilty as charged," it is not error for the court, after being informed by the jury that they intended to find the defendant guilty of murder in the second degree, to allow the verdict, with the consent of the jury, to be amended so as to read as follows: "We, the jury, find the defendant guilty of murder in the second degree, as charged in the information." *State v. Potter*, 16 Kan. 80.

As to the amendment of verdicts generally, see article VERDICTS.

1. *State v. Cleveland*, 58 Me. 564.

2. *Hogan v. State*, 30 Wis. 428.

3. *Leschi v. Territory*, 1 Wash. Ter. 13; *Cook v. Territory*, 3 Wyoming 110; *Com. v. Earle*, 1 Whart. (Pa.) 525; *State v. Weese*, 53 Iowa 92; *People v. Rugg*, 98 N. Y. 537; *Territory v. Romine*, 2 N. Mex. 114; *Territory v. Yarberry*, 2 N. Mex. 391; *State v. Gilchrist*, 113 N. Car. 673; *Timmerman v. Territory*, 3 Wash. Ter. 445.

**Murder Committed in Perpetrating a Felony.**—Where an indictment charged the defendant with the crime of murder, committed in the perpetration of robbery and burglary, and the jury returned a verdict, "Guilty as charged in the indictment," it was held that such verdict was sufficient and found the defendant guilty of murder in the first degree, the indictment charging

the highest degree of the crime under the statute in language that could not be applied to any lesser degree. *State v. Weese*, 53 Iowa 92.

**Murder Committed by Poison.**—In *Com. v. Earle*, 1 Whart. (Pa.) 525, it was held that where the indictment charged the prisoner with perpetrating the crime by means of poison, and the jury found the prisoner "guilty in manner and form as stated in the indictment," without fixing the degree of the offense, the court would adjudge the offense to be murder in the first degree.

**Murder by "Lying in Wait."**—Where the indictment charges the prisoner with perpetrating the murder by "lying in wait," and the jury find him guilty without stating the degree, the court will adjudge it murder in the first degree. *Leschi v. Territory*, 1 Wash. Ter. 13.

4. *Bilansky v. State*, 3 Minn. 427; *State v. Eno*, 8 Minn. 220; *Territory v. Romine*, 2 N. Mex. 114.

**Under the New York Penal Code**, the finding of the degree of murder is necessary only when the finding is of a degree other than that charged. *People v. Rugg*, 98 N. Y. 537.

5. *Johnson v. Com.*, 24 Pa. St. 386. In this case, under an indictment charging that the defendant feloniously, wilfully, and of his malice aforethought did cast a certain E. T. into a dam of water and held her in and under the water until drowned, he was found "guilty in manner and form as he stands indicted." It was held that the defendant was not convicted

**Requiring Verdict for Particular Degree.** — Though it is proper for the judge to apprise the jury, in a trial for homicide, of a distinction between the degrees of the offense, to apply the evidence, and to instruct them to which of these degrees it points,<sup>1</sup> yet the jury must not be imperatively required to render a verdict for a particular degree of homicide, nor must the instructions be such as to deny them the power of rendering such verdict as their judgment and conscience dictate after being fully instructed as to their duty.<sup>2</sup>

**c. SPECIFIC ACQUITTAL OF HIGHER DEGREE.** — Since a verdict of guilty of any degree of homicide is equivalent to an express acquittal of all higher degrees of that offense, a verdict convicting the defendant of a lower degree need not specifically acquit him of the higher degree.<sup>3</sup> Where, however, the acquittal

of murder in the first degree, but of murder in the second degree.

1. *Rhodes v. Com.*, 48 Pa. St. 396; *Lane v. Com.*, 59 Pa. St. 371.

2. *Adams v. State*, 29 Ohio St. 412; *Robbins v. State*, 8 Ohio St. 132.

"It is argued that where the facts bring the case within either of the modes of killing declared murder in the first degree, it being the duty of the jury to find a verdict in accordance therewith, a peremptory direction to find that degree is proper and right. To admit this would be to determine that this portion of the verdict is matter of form, and to substitute a court to do that which the law says the jury shall upon their oaths do. They have undoubtedly the power to fix a lower degree to the crime than the statute provides." *Lane v. Com.*, 59 Pa. St. 371.

"It is in vain to argue that the judge was more competent to fix the degree than the jury, or that the circumstances proved the crime to be murder of the first degree, if murder at all, for the statute is imperative that commits the degree to the jury. \* \* \* To tell them they *must* find the first degree was to withdraw the point from the jury and decide it himself." *Rhodes v. Com.*, 48 Pa. St. 396.

In an indictment for murder which did not charge the offense to have been committed wilfully, deliberately, and premeditatedly, or by means of poison, or by lying in wait, or in perpetration of or attempt to perpetrate a felony, it was held error in the court to charge the jury: "If you find the defendant guilty, your verdict must state, 'Guilty of murder in the first degree, in the

manner and form as he stands indicted.' If not guilty, your verdict will be simply, 'Not guilty.'" *Rhodes v. Com.*, 48 Pa. St. 396.

**Murder by Means of Poison.** — In *Robbins v. State*, 8 Ohio St. 131, it was held that, the statute having required that "in all trials for murder" the jury shall, if they find the defendant guilty, ascertain from the evidence before them the degree of the homicide, it is error for the court to instruct the jury, on the trial of an indictment for murder in the first degree by means of poison, that in this kind of case murder is not of different degrees, and that, therefore, if they find the defendant guilty as he stands charged in the indictment, they must return a verdict for murder in the first degree.

3. *Allen v. State*, 37 Ark. 436; *Brennan v. People*, 15 Ill. 511; *State v. Tweedy*, 11 Iowa 350; *Weighorst v. State*, 7 Md. 442; *State v. Lessing*, 16 Minn. 75; *Brooks v. State*, 3 Humph. (Tenn.) 25.

In *State v. Lessing*, 16 Minn. 75, the court, in passing on the objection that the jury had not negatived the higher offense of murder in the first degree as charged in the indictment, but had convicted the defendant of a lesser degree of murder, said: "The indictment, as we have already observed, is for murder in the first degree, and contains a single count. The defendant in due form entered a plea of, not guilty. Issue was joined, and the issue was submitted to a jury, which jury rendered a verdict of guilty of murder in the second degree against the prisoner. If, as we have determined, the verdict is supported by the indictment, we

of the higher degree of the crime is specified together with the conviction of a lower, the verdict will not be bad for that reason, provided that all parts of such verdict considered together import conclusively that the jury intended only to acquit of the greater crime and to convict of the lower.<sup>1</sup>

*d.* SPECIFICATION OF COUNT SUSTAINED. — Where the indictment contains several counts, and the homicide is alleged to have

think, under the circumstances presented here, the verdict rendered in this case is equivalent to an express acquittal of the defendant for murder in the first degree, and that the defendant could successfully plead the proceedings in this case in bar of any subsequent prosecution against him for the same offense." The court in this case, as supporting the verdict, cited the following cases: *Weinzorpflin v. State*, 7 Blackf. (Ind.) 187; *Stoltz v. People*, 5 Ill. 168; *Guenther v. People*, 24 N. Y. 101.

In *Brooks v. State*, 3 Humph. (Tenn.) 25, the prisoner was indicted for the crime of murder. The jury found him guilty of manslaughter without negating the murder, and it was insisted that this was erroneous. The court said: "Blackstone is cited as authority for the proposition; he says that 'one indicted for murder may be acquitted of the murder, and found guilty of manslaughter.' We do not think that this was intended to mean that the jury must return a verdict of not guilty as to the murder, before the return of guilty of manslaughter, but that a prisoner might be found guilty of manslaughter although indicted for murder and not for manslaughter. The prisoner will be in no danger of being again arraigned for the murder; having been once indicted therefor, and having been punished for the offense as manslaughter, he stands forever acquitted of the murder, as the law provides that no man shall be punished twice for the same offense."

*Contra.* — In *State v. Flannigan*, 6 Md. 167, it was held that where issue is joined upon an indictment involving different degrees of the same offense, and the party is acquitted of the higher and convicted of the lower grade, the verdict must find specifically not guilty of the higher and guilty of the inferior charge, and if it merely find the party guilty of the inferior charge it will be of no avail. In this case, upon an indictment for murder, a verdict of

"guilty of manslaughter," without saying "not guilty of murder," was held erroneous.

In England the practice was for the juries to say, "not guilty of murder, but guilty of manslaughter." Hawk. P. C. 620; 1 Chit. Crim. L. 641, 642.

**Distinct Offenses Charged in Separate Counts.** — In *Casey v. State*, 20 Neb. 138, it was held that where distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty or respond to each charge in their finding. To the same effect, see *Wilson v. State*, 20 Ohio 26; *Williams v. State*, 6 Neb. 343.

1. *State v. Bowen*, 16 Kan. 475. In this case, under an information charging murder in the second degree, the following verdict was returned: "We, the jury, find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree." The defendant moved to be discharged on the ground that, as murder includes all of the degrees of manslaughter, the information in fact charged all those degrees, and the first part of the verdict, finding him "not guilty in manner and form as charged," was responsive to all the charges, and acquitted him of guilt, not only as to murder, but as to all the degrees of manslaughter, and that therefore the latter part of the verdict must be disregarded as surplusage. The court, however, held that the point was not well taken. "The verdict must be taken as a whole, and its meaning determined from a consideration of every part. So taken, there is no chance for misconception as to the meaning of the jury. It finds the defendant guilty of a crime, and states the crime of which it finds him guilty. That crime is included in the offense charged, and the verdict of guilty is good under the information. So much as declares the defendant not guilty is plainly, when taken in connection with

been committed in different ways or under different circumstances, a verdict of guilty rendered upon the trial of such indictment should specify upon which count it was rendered. Where, however, all the counts are the same as to the manner of death and the circumstances surrounding it except as to the weapon or instrument used, it need not be specified in the verdict upon which count the jury found the defendant guilty.<sup>1</sup>

**Plea of Guilty.**—As a general rule, where the defendant indicted for murder pleads guilty, it is the duty of the court, and not of the jury, to determine the degree from the evidence.<sup>2</sup> In at least one state, however, it is provided by statute that even where the defendant pleads guilty to murder in the first degree, the jury is required to find the degree.<sup>3</sup>

**e. OMISSION OF DEFENDANT'S NAME.**—Where only one person is indicted for homicide, the verdict need not contain his name, but a general verdict finding the defendant guilty will be sufficient.<sup>4</sup>

the other part of the verdict, to be limited to the major offense in terms charged."

1. *Jackson v. State*, 74 Ala. 26; *Kilgore v. State*, 74 Ala. 1; *Brown v. State*, 105 Ind. 385; *Hudson v. State*, 1 Blackf. (Ind.) 317; *State v. Wright*, 53 Me. 328; *Com. v. Desmarteau*, 16 Gray (Mass.) 1; *Donnelly v. State*, 26 N. J. L. 463.

**General Verdict Sufficient.**—In *Kilgore v. State*, 74 Ala. 1, the court said: "There was no error in the refusal to instruct the jury that by the verdict they must specify upon which of the two counts of the indictment they found the defendant guilty. Each count is in form sufficient, and the only difference is in the description of the means by which the unlawful and malicious killing was perpetrated. When the several counts of an indictment are in proper legal form, and relate to a single offense, and a conviction upon either requires the same judgment and the same sentence as a conviction upon all would, a general verdict is all that the law requires."

In *State v. Parker*, 65 N. Car. 453, it was held that "it is taken to be settled law that if an indictment charges in different counts that the crime was committed by several different means, if the jury believe it was committed by either of those means they are not obliged to find by which in particular, but may find a general verdict of guilty on all the counts notwithstanding the means charged in the several

counts are inconsistent with each other." See also *State v. Williams*, 9 Ired. L. (N. Car.) 140; *State v. Baker*, 63 N. Car. 276.

In *Brown v. State*, 105 Ind. 385, one count of the indictment charged the killing to have been done with a stone, and another count charged it to have been done with a knife. It was held that a verdict of guilty need not determine which instrument caused the death.

2. *Lane v. Com.*, 59 Pa. St. 371; *People v. Lennox*, 67 Cal. 113; *State v. Cumberland*, 90 Iowa 525.

**Record Need Not Show Finding of Court.**—In *State v. Cumberland*, 90 Iowa 525, it was held that the court is not required, after performing the duty of ascertaining and determining from the testimony the degree of the offense, to enter the fact of record. *Overruling M'Cauley v. U. S.*, 1 Morr. (Iowa) 486.

3. *Sanders v. State*, 18 Tex. App. 372; *Giles v. State*, 23 Tex. App. 285.

4. *Martin v. State*, 25 Ga. 494; *State v. Yancey*, 3 Brev. (S. Car.) 142. See also *State v. Bradley*, 9 Rich. L. (S. Car.) 168; *State v. Motley*, 7 Rich. L. (S. Car.) 327; *People v. Boggs* 20 Cal. 432.

**Incorrect Name Rejected as Surplusage.**—In *People v. Boggs*, 20 Cal. 432, the indictment was against J. B. B., and the verdict pronounced the defendant, J. M. B., guilty of manslaughter. It was held that the error in the initial of the middle name of the defendant, on

*f.* **ASSESSMENT OF PUNISHMENT.**—Where it is provided by law that the jury, upon returning a verdict of conviction for homicide, shall assess the punishment for the offense in such verdict, the punishment assessed must be specifically set out in the verdict, without implication or inference.<sup>1</sup>

the verdict, was immaterial. The court said: "It was enough that they found the defendant whom they had in charge guilty. The words 'J. M. Boggs' might have been rejected as surplusage, and their presence, under the circumstances, could work no injury."

**Amendment by Subsequent Insertions.**—In *State v. Bradley*, 9 Rich. L. (S. Car.) 168, the defendant J. B., though jointly indicted with another, was tried separately. The jury found the following verdict: "We find the defendant guilty." The presiding judge directed the verdict to be written as follows: "We find the defendant, Jackson Bradley, guilty," which was done, and the first verdict was erased. It was held that the direction of the presiding justice was proper. See also *State v. Motley*, 7 Rich. L. (S. Car.) 327; *State v. Yancey*, 3 Brev. (S. Car.) 142; *Thornton v. Com.*, 24 Gratt. (Va.) 657.

1. *Veatch v. State*, 60 Ind. 291; *Dias v. State*, 7 Blackf. (Ind.) 20; *State v. Foster*, 36 La. Ann. 857; *Walton v. State*, 57 Miss. 533; *Spain v. State*, 59 Miss. 19; *People v. French*, 69 Cal. 169.

**Provision Constitutional.**—In *State v. Hockett*, 70 Iowa 442, it was held that the *Iowa* Code, providing that the jury, on a trial on an indictment for murder in the first degree, must designate in a verdict of guilty whether the accused shall be punished by death or imprisonment for life at hard labor, is not unconstitutional and void as intrenching upon judicial powers, given by the *Iowa* constitution, in the district and other courts.

In *Texas*, under Rev. Code, requiring the jury to assess the punishment upon conviction of homicide in whatever degree, a verdict which finds the defendant "guilty of murder in the first degree," but assesses neither death nor confinement for life as his punishment, is insufficient. *Doran v. State*, 7 Tex. App. 385.

In *Mississippi*, under the Acts of 1875, p. 79, the jury, in the trial of an indict-

ment for a capital crime, must be informed that if they find the defendant guilty, and do not declare in their verdict whether his punishment shall be death or imprisonment for life, the court will pronounce the sentence of death or the verdict will be set aside. *Walton v. State*, 57 Miss. 533.

**Verdict "Guilty of Capital Punishment" Insufficient.**—In *State v. Foster*, 36 La. Ann. 857, the jury rendered the verdict "guilty of capital punishment." It was held that such verdict could not serve as a foundation for the sentence of death, the meaning (whether guilty with capital punishment or without) being ambiguous.

**Sufficient Assessment of Punishment.**—Where, under statute, there are two punishments for murder in the first degree, viz., death or life imprisonment at hard labor, and the jury have been instructed to assess one of these in their verdict, a verdict fixing the punishment at "imprisonment in the penitentiary for life" will not be defective for the omission of the words "at hard labor." Such verdict indicates beyond question which of the only two punishments authorized it designed to have adjudged. *State v. Trout*, 74 Iowa 545.

In *New Mexico* it is held that where the jury find the defendant guilty of murder in the first degree, the verdict need not assess the punishment, since the punishment for that degree of the offense is fixed by law. *Territory v. Webb*, 2 N. Mex. 149; *Territory v. Romine*, 2 N. Mex. 114.

**Averaging Assessments of Jurors Improper.**—Where the defendant was convicted of murder in the second degree, and his punishment fixed at thirteen years in the penitentiary by averaging the assessments of the different jurors, all agreeing to be bound thereby, it was held that the assessment was invalid. *Hunter v. State*, 8 Tex. App. 75.

**Failure to Agree on Punishment.**—In *People v. Welch*, 49 Cal. 177, it was held that where the jury agree that the defendant is guilty of murder in the

*g.* **RECOMMENDATION TO MERCY.**—Where the punishment of the offense is at the discretion of the court the jury may incorporate in their verdict convicting the defendant of homicide a recommendation of the defendant to the mercy of the court.<sup>1</sup> Such recommendation is purely a matter of discretion with the jury, which they may exercise or not,<sup>2</sup> and when it is so exercised it is not binding on the court, but may be disregarded in assigning the punishment.<sup>3</sup>

**No Part of Verdict.**—The recommendation to the mercy of the court constitutes no essential part of the verdict, and the court may direct the verdict to be recorded without it.<sup>4</sup>

*h.* **ERRONEOUS SPELLING.**—As a general rule, when the meaning intended is clear, the mere fact that certain words in the verdict may be misspelled will not vitiate the verdict.<sup>5</sup> Where, however, the errors are such as to render the words unintelligible or their meaning doubtful, they will invalidate the verdict.<sup>6</sup>

**3. Polling the Jury.**—Upon a trial for homicide, as in other criminal offenses, after the jury have announced their verdict

first degree, but cannot agree on imprisonment for life as his punishment, or at least do not in their verdict fix such imprisonment as the punishment, the court shall pronounce punishment to be death.

1. *West v. State*, 79 Ga. 773; *In re Harris*, 93 Ga. 203; *State v. Bennett*, 40 S. Car. 308; *Hackett v. People*, 8 Colo. 390; *Eason v. State*, 6 Baxt. (Tenn.) 431.

2. *Eason v. State*, 6 Baxt. (Tenn.) 431; *Thomas v. State*, 89 Ga. 479.

3. *Hackett v. People*, 8 Colo. 390; *Walston v. State*, 54 Ga. 242; *Eason v. State*, 6 Baxt. (Tenn.) 431.

4. *People v. Lee*, 17 Cal. 76. In this case the verdict of the jurors was accompanied by a recommendation of mercy. The court directed the verdict to be entered without the recommendation. It was held that there was no error in such direction, and that the recommendation was addressed solely to the court and constituted no part of the verdict.

5. *State v. Ross*, 32 La. Ann. 854; *Walker v. State*, 13 Tex. App. 618; *Krebs v. State*, 3 Tex. App. 348; *Wooldridge v. State*, 13 Tex. App. 443. See in general, upon this subject, article VERDICT.

Thus a verdict, "Wee the jurors finde the defendant guilty and of mrdner in the first degree and assess his confinement in the penitentiary for life," was held sufficiently certain, though "u" was

omitted in "murder" and "punishment at" before "confinement." *Walker v. State*, 13 Tex. App. 618.

In *Krebs v. State*, 3 Tex. App. 348, it was held that the following verdict, "We, the juror, find the defendant guilty, and sess his punishment deth," was an intelligible verdict in a murder case, however obnoxious in the spelling and style.

**Verdict Misspelled but Properly Read.**—In *State v. Ross*, 32 La. Ann. 854, a verdict written, "Gulty withoit capitel purnish," but distinctly read by the clerk, "Guilty without capital punishment," was held to be valid, since the law did not require the verdict in a capital case to be in writing.

**6. "Fist" Degree.**—*Wooldridge v. State*, 13 Tex. App. 443. In this case the verdict, finding the defendant guilty of murder in the "fist" degree, was held insufficient and illegal. The court said: "It is to be particularly noted that here we have no case of the misspelling of a word; the word used is 'fist,' is properly spelled 'fist,' and is a word as well defined and as well known to the English language as any other word in daily common use. It is further to be noted that this word 'fist' is not pronounced, and cannot by any contortion of pronunciation be made to sound, like the word 'first,' and consequently the well-recognized doctrine of *idem sonans* is not applicable."

either the defense or the prosecution may demand that the jury be polled.<sup>1</sup> This may be done at any time after the verdict is returned into court and before it is accepted by the court for record.<sup>2</sup> Where a poll is thus demanded it is the duty of each juror, upon his name being called, to announce his individual decision as to the prisoner's guilt,<sup>3</sup> and if the juror's answer is that the prisoner is guilty, it should also state the degree of which he finds him guilty.<sup>4</sup> In some jurisdictions, however, he may simply be asked, "Is this your verdict?"<sup>5</sup>

**Dissent.**—Any juror may, upon being polled, dissent from the

1. *Grant v. State*, 33 Fla. 291; *Williams v. State*, 60 Md. 402; *State v. Ostrander*, 30 Mo. 13; *Rothbauer v. State*, 22 Wis. 468. See also the article VERDICT.

**Absence of Counsel.**—In *Penn v. State*, 62 Miss. 450, it was held that the absence of the defendant's counsel and the failure of the court to call him when a verdict convicting the defendant of murder was returned and received, and the jury discharged, are not good ground for a new trial if the jury was polled, as the defendant's counsel, if present, could only have demanded that.

2. *Grant v. State*, 33 Fla. 291; *Briser v. State*, 26 Ala. 107.

3. *Williams v. State*, 60 Md. 402; *State v. John*, 8 Ired. L. (N. Car.) 330.

4. *State v. Ostrander*, 30 Mo. 13.

**Verdict "Guilty" Insufficient.**—In *Williams v. State*, 60 Md. 402, the response of each juror, upon being polled, was, "Guilty," without a designation of the degree of guilt. The verdict was held to be a nullity. The fact that the clerk, immediately after polling the jury, called upon them to hearken to the verdict as the court had recorded it—"Your foreman saith that J. W., the prisoner at the bar, is guilty of murder in the first degree, and so say you all"—does not affect the question. In this case the court said: "Before the verdict was recorded, the plaintiff in error demanded a poll of the jury; and each juror, when called upon to answer for himself and in his own language, responded, 'Guilty,' without specifying the degree of murder. Now, murder in the first degree is punishable by death, and murder in the second degree by confinement in the penitentiary. The code, therefore, provides that on an indictment for murder the jury shall, if

they find the person guilty, ascertain in their verdict whether it be murder in the first or second degree. A general verdict of guilty on an indictment for murder is a bad verdict, and on such a verdict no judgment can be pronounced."

5. *Prior v. State*, 77 Ala. 56; *Harris v. State*, 31 Ark. 196; *Rothbauer v. State*, 22 Wis. 468; *Penn v. State*, 62 Miss. 450.

When, in polling the jury, a juror answers that he agrees to the verdict, without other remark or explanation, the court will not presume for the purpose of imputing error that he wished to make an explanation merely because the defendant's counsel asked that he be allowed to explain and the court refused him, the juror himself saying nothing. *Prior v. State*, 77 Ala. 56.

**Assent for the Sake of Agreement.**—If, upon the jury being polled in a trial for murder, a juror says that in his opinion the prisoner is only guilty of manslaughter, but that he assents to the verdict of guilty of murder for the sake of an agreement, such verdict is not a proper one, and the judgment entered thereon against the prisoner's objection will be reversed. *Rothbauer v. State*, 22 Wis. 468.

**Assent to the Verdict as a Compromise.**—In *State v. Ostrander*, 30 Mo. 13, a verdict of guilty of murder in the second degree having been rendered upon an indictment for murder in the first degree, and it afterwards appearing that one of the jurors assented to it as a compromise, he refusing in open court to assent to it according to its legal effect as a verdict of not guilty in the first degree, the court held that there was no verdict, and that there was a mistrial. This decision was overruled upon appeal.

verdict as returned by the foreman.<sup>1</sup> If any of the jurors thus dissent, the jury should be sent out for further deliberation.<sup>2</sup>

**The Court May of Its Own Motion** cause the jury to be polled if there is any reason to doubt that all the jurors concur in the verdict.<sup>3</sup>

**In the Absence of the Polling of a Jury**, any member thereof has the right of his own accord to recede from the verdict agreed upon, at any time before it is accepted for record.<sup>4</sup>

**XIII. SENTENCE — Allocution.** — Upon the conviction of a defendant indicted for homicide, it is usual, as in a case of conviction for other felonies, to inquire of him before pronouncing sentence if he has anything to say why sentence should not be pronounced against him.<sup>5</sup> At common law it was required to appear of record that this had been done.<sup>6</sup> In some of the states of this country it is held that the absence of this formality will not vitiate the proceedings, even in capital cases.<sup>7</sup> In other states it is held that the omission will not operate to reverse the conviction,<sup>8</sup> but that its effect is merely to necessitate the remanding of the case for sentence after the question has been asked.<sup>9</sup>

**XIV. MOTION FOR NEW TRIAL.** — See article NEW TRIAL.

**XV. APPEAL AND ERROR — 1. Manner of Allowance.** — In homicide, as in other cases of prosecution of felony, an appeal or writ

1. *Williams v. State*, 60 Md. 402; *State v. Ostrander*, 30 Mo. 13; *State v. John*, 8 Ired. L. (N. Car.) 330; *State v. Harden*, 1 Bailey L. (S. Car.) 3; *Nomaque v. People*, 1 Ill. 145.

2. *Brown v. State*, 63 Ala. 97.

3. *Harris v. State*, 31 Ark. 196.

4. *Grant v. State*, 33 Fla. 291.

5. *Sarah v. State*, 28 Ga. 576; *State v. Jennings*, 24 Kan. 642; *State v. Askins*, 33 La. Ann. 1253; *State v. Shields*, 33 La. Ann. 991; *Territory v. Webb*, 2 N. Mex. 147; *McCue v. Com.*, 78 Pa. St. 185; *Jewell v. Com.*, 22 Pa. St. 102; *Hamilton v. Com.*, 16 Pa. St. 129; *State v. Jefcoat*, 20 S. Car. 383; *State v. Trezevant*, 20 S. Car. 363; *State v. Washington*, 1 Bay (S. Car.) 155. See in general article SENTENCE.

6. *Territory v. Webb*, 2 N. Mex. 147; *McCue v. Com.*, 78 Pa. St. 185.

**Presumption Where Record Is Silent.** — In *McCue v. Com.*, 78 Pa. St. 185, it was held that though the question might have been asked in fact, yet, as it did not appear in the record, and was a matter of substance, the court must treat it as not having been done.

*Contra.* — In *Territory v. Webb*, 2 N. Mex. 147, it is held that where the record is silent it will be presumed that the question was asked.

**Reason for Requirement.** — This was held necessary in order that the de-

fendant might then allege grounds in arrest of judgment, or might plead a pardon, etc. 4 Black. Com. 376; *State v. Trezevant*, 20 S. Car. 363; *McCue v. Com.*, 78 Pa. St. 185.

7. *Sarah v. State*, 28 Ga. 576; *State v. Shields*, 33 La. Ann. 991; *Jones v. State*, 51 Miss. 718.

**Contra — Necessary in Capital Cases.** — In *New Jersey* it was held that the inquiry of the prisoner and the record of it were necessary in capital cases, and in these only. *West v. State*, 22 N. J. L. 212. See also *State v. Ball*, 27 Mo. 324.

**Omission in Case of Manslaughter.** — It has been held that the omission of the question in pronouncing the sentence upon conviction for manslaughter is immaterial. *State v. Askins*, 33 La. Ann. 1253; *State v. Shields*, 33 La. Ann. 991.

8. *McCue v. Com.*, 78 Pa. St. 185.

9. *McCue v. Com.*, 78 Pa. St. 185; *State v. Jennings*, 24 Kan. 642; *State v. Jefcoat*, 20 S. Car. 383; *State v. Trezevant*, 20 S. Car. 363.

"The error occurred after trial and conviction, and applied to the subsequent proceeding, to wit, the sentence only; and in reason the remedy should extend only so far as the error extended." *State v. Trezevant*, 20 S. Car. 363.



of error will be allowed only in the manner and in the time fixed by law.<sup>1</sup>

**2. What Judgment Appealable.** — The general principle that final decisions only may be appealed from applies to appeals in the prosecution of homicide, and an appeal can be taken only from the judgment of the trial court.<sup>2</sup>

**3. What Questions Considered** — *a. ERRORS NOT NOTICED BELOW.* — It is usually the rule in convictions for homicide, as in other appeals, that errors will not be considered by the appellate court which were not excepted to in the trial court.<sup>3</sup> Where, however, an error may have been prejudicial to the defendant, it is often held that it will furnish ground for appeal even though not excepted to below.<sup>4</sup>

*b. SUFFICIENCY AND WEIGHT OF EVIDENCE.* — Where, upon review by the appellate court of the evidence upon which a conviction of homicide was based, the verdict appears to it to be manifestly against the weight of evidence, it may reverse the judgment and grant a new trial.<sup>5</sup>

*c. ERRONEOUS ADMISSION OR REJECTION OF EVIDENCE.* — Upon appeal from a conviction in homicide such conviction must be set aside if, over the defendant's objection, illegal evidence was admitted against him to which he duly excepted. In such case the presumption is that the error was to his prejudice, and the conviction cannot be sustained by the sufficiency of the legal evidence.<sup>6</sup> So also a reversal may be had where a competent witness has been rejected.<sup>7</sup>

1. See articles 'APPEALS, vol. 2, p. 146; ERROR, WRIT OF, vol. 7, p. 817.

2. See article APPEALS, vol. 2, p. 149. In *Regan v. Territory*, 1 Wash. Ter.

31, it is held that a verdict of guilty of murder and a warrant of execution do not constitute a judgment reviewable by writ of error.

3. See article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 157.

4. *State v. Ricks*, 32 La. Ann. 1098; *People v. Lyons*, 110 N. Y. 618, 16 N. Y. St. Rep. 660. See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 162.

5. *Lewis v. Com.*, 81 Va. 416;

*Mitchell v. State*, 8 Verg. (Tenn.) 514; *Holmes v. State*, 20 Tex. App. 110; *Giles v. State*, 23 Tex. App. 281.

6. *Preston v. State*, 4 Tex. App. 186. See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 211.

7. *Stokes v. State*, 4 Baxt. (Tenn.)

47. In this case it was held that a reversal of a conviction of murder in the second degree may be had where a competent witness has been objected to, though the materiality of his testimony does not appear in the bill of exceptions. See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 236.

## HORSE RACING.

**An Indictment** charging the offense of running a horse race upon a public highway should be certain and definite,<sup>1</sup> and should conform to the wording of the statute,<sup>2</sup> but a substantial compliance therewith is sufficient.<sup>3</sup>

1. *Myers v. State*, 1 Ind. 251, wherein it was held that an indictment founded on *Indiana Rev. Stat.*, c. 53, § 103, and charging that the defendant acted as "rider in a certain horse race, which was then and there run along a public highway in said county, between animals of the horse kind, in a trial of speed," was not sufficiently certain and definite.

2. **Omission of Word "Thereon."** — Under *Missouri Act 1845*, art. 8, § 43, a count in an indictment, which alleges that the defendant ran a horse upon the highway, etc., "so as to interrupt travelers," instead of "so as to interrupt travelers thereon," is bad. *State v. Fleetwood*, 16 Mo. 448.

3. *State v. Fleetwood*, 16 Mo. 448.

**Need Not State Termini of Highway.** — In an indictment for racing horses on a public highway it is not necessary to state the termini of the highway. *State*

*v. Burgett*, 1 Ind. 479; *State v. Brown*, 1 Ind. 532; *State v. Armstrong*, 3 Ind. 139.

**Variance Between Allegation and Proof.** — An indictment which charges that the defendant suffered his mare to be run in a certain race, etc., is defective when it appears from the evidence that the animal run was a horse. *Thrasher v. State*, 6 Blackf. (Ind.) 460.

**Mules Used Instead of Horses.** — An indictment charging the offense of running a horse race in and along a public road is not defective because it appears from the evidence that mules were used in the same. *Goldsmith v. State*, 1 Head (Tenn.) 154.

**Defendant's Horse Ridden by Third Party.** — An indictment which alleged "that W. and C. made and ran the race" is not made defective by proof that some one else rode W.'s horse. *State v. Wagster*, 75 Mo. 107.

## HOTELS.

See article *INNS AND INNKEEPERS*.

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## HOUSE BREAKING.

See article *BURGLARY*, vol. 3, p. 736.

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## HOUSES OF ILL FAME.

See article *DISORDERLY HOUSES*, vol. 7, p. 7.

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## HUSBAND AND WIFE.

BY E. A. CRAIGHILL, JR.

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## CROSS-REFERENCES.

As to *Appeals by Husband and Wife*, see article *APPEALS*, vol. 2, p. 195.

*Comment on Defendant's Failure to Call His Wife*, see article *ARGUMENTS OF COUNSEL*, vol. 2, p. 725.

*Action on Covenant in Deed by Husband and Wife*, see article *COVENANT*, vol. 5, p. 361.

*Protection of Communications Between Husband and Wife from Discovery*, see article *DISCOVERY*, etc., vol. 6, p. 757.

*Ejectment By and Against Husband and Wife*, see article *EJECTMENT*, vol. 7, pp. 288-290, 305-306.

*Foreclosure of Mortgage By and Against Husband and Wife*, see article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 84.

*Forcible Entry and Detainer Against*, see article *FORCIBLE ENTRY AND DETAINER*, vol. 9, p. 54.

*Execution Against*, see article *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 552.

*Writ of Error by*, see article *ERROR, WRIT OF*, vol. 7, p. 862.

*For matters of Substantive Law in regard to this subject*, see *AM. AND ENG. ENCYC. OF LAW* (2d ed.), tit. *HUSBAND AND WIFE*.

*And for cognate titles in this work*, see articles *ADULTERY*; *ALIMONY*; *BREACH OF PROMISE*; *CIVIL DAMAGE ACT*; *CRIMINAL CONVERSATION*; *CURTESY*; *DIVORCE*; *DOWER*; *HOMESTEAD*; *INSANITY*; *MARRIAGE*; *NEXT FRIEND*; *PARENT AND CHILD*; *PARTIES TO ACTIONS*; *SEPARATION*.

**I. INTRODUCTORY.** — The common-law doctrines in regard to the relation of husband and wife have been altered so frequently and materially by statutes in the various states that, of necessity,

many of the cases cited in this article are not in accord with the present practice. The practitioner is therefore advised to refer in every instance to the latest statutes on the subject.

The term "common law" is used in this article in contradistinction to the Married Woman's Act, and not to the codes of procedure.

**II. SUITS BETWEEN HUSBAND AND WIFE — 1. What Courts Have Jurisdiction.** — At Common Law husband and wife have always been looked upon as one person, and, in consequence of this legal fiction, actions between them have never been allowed in a court of law during the continuance of the married state.<sup>1</sup>

In Equity, however, the duality of husband and wife has always been recognized, and whenever the interests of the two are conflicting the wife is allowed to bring a suit against her husband, or the husband against his wife, as if they were sole and unmarried.<sup>2</sup>

1. *Hobbs v. Hobbs*, 70 Me. 381; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641; *Longendyke v. Longendyke*, 44 Barb. (N. Y.) 366; *Barber v. Barber*, 21 How. U. S.) 582. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

A Judgment by Confession, rendered against a husband in favor of the wife, is void, and will be quashed on certiorari. *Countz v. Markling*, 30 Ark. 17.

But where, as in *Pennsylvania*, the courts of law and equity are combined, a husband may confess or suffer a judgment to be entered against himself in favor of his wife without the intervention of a trustee, and execution may be lawfully issued thereon. *Rose v. Latshaw*, 90 Pa. St. 238.

**After Dissolution of the Marriage Contract** the law courts will allow suits between the parties. *Webster v. Webster*, 58 Me. 139; *Carlton v. Carlton*, 72 Me. 115. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

2. *Cannel v. Buckle*, 2 P. Wms. 243; *Barber v. Barber*, 21 How. (U. S.) 582; *Lane v. Lane*, 76 Me. 523; *Markham v. Markham*, 4 Mich. 305; *Simmons v. Thomas*, 43 Miss. 31; *Wood v. Chetwood*, 44 N. J. Eq. 64; *Hutton v. Hutton*, 3 Pa. St. 100; *Porter v. Rutland Bank*, 19 Vt. 410; *Barron v. Barron*, 24 Vt. 375. See also Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

In *Stone v. Wood*, 85 Ill. 603, the court said: "When either party becomes untrue to his or her vows and

marital duties, and by fraud obtains an unjust advantage of the other, equity will as readily afford relief as it will between other persons not occupying that relation."

In *Higgins v. Higgins*, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 13, the court said: "At law he would be without a remedy because of his inability to maintain an action against his wife, but it is one of the fundamental principles of courts of equity to extend their jurisdiction and powers of relief to cases in which the party has no legal remedy, or where that may be inadequate, and a right to substantial redress appears to be supported by the circumstances of the case. And within this principle it has been held that an action for equitable relief may be maintained by a husband against his wife."

**Suit to Remove Husband from Trusteeship.** — A married woman, having a separate estate created by law, may come into equity to have her husband removed from the trusteeship of her estate, and to recover property which he has disposed of without authority. *Whitman v. Abernathy*, 33 Ala. 154.

**Bill to Impeach Marriage Agreement.** — Where a husband intends by a bill in equity to impeach a marriage agreement made between him and his wife before marriage, the wife must be a party defendant to the bill and not be joined with him as a plaintiff. *Hale v. Gause*, 3 Ired. Eq. (N. Car.) 114.

**Suit Against Husband's Personal Representative.** — A court of equity is the proper forum in which a wife should

**Under Statutes.**—The numerous statutes on this subject have greatly altered the practice in suits between husband and wife. In many of the states actions may now be brought directly by one against the other in a law court.<sup>1</sup>

**The Code Procedure** having abolished the distinction between law and equity, it is immaterial whether the form of the action between husband and wife be at law or in equity.<sup>2</sup> And the error, if there is any, in bringing the action at law, is held to be

litigate with her husband's personal representative her right to property which she claims against him, as her separate estate under her father's will and by post-nuptial contract with her husband. *Williams v. Maull*, 20 Ala. 721.

**1. Illinois.**—Since the Illinois statute of 1861 the remedy for an injury to the property of a married woman by her husband, although formerly in equity, is now at law, and the interference of a court of equity is not proper unless it becomes necessary to prevent an irreparable injury. *Larison v. Larison*, 9 Ill. App. 27. But a married woman cannot bring an action at law against her husband except for the purpose of enabling her to recover and enjoy her separate property. *Chestnut v. Chestnut*, 77 Ill. 346.

**Iowa.**—Under Iowa Code, § 2971, it was held that a wife might maintain an action of replevin, in her own name, against her husband to recover possession of her separate personal property. *Jones v. Jones*, 19 Iowa 236.

**Michigan.**—Under Michigan Rev. Stat. 1846, c. 85, § 26, a wife may sue her husband at law as well as in chancery. *Markham v. Markham*, 4 Mich. 305.

**Ohio.**—Under Ohio Rev. Stat., §§ 4947, 6793, a married woman may sue in her own name to recover a money judgment against her husband. *Brenneman v. Brenneman*, 1 Ohio N. P. 332.

**Pennsylvania.**—Under Pennsylvania Act of April 11, 1848, P. L. 536, a wife was not authorized to bring a common-law action against her husband to recover her separate property. But under Act of June 16, 1836, P. L. 790, the Court of Common Pleas has jurisdiction in equity to prevent a husband from depriving his wife of her separate property. And if the husband takes her property against her consent she may maintain against him an action of ejectment, treating it as a substitute

for a proceeding by bill in equity. *McKendry v. McKendry*, 131 Pa. St. 24.

**Contra in Kentucky and Missouri—Kentucky.**—In an action at law on a note for money loaned to a husband by a wife, it was held that the Kentucky statute did not authorize an action at law, but that the wife must seek her relief in equity. *Kalfus v. Kalfus*, 92 Ky. 542.

**Missouri.**—In *Ilgenfritz v. Ilgenfritz*, 49 Mo. App. 127, it was held that the Married Woman's Act did not entitle the wife to sue her husband in a law court.

**Action Against Husband's Executors.**—Under the *Maryland* Code, a widow may maintain an action at law, against the executors of her deceased husband, for money which she loaned to him before marriage, and also for the recovery of the value of securities belonging to her, as of her sole and separate estate, which she loaned to him during marriage, upon his express promise to repay the amount thereof to her. *Barton v. Barton*, 32 Md. 214.

**Suit After Divorce.**—In *Blake v. Blake*, 64 Me. 177, it was held that where, in consequence of *Maine* Rev. Stat., c. 61, a husband could sue his wife after divorce for improvements to her property made during coverture, there was no occasion to resort to equity, but the action might be maintained in a law court. *Citing Webster v. Webster*, 58 Me. 139; *Tunks v. Grover*, 57 Me. 586.

**Writ of Possession in Favor of Wife Against Husband.**—Where an action is brought by a wife against her husband to recover possession of her lands, and it appears that the wife is entitled to a judgment and a writ of possession, the writ should be so framed as to put the wife in possession without putting the husband out. *Manning v. Manning*, 79 N. Car. 293.

**2. Wright v. Wright**, 54 N. Y. 437, wherein it was held that, if facts are stated entitling the plaintiff to the relief



waived by the defendant's failure to move a transfer to the proper docket.<sup>1</sup>

**2. How Brought — Wife to Sue in Equity by Next Friend.** — Where a married woman brings a suit in equity against her husband, she should prosecute her claim through the intervention of her next friend.<sup>2</sup> If it appear upon the face of the bill that the wife is suing her husband without joining her next friend, the objection must be taken by demurrer, and comes too late after answer filed.<sup>3</sup>

demanding, it is the duty of the court to afford the relief without regard to the name given to the action.

In *Gillespie v. Gillespie*, (Minn. 1896) 67 N. W. Rep. 206, it was held that a married woman may sue her husband in any form of action as if he were a stranger. The court said: "To hold, as contended by defendant, that she may only maintain an action in equity (which she could always do, by a trustee or her next friend, in respect to her separate estate), would be to disregard not only the obvious spirit, but also the express language, of the statute, which declares that she shall have the right to appeal to the courts of law and equity for redress."

**Complaint Demanding Money Judgment.** — At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted. And the code having abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts and praying judgment against the defendant for the amount taken by him and converted to his own use states a good cause of action, and is therefore not demurrable. It is no objection to the complaint, in such a case, that a money judgment is demanded instead of an accounting. *Whitney v. Whitney*, 49 Barb. (N. Y.) 319.

1. *Munday v. Collier*, 52 Ark. 126. See generally article CALENDARS AND TRIAL DOCKETS, vol. 3, p. 809.

2. *Lewis v. Elrod*, 38 Ala. 17; *Bridges v. McKenna*, 14 Md. 258; *Heck v. Vollmer*, 29 Md. 507; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Smith v. Kearney*, 9 How. Pr. (N. Y. Super. Ct.) 466; *Thomas v. Thomas*, 18 Barb. (N. Y.) 149. See also *In re Williams*, 12 Beav. 510; *Wake v. Parker*, 2 Keen 59; *Barber v. Barber*, 21 How. (U. S.) 582; *Walter v. Walter*, 48 Mo. 140; *Dewall*

*v. Covenhoven*, 5 Paige (N. Y.) 581; *Cantrell v. Davidson County*, 3 Tenn. Ch. 426. But compare *Knight v. Knight*, Tayl. (N. Car.) 120.

In *Louisiana* the wife is required to obtain authority from the judge in order to institute a suit against the husband. The laws requiring this were designed for the protection of the husband against ill-advised and vexatious suits. It is a defense which may be waived by him, and his so doing forms no ground for annulling, at the suit of third persons, a judgment between him and his wife. *LeBlanc v. Dubroca*, 6 La. Ann. 360.

**Inquisition of Lunacy.** — Under the *Alabama Code*, § 2750, as under the English chancery practice, an inquisition of lunacy against the husband cannot be sued out by the wife in her own name, but must be by her next friend, who will be liable for the costs if the petition is dismissed. *Campbell v. Campbell*, 39 Ala. 312.

**Cannot Sue by Her Trustee.** — A *feme covert*, claiming a separate estate, cannot sue her husband by her trustee. It is a well-settled rule of pleading that when the wife claims any property in opposition to the marital rights of the husband she must sue by her next friend. *Hunt v. Booth*, Freem. (Miss.) 215.

**Suit by Wife in Forma Pauperis.** — In suits by married women, a *prochein ami* is necessary, not only to secure the costs, but, when the husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with even where the wife sues in *forma pauperis*. *Ward v. Ward*, 2 Dev. Eq. (N. Car.) 553.

**Wife's Trustee Refusing to Interpose Claim.** — A married woman may come into equity, suing by her next friend, to protect her separate property from levy and sale under executions against her husband, if her trustee refuses to interpose a claim at law. *Bridges v. Phillips*, 25 Ala. 136.

3. *Kenley v. Kenley*, 2 How. (Miss.)

**Necessity for Next Friend Obviated by Statute.**—In some states the necessity for the intervention of a next friend has been obviated by statute, and the wife may sue alone.<sup>1</sup>

**3. Coverture as a Defense.**—In the absence of any statute allowing the wife to sue her husband in a law court, if she brings an action at law against him her coverture is pleadable in bar, and not in abatement.<sup>2</sup>

**4. Suits for Separate Maintenance**—*a. IN GENERAL.*—In many of the states a wife may sue her husband for separate maintenance without asking for a divorce.<sup>3</sup> The practice and procedure in such suits is similar, or analogous, to that in suits for alimony with divorce.<sup>4</sup>

751. See in general article NEXT FRIEND.

**Defect Obviated by Amendment.**—When a bill is filed by a married woman in her own name without the intervention of a next friend, the defect may be obviated by proper amendment. *Heck v. Vollmer*, 29 Md. 507.

**1. Indiana.**—By Ind. Act of 1852 a married woman over twenty-one years of age may maintain an action against her husband to recover her separate property without the intervention of a next friend. *Wilkins v. Miller*, 9 Ind. 100.

**Kentucky.**—The provision, Ky. Civ. Code, § 49, that where an action is by a wife against her husband she may sue alone, dispenses with the necessity for the intervention of a next friend, where she sues in equity to enforce some equitable right against her husband. *Matson v. Matson*, 4 Metc. (Ky.) 262; *Hardin v. Gerard*, 10 Bush (Ky.) 259.

**Rhode Island.**—Under R. I. Pub. Laws, 1893, c. 1204, a suit by a wife against her husband must be brought in the name of the wife and not by next friend. *Taylor v. Slater*, 18 R. I. 797.

**Where Husband Has Abandoned Wife.**—Under *Connecticut* Gen. Stat. 1888, § 2794, providing that any married woman abandoned by her husband may sue and be sued as a *feme sole*, a married woman may in her own name maintain a suit in equity against her husband, to set aside a conveyance of real estate which he had wrongfully obtained from her. *Adams v. Adams*, 51 Conn. 135.

**2. Roseberry v. Roseberry**, 27 W. Va. 759, wherein the court said: "Coverture may be pleaded in abatement or in bar according to circumstances. Where

the defense goes merely to the disability of the wife to maintain the action in her name alone, or shows simply matter for abatement without destroying the cause of action, it must be pleaded in abatement; but when the defense, as in this instance, is not merely such disability, but shows a total absence of anything like responsibility or cause of action, the matter is pleadable in bar."

**3. Hagle v. Hagle**, 68 Cal. 588; *Platner v. Platner*, 66 Iowa 378; *Earle v. Earle*, 27 Neb. 277; *Bueter v. Bueter*, 1 S. Dak. 94. See also *Regnes v. Lewis*, 1 Ch. Ca. 35; and article ALIMONY, vol. 1, p. 408.

**4. See article ALIMONY**, vol. 1, p. 409.

**No Jurisdiction of Defendant Until Return Day of Summons.**—In proceedings by a wife for separate maintenance under *Missouri* Rev. Stat., § 3283, the court on motion ordered the defendant to provide temporary separate maintenance for plaintiff pending the result. It was held that until the return day of the summons the court had no jurisdiction of the defendant and was without power to make any order against him. *Newton v. Newton*, 32 Mo. App. 162.

**Waiver of Right to Appeal.**—Under *Massachusetts* Pub. Stat., c. 147, § 33, upon a petition by a wife for separate support, the court is not empowered to decree payment by the husband of a sum in gross. But where, by consent of the parties, such decree has been rendered, and a wife receives and retains the sum and never offers to return it, she thereby waives her right to appeal from the decree upon the ground that the sum awarded is "insufficient for her apparent needs during the probable length of her life." *Doole v. Doole*, 144 Mass. 278.

*b.* BILL OR COMPLAINT. — Where a wife sues her husband for separate maintenance, she must set out in her bill or complaint the facts upon which she bases the general allegation that she is living separate and apart from her husband without her fault.<sup>1</sup> If the suit is under a statute the bill or complaint should conform to its terms.<sup>2</sup>

**III. SUITS BY HUSBAND AND WIFE** — 1. Parties to Suits — *a.* ON CAUSES OF ACTION IN HUSBAND'S RIGHT. — Where a cause of action belongs solely to the husband, the wife is neither a necessary nor a proper party to the action, as she has no legal interest therein.<sup>3</sup>

*b.* ON WIFE'S ANTE-NUPTIAL CHOSSES IN ACTION — (1) *At Common Law*. — At common law, the choses in action belonging to the wife at the time of the marriage do not, as in case of her personal property, vest absolutely in the husband. He must first reduce them into possession, and if he die before doing so they survive to the wife.<sup>4</sup> In consequence of this right of survivorship

1. *Fountain v. Fountain*, 23 Ill. App. 529.

**Sufficiency of Averments.** — An allegation that the defendant had "abandoned this plaintiff" is sufficient, being equivalent to "deserted" as used in the statute. But an allegation that the defendant "has renounced the marriage covenant" is too general. The act or acts claimed to have amounted to such renunciation should be alleged. *Carr v. Carr*, 6 Ind. App. 377.

**Variance.** — In a bill for separate maintenance the plaintiff alleged that on account of her husband's cruel conduct she was forced to live apart from him. The proof showed, however, that her husband deserted her, and the decree was rendered upon this ground. It was held that the allegations were not supported by the proof, and a decree must be refused. *Fountain v. Fountain*, 23 Ill. App. 529.

2. **Amount Necessary for Maintenance.** — *Indiana Rev. Stat.*, § 5133, allowing an action by a wife against her husband for separate support, provides among other things that "the complaint shall also state the circumstances and mode of life of the husband and wife, and the sum necessary for the support of the wife and children, if there be any." In an action under this statute a complaint which failed to state what amount would be necessary for the maintenance of the wife, or of herself and children, was held to be fatally defective. *Arnold v. Arnold*, 140 Ind. 199.

**Defect Cured by Verdict.** — A complaint by a wife against her husband to obtain provision for her support, under *Indiana Rev. Stat.*, §§ 5132, 5133, which fails to allege that the desertion was without cause, is cured by verdict. *Harris v. Harris*, 101 Ind. 498.

3. *Dunderdale v. Grymes*, 16 How. Pr. (N. Y. Supreme Ct.) 195; *Hyatt v. Cochran*, 85 Ind. 231; *Monroe v. Maples*, 1 Root (Conn.) 422.

**Wife's Interest Contingent.** — Where a husband and wife brought a joint action against an insurance company to recover damages for an alleged fraudulent declaration of forfeiture of a policy of insurance, in which the wife was named as a beneficiary, it was held that the wife was improperly joined, her interest being merely contingent, and the husband being the true party in interest. *Knights Templar, etc., L. Indemnity Co. v. Gravett*, 49 Ill. App. 252.

**Popular Action.** — In *Hill v. Davis*, 4 Mass. 137, it was held that husband and wife could not recover in a popular action sued in their joint names. The court said: "The wife can have no interest in the judgment jointly with her husband in this case, nor is his interest therein in her right, but the effect of his own suit."

4. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

As to the effect of the husband's death on a suit commenced by husband and wife, see *infra*, III. 5. *a.* *Death of Husband*.

in the wife, she must be joined with her husband in all actions to recover choses in action which accrued to her before coverture.<sup>1</sup>

(2) *Under Married Woman's Acts.*—By statutes in almost all of the United States the choses in action belonging to the wife before coverture are made her separate property,<sup>2</sup> for the recovery of which she is generally allowed to sue in her own name without joining her husband.<sup>3</sup>

1. *Morris v. Booth*, 8 Ala. 907; *Weagle v. Hensley*, 5 J. J. Marsh. (Ky.) 378; *Fightmaster v. Beasley*, 1 J. J. Marsh. (Ky.) 606; *Banks v. Marksberry*, 3 Litt. (Ky.) 276; *Brown v. Fifield*, 4 Mich. 322; *Wade v. Grimes*, 7 How. (Miss.) 425; *Morse v. Earl*, 13 Wend. (N. Y.) 272; *Armstrong v. Simonton*, 2 Murph. (N. Car.) 351; *Norfleet v. Harris*, Conf. Rep. (N. Car.) 517; *Johnston v. Pasteur*, Conf. Rep. (N. Car.) 464; *Williams v. Coward*, 1 Grant's Cas. (Pa.) 21; 1 Chit. Pl. (16th Am. ed.) 33; *Dacey on Parties* (2d Am. ed.) 193.

In *Rumsey v. George*, 1 M. & S. 180, it was held that to recover a debt composed partly of a sum of money due to the husband in his own right, and partly of a sum due to his wife while unmarried, the wife must be joined as co-plaintiff.

In *Broome v. King*, 10 Ala. 819, it was held that where a remainder was created in a slave, and the tenant for life sold it to a stranger, this was a discontinuance of the estate in remainder, and turned it into a chose in action. Consequently, when such a remainder was vested in a *feme sole*, and the discontinuance took place before her marriage, it was held that her estate in the slave did not pass to the husband absolutely by the marriage, so as to enable the husband to sue for the conversion in his own name, although the life estate determined during the coverture, but that the suit must be in the names of the husband and wife jointly.

In an Action on a Bond or Single Bill given to a woman before marriage, she must be joined with her husband, and the husband cannot sue alone. *Young v. Bennett*, 5 Harr. (Del.) 365; *Bates v. Dandy*, 2 Atk. 208. See also *Smith v. Johnson*, 5 Harr. (Del.) 57.

*Bond Made to Wife During Former Coverture.*—Where an action is brought on a bond made to the wife during a former coverture, the present husband is a proper party plaintiff, as the cause of action is one which may

survive to the wife. *Hoy v. Rogers*, 4 T. B. Mon. (Ky.) 225.

**Rent Arising from Wife's Land Before Marriage.**—In an action for rent, or any other cause accruing before marriage in regard to the real estate of the wife, she must be joined with her husband. *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

**Injury to Wife's Land Before Marriage.**—In an action to recover for an injury to the wife's land before marriage, the wife must be joined with the husband. *Milner v. Milnes*, 3 T. R. 627; *Hair v. Melvin*, 2 Jones L. (N. Car.) 59.

**Equitable Interest of Wife.**—The husband cannot recover an equitable interest of the wife which accrued to her before marriage without uniting her with himself in the suit. Therefore, the husband of a *cestui que trust* cannot recover the interest of his wife without joining her. *Gillis v. McKay*, 4 Dev. L. (N. Car.) 172.

In *Mertens v. Loewenberg*, 69 Mo. 208, it was held that an action under *Missouri Acts*, 1875, pp. 61, 62, § 1, to recover the wife's interest in a certain trust fund, acquired previous to her marriage, could not be maintained by the husband alone.

**Where the Wife's Right of Survivorship Ceases to Exist** by reason of the husband's having reduced her chose in action into possession, she cannot be joined in the action, but the husband must sue alone. *Hill v. Royce*, 17 Vt. 190.

2. As to what constitutes a married woman's separate estate, see Am. and Eng. Encyc. of Law (2d ed.), tits. *Husband and Wife*; *Separate Property of Married Women*.

3. For a full citation of cases holding that a married woman may sue alone where the suit concerns her separate property, see *infra*, III. 1, g. *Concerning Wife's Statutory Separate Estate*.

**Scire Facias to Revive Judgment.**—Under *Maine Stat.* 1848, c. 73, a married woman may maintain *scire facias* to revive a judgment rendered in her

c. ON WIFE'S POST-NUPTIAL CHOSSES IN ACTION — (1) *At Common Law* — (a) *In General* — *Action by Husband Alone*. — According to the doctrine of the common law, the chosses in action accruing to the wife during coverture become absolutely vested in the husband,<sup>1</sup> and, as a general rule, an action for their recovery must be brought in his name alone.<sup>2</sup>

*When Joinder of Wife Optional*. — Where the wife is the meritorious cause of action, however, and in general wherever the cause of action will survive to her,<sup>3</sup> the husband may either sue alone,<sup>4</sup> or join the wife with him,<sup>5</sup> in the latter case taking care to

favor before marriage either in her own name or jointly with her husband. *Walker v. Gilman*, 45 Me. 28.

*Services Rendered by Wife Before Marriage*. — In *California* a married woman may maintain an action in her own name to recover for services rendered by her before marriage. It is not improper, however, to join the husband. *Van Maren v. Johnson*, 15 Cal. 308.

*Rhode Island*. — By R. I. Gen. Laws, 1896, c. 194, § 16, "in all actions, suits and proceedings, whether at law or in equity, by or against a married woman, she shall sue and be sued alone." Under an earlier statute it was necessary in certain actions for the husband and wife to sue jointly. *Waterman v. Matteson*, 4 R. I. 539.

1. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

2. *Cornwall v. Hoyt*, 7 Conn. 420; *Stampoffski v. Hooper*, 75 Ill. 241; *Fightmaster v. Beasley*, 1 J. J. Marsh. (Ky.) 606; *Williams v. Coward*, 1 Grant's Cas. (Pa.) 21; *Bidgood v. Way*, 2 W. Bl. 1239; *Buckley v. Collier*, 1 Salk. 114; 1 Chit. Pl. (16th Am. ed.) 34. See also *Little v. Keyes*, 24 Vt. 118.

*Services of Wife*. — At common law the husband must sue alone for work done by the wife during coverture, unless there be an express promise to the wife, in which case she may be joined. *Buckley v. Collier*, 1 Salk. 114.

3. It is a general rule at common law that wherever the cause of action will survive to the wife the husband may at his election join her with him in the action. *Fowler v. Frisbie*, 3 Conn. 320; *Fuller v. Naugatuck R. Co.*, 21 Conn. 558; *West v. Tilghman*, 9 Ired. L. (N. Car.) 163; *Dunstan v. Burwell*, 1 Wils. 224; *Ayling v. Whicher*, 6 Ad. & El. 259, 33 E. C. L.

76. See also *Bryant v. Puckett*, 3 Hayw. (Tenn.) 252.

4. *Woodley v. Findlay*, 9 Ala. 716; *Candy v. Smith*, 6 Mackey (D. C.) 303; *Banks v. Marksberry*, 3 Litt. (Ky.) 276; *Bodgett v. Ebbing*, 24 Miss. 245; *Haile v. Palmer*, 5 Mo. 403; *Tucker v. Gordon*, 5 N. H. 564; *Hutchins v. Gilman*, 9 N. H. 359; *Thorne v. Dillingham*, 1 Den. (N. Y.) 256; *Reinheimer v. Carter*, 31 Ohio St. 579; *Gay v. Rogers*, 18 Vt. 342; *Rose v. Bowler*, 1 H. Bl. 108. See also *Weller v. Baker*, 2 Wils. 414; *Dalton v. Midland Counties R. Co.*, 13 C. B. 474, 76 E. C. L. 474; *Clark v. Anjier*, 1 Ch. Ca. 41.

5. *Woodley v. Findlay*, 9 Ala. 716; *Candy v. Smith*, 6 Mackey (D. C.) 303; *Banks v. Marksberry*, 3 Litt. (Ky.) 276; *Bodgett v. Ebbing*, 24 Miss. 245; *Heirn v. McCaughan*, 32 Miss. 17; *Tucker v. Gordon*, 5 N. H. 564; *Reinheimer v. Carter*, 31 Ohio St. 579; *Baird v. Fletcher*, 50 Vt. 603; *Wheeling v. Trowbridge*, 5 W. Va. 353; *Weller v. Baker*, 2 Wils. 414; *Rose v. Bowler*, 1 H. Bl. 108; *Dalton v. Midland Counties R. Co.*, 13 C. B. 474, 76 E. C. L. 474. See also cases cited in the last note but one.

In *Gay v. Rogers*, 18 Vt. 342, the court said: "If the property or service of the wife has been the meritorious cause of action, and an express promise of payment is made to her, she may be joined with her husband in an action to enforce payment. At the same time the husband, if he so elects, may sue alone. This has been settled law for ages."

In *Thorne v. Dillingham*, 1 Den. (N. Y.) 256, the court said: "In general, a wife cannot join with her husband in an action upon any contract made during coverture, whether with the wife alone as the party, or with the two jointly. But to this rule there

state in his declaration the wife's interest in the suit.<sup>1</sup> Rents accruing from the wife's land during coverture may be recovered in an action by the husband alone, or by husband and wife jointly.<sup>2</sup>

(b) **Express Promise to Wife.**—Where an express promise is made to the wife after marriage, she becomes the meritorious cause of action,<sup>3</sup> and the husband may either sue thereon in his own name,<sup>4</sup> or may join the wife with him in the action.<sup>5</sup> Thus at common law, actions upon bonds, notes, and other written contracts for the payment of money, given to the wife during cover-

are exceptions; for where the wife is the meritorious cause of action, and a party to an express promise founded thereon, she may be joined with her husband in an action for its violation. In all such cases, however, the declaration must distinctly state the particular cause for making the wife a party to the action, for it will not be presumed that any such cause exists."

**To Recover Proceeds of Sale of Wife's Land.**—Where lands of the wife are sold by virtue of a power of attorney from the husband and wife, in an action to recover the proceeds of the sale the husband may join his wife or sue alone at his election. *Hutchins v. Gilman*, 9 N. H. 359.

**Chose in Action Distributed to Wife.**—Where by decree in chancery a chose in action was assigned to a distributee, who was a *feme covert*, if the legal title to such chose in action was vested in the distributee an action therefor should be in the name of the *feme covert* and her husband. *Pennington v. McWhirter*, 8 Humph. (Tenn.) 130.

**Inception Before, Completion After, Marriage.**—In *Haile v. Palmer*, 5 Mo. 403, McGirk, J., said: "When the inception of the cause of action was before marriage and the completion afterwards, they may both join, as in case of trover before marriage, and conversion afterwards; or the husband may sue alone for the conversion after the marriage." See also *Little v. Keyes*, 24 Vt. 118.

**Where the Cause of Action Does Not Survive to the Wife,** she need not be joined as a party plaintiff. *Magruder v. Stewart*, 4 How. (Miss.) 204; *Little v. Keyes*, 24 Vt. 118.

1. See *infra*, III. 6. a. (1) *In General*.

2. See *infra*, III. 1. e. (1) (c) *Rents Accruing During Coverture*.

3. *Morris v. Booth*, 8 Ala. 907.

4. *Candy v. Smith*, 6 Mackey (D. C.)

303; *Templeton v. Cram*, 5 Me. 417; *Gould v. Carlton*, 55 Me. 511; *Bodgett v. Ebbing*, 24 Miss. 245.

5. *Morris v. Booth*, 8 Ala. 907; *Candy v. Smith*, 6 Mackey (D. C.) 303; *Bodgett v. Ebbing*, 24 Miss. 245; *Baird v. Fletcher*, 50 Vt. 603.

**Personal Services of Wife.**—Where the wife has rendered personal services during coverture, an action to recover therefor may be brought by the husband alone, or by husband and wife jointly. *Candy v. Smith*, 6 Mackey (D. C.) 303; *Gould v. Carlton*, 55 Me. 511.

**Must Count Specially upon Express Promise.**—If services are rendered by the wife during coverture, the right of the husband to join his wife with him as plaintiff is based upon the express promise to the wife, and the plaintiffs must count upon the express promise, and cannot sustain either *indebitatus assumpsit* or book account. *Gay v. Rogers*, 18 Vt. 342.

**Assumpsit for Wife's Services.**—It has been held in *Vermont* that in a suit for a wife's personal services rendered during coverture, if the action is brought on book account it must be in the name of the husband alone, the implied promise of defendant to pay for such services inuring to him alone. However, the husband may join the wife in an action of assumpsit, counting specially upon the facts showing that his wife's services were the meritorious cause of action, and averring an express promise to her to pay for the same; but they cannot maintain a joint action in any other form. *Goodale v. Frost*, 59 Vt. 491.

**Promise Not in Writing.**—In *Fallwick v. Keith*, 1 Heisk. (Tenn.) 360, it was held that a joint action by husband and wife could not, in general, be sustained on promises not in writing made to the wife.

ture, may be brought either by the husband alone,<sup>1</sup> or by husband and wife jointly.<sup>2</sup>

(c) **Promise to Husband and Wife Jointly.**—On a promise made to husband and wife jointly, the husband may, at common law, either sue alone,<sup>3</sup> or jointly with his wife.<sup>4</sup>

(2) **Under Married Woman's Acts**—**In General.**—The common-law doctrine that the rights in action which accrued to a married woman after marriage vested absolutely in the husband has been superseded in most of the United States by statutory enactments making such rights of action the wife's separate property. As a general rule the wife is allowed, at the present day, to sue alone for her rights of action accruing during coverture.<sup>5</sup> In a few of

1. *Sutton v. Warren*, 10 Met. (Mass.) 451; *Searing v. Searing*, 9 Paige (N. Y.) 283; *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264; *Bates v. Dandy*, 2 Atk. 208; *Oglander v. Baston*, 1 Vern. 396.

**Wife's Debt Cannot Be Set Off.**—At common law, where a promissory note was given to a married woman the husband might sue in his own name alone, and then a debt due to the maker from the wife while unmarried could not be set off. *Burrough v. Moss*, 10 B. & C. 558, 21 E. C. L. 128.

**Marriage of Wife Before Bill Became Due.**—Where a bill of exchange was payable to a *feme sole*, who married before it became due, it was held that the husband might sue in his own name, without joining the wife, although the latter had not indorsed the bill. *M'Neilage v. Holloway*, 1 B. & Ald. 218.

2. *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264; *Searing v. Searing*, 9 Paige (N. Y.) 283; *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Oglander v. Baston*, 1 Vern. 396.

In *Thompson v. Ellsworth*, 1 Barb. Ch. (N. Y.) 624, the court said: "The law on that subject is that, if a bond or other security is taken in the name of the wife during coverture, the husband may elect to treat it as his own property, and may bring a suit thereon in his own name, or he may treat it as the property of the wife and bring a suit in the name of both."

3. *Fischer v. Hess*, 9 B. Mon. (Ky.) 614; *Higdon v. Thomas*, 1 Har. & G. (Md.) 138.

**Bonds, Notes, and Other Promises to Pay Money.**—Where a bond or note is given to husband and wife jointly, the husband may sue thereon without joining the wife. *Ankerstein v. Clarke*, 4

T. R. 616; *Steward v. Chance*, 3 N. J. L. 396; *Young v. Ward*, 21 Ill. 223.

4. *Titus v. Ash*, 24 N. H. 319; *Young v. Ward*, 21 Ill. 223; *Schoonmaker v. Elmendorf*, 10 Johns. (N. Y.) 49; *Miller v. Garrett*, 35 Ala. 96.

**Action for Joint Services.**—Where a husband and wife sued jointly, upon a promise to pay them jointly for services performed by them jointly, it was held that they were rightly joined as plaintiffs. *Hopkins v. Angell*, 13 R. I. 670, following *Berry v. Teel*, 12 R. I. 267.

**Where Wife Has Interest in Husband's Contract.**—Where the wife has a distinct interest in a contract of the husband's, she may properly be made a party plaintiff in an action thereon. *Smith v. Tallcott*, 21 Wend. (N. Y.) 202.

**Implied Promise to Wife, Express Promise to Husband.**—The consideration for an agreement being the sale of the wife's inheritance, in the absence of an express promise the law will raise one to husband and wife, on which the husband may sue either in his own name or in the names of himself and wife; and in such case, even if there was an express promise to the husband, the wife might be joined as plaintiff. *Higdon v. Thomas*, 1 Har. & G. (Md.) 138.

5. *Alabama.*—*Carter v. Owens*, 41 Ala. 217.

*California.*—*Corcoran v. Doll*, 32 Cal. 83.

*District of Columbia.*—*Candy v. Smith*, 6 Mackey (D. C.) 303. But where the right of action accrued prior to the passage of the Act of Congress of April 10, 1869, it was held that the wife could not sue alone. *Kimbro v. Washington First Nat. Bank*, 1 MacArthur (D. C.) 61.

the states, however, it seems that the wife cannot sue alone in such cases.<sup>1</sup>

**To Recover for Wife's Personal Services.** — Under the various Married Woman's Acts the wife is generally allowed to recover in her own name for services rendered on her sole and separate account.<sup>2</sup> But where the services of the wife are not such as are contemplated by the statute, the husband may still, as at common law, recover therefor in his own name or jointly with his wife.<sup>3</sup>

*Illinois.* — *Beach v. Miller*, 51 Ill. 206; *Stampoffski v. Hooper*, 75 Ill. 241, holding that the wife must sue without joining the husband for breach of a contract made with her alone upon a consideration moving from her, *citing* *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260; *Hayner v. Smith*, 63 Ill. 430; *Chicago, etc., R. Co. v. Dickson*, 67 Ill. 122.

*Indiana.* — *Hollingsworth v. State*, 8 Ind. 257; *Martindale v. Tibbetts*, 16 Ind. 200.

*Iowa.* — *Malli v. Willett*, 57 Iowa 705. In *King v. Gottschalk*, 21 Iowa 512, it was held that although the husband could not bring suit upon the wife's choses in action without her consent, either in his own name or in their joint names, she might give or deliver them to him, which would authorize him to sue in his own name.

*Kentucky.* — *Campbell v. Galbreath*, 12 Bush (Ky.) 459.

*Minnesota.* — *Nininger v. Carver County*, 10 Minn. 133.

*Missouri.* — *Gotcher v. Haefner*, 107 Mo. 270; *Boal v. Morgner*, 46 Mo. 48. But see *Lavelle v. Stifel*, 37 Mo. App. 525.

*New Jersey.* — *Lehman v. Hauk*, 42 N. J. L. 206; *Young v. Young*, 45 N. J. Eq. 27.

*New York.* — *Rusher v. Morris*, 9 How. Pr. (N. Y. Supreme Ct.) 266; *Smart v. Comstock*, 24 Barb. (N. Y.) 411; *Paine v. Hunt*, 40 Barb. (N. Y.) 75; *Palmer v. Davis*, 28 N. Y. 242.

*West Virginia.* — *Fox v. Manufacturers' F. Ins. Co.*, 31 W. Va. 374.

*Wisconsin.* — *Norval v. Rice*, 2 Wis. 22; *Botkin v. Earl*, 6 Wis. 393.

For a full citation of authorities holding that a married woman may sue alone when the action concerns her separate property, see *infra*, III. 1. g. *Concerning Wife's Statutory Separate Estate*.

**1. Florida.** — Under Florida Act of March 6, 1845, it is held that a married woman cannot maintain an action at law in her own name and alone for the

recovery of her separate property, secured by the statute. But where the husband sues for the recovery of the separate property of the wife, which is secured to her by the Married Woman's Law, she must be joined as co-plaintiff. *Lignoski v. Bruce*, 8 Fla. 269. Under Rev. Stat., § 2074, a wife is not allowed to sue alone for the recovery of her real property or for injuries thereto.

**Mississippi.** — By Miss. Acts of 1839 and 1846 in relation to the rights of married women, a promissory note, made payable directly to the wife, became *prima facie* her separate property, and a suit for its recovery was to be brought in the joint names of the husband and wife. *Bodgett v. Ebbing*, 24 Miss. 245. Under Miss. Code, § 2289, a married woman may now sue alone in all cases as if she were a *feme sole*.

**Ohio.** — Under the Ohio Code, § 28, it was held that a suit concerning a married woman's separate property must be brought by next friend for the wife, and not by husband and wife jointly. If the husband were made party to the suit, it should be as defendant, and not as plaintiff. *Stannus v. Walker*, 1 Handy (Ohio) 537. The necessity for a next friend has been obviated by Ohio Rev. Stat., § 4996.

**Maryland, Louisiana, and Texas.** — For the practice in these states, see *infra*, III. 1. g. (2) *Exceptions to General Rule*.

**2.** *Allen v. Eldridge*, 1 Colo. 287; *Rockwell v. Clark*, 44 Conn. 534; *Meriwether v. Smith*, 44 Ga. 541; *McDavid v. Adams*, 77 Ill. 155; *Kase v. Painter*, 77 Ill. 543; *Parker v. Parker*, 52 Ill. App. 333; *Gee v. Lewis*, 20 Ind. 149; *Tunks v. Grover*, 57 Me. 586; *Fowle v. Tidd*, 15 Gray (Mass.) 94; *Cooper v. Alger*, 51 N. H. 172; *Alexander v. Goodwin*, 54 N. H. 423; *Stokes v. Pease*, 79 Hun (N. Y.) 304.

**3. New York.** — N. Y. Laws 1860, c. 90, § 2, authorizes a married woman to "perform any labor or services on her sole and separate account."



**Joint Right of Action in Husband and Wife.**—Where there is a joint right of action in the husband and wife, they may sue jointly, as at common law.<sup>1</sup>

**d. FOR INJURIES TO WIFE'S PERSON OR CHARACTER—**  
**(1) For Personal Injury and Suffering of Wife—**(a) **At Common Law.**—At common law, except in cases where the wife has been deserted by the husband,<sup>2</sup> an action to recover damages for personal injuries to the wife, if the ground of the action is her injury and suffering, must be brought in the names of husband and wife jointly, the cause of action being in the wife and surviving to her in case of the husband's death.<sup>3</sup>

Under this statute, where it appears that the husband and wife lived together and were mutually engaged in the support of their family, and there is nothing to show an intention on the part of the wife to separate her earnings from those of her husband, the husband may still, as at common law, maintain an action in his own name for the wife's earnings. *Birkbeck v. Ackroyd*, 74 N. Y. 356.

**Pennsylvania.**—Under Pennsylvania Act of June 3, 1887, empowering a married woman to sue in her own name where she engages in trade or business, it was held that acting as a temporary nurse was not engaging in such trade or business as was contemplated by the act. In such case the husband might sue alone to recover for such services rendered by the wife. *Himes v. Sheneman*, 9 Pa. Co. Ct. Rep. 363.

**Alabama.**—Under Ala. Code, § 2131, husband and wife may join, as at common law, to recover upon a promise made to the wife for services rendered by her during coverture. *Jordan v. Hubbard*, 26 Ala. 433.

1. *Lyfood v. North Pac. Coast Co.*, 92 Cal. 93.

**Joint Moneys Paid for Land.**—Where a husband and wife paid their joint moneys for land conveyed to the wife alone, and it turned out that there was an overpayment, it was held that the sum so overpaid might be recovered back in a joint action by them. *Collins v. Powell*, 87 Ga. 571.

**Contract Made by Husband for Benefit of Wife.**—Under Indiana Code of 1852, §§ 4, 8, as at common law, in an action on a contract made by the husband for the benefit of the wife, the wife may be joined as plaintiff, she being the meritorious cause of the action. *Scotton v. Mann*, 89 Ind. 404.

**When Wife Not Necessary Party.**—When a husband purchases real estate in his own name, paying part of the purchase price out of his own funds and property at the time of the transaction, and the balance thereof is secured by the notes and trust deed of his wife, such facts alone do not make the wife a necessary party to a suit brought by the husband against the vendor to rescind the contract on the ground of fraudulent representations. *Wheeler v. Dunn*, 13 Colo. 428.

**Wife Cannot Sue Alone.**—Where a promise is made to husband and wife jointly, the wife cannot bring an action thereon in her own name. *Howe v. Hyde*, 88 Mich. 91.

2. As to the effect of desertion, see *infra*, III. 3. *Effect of Desertion or Separation.*

3. *Weagle v. Hensley*, 5 J. J. Marsh. (Ky.) 378; *Babb v. Perley*, 1 Me. 6; *Ballard v. Russell*, 33 Me. 196; *Beach v. Ranney*, 2 Hill (N. Y.) 309; *Gallaher v. Thompson*, Wright (Ohio) 466; *Clark v. Koch*, 9 Phila. (Pa.) 109; *Carr v. Easton*, 7 Pa. Co. Ct. Rep. 404.

**Malpractice of Physician.**—In *Indiana*, as at common law, husband and wife must join in a suit for an injury to the person of the wife by malpractice of a physician. *Long v. Morrison*, 14 Ind. 595.

**Defect in Highway.**—For an injury done to the wife through a defect in a highway, an action against the town will not lie in the name of the husband alone, but in that of husband and wife. *Starbird v. Frankfort*, 35 Me. 89.

**Action on Contract Sounding in Tort.**—An action by husband and wife against a common carrier for breach of its contract to carry the wife, which breach caused her illness and other injuries, though based on a contract, sounds in tort, and the wife is a proper

(b) **Under Married Woman's Acts** — *aa. IN GENERAL* — **Action by Wife Alone.** — The common-law rule requiring an action for injuries to the wife to be brought in the joint names of husband and wife has been in a large measure abrogated by the various Married Woman's Acts, and at the present time, in many of the states, a married woman is allowed to sue in her own name, without joining the husband, to recover damages for personal injuries to herself, where the ground of the action is her injury and suffering.<sup>1</sup>

and necessary party plaintiff. *Warner v. Steamship Uncle Sam*, 9 Cal. 697.

**1. Alabama.** — Since the Ala. Act of February, 28, 1887, a married woman must sue alone for injuries to her person or reputation. *Barker v. Anniston*, etc., R. Co., 92 Ala. 314.

**Georgia.** — Under the Ga. Code, §§ 1754, 1755, a wife, although living with her husband, may sue and recover in her own name for a tort committed to her person causing physical injury to her. *Atlanta v. Dorsey*, 73 Ga. 479; *Pavloski v. Thornton*, 89 Ga. 829. But see *Lewis v. Atlanta*, 77 Ga. 756.

**Illinois.** — Since the Ill. Act of 1861, a married woman may sue alone to recover damages for personal injury to herself, such right of action being her separate property. *Chicago*, etc., R. Co. *v. Dunn*, 52 Ill. 260; *Chicago v. Speer*, 66 Ill. 154; *Hennies v. Vogel*, 66 Ill. 401; *Chicago*, etc., R. Co. *v. Dickson*, 67 Ill. 122; *Chicago*, etc., R. Co. *v. Button*, 68 Ill. 409; *Anderson v. Friend*, 71 Ill. 475; *Rock Island v. Deis*, 38 Ill. App. 409.

**Indiana.** — Under Ind. Rev. Stat. 1881, § 5131, a married woman may maintain an action in her own name for damages for any injury to her person or character, the same as if she were sole; and the money recovered becomes her separate property. *Barnett v. Leonard*, 66 Ind. 422; *Logan v. Logan*, 77 Ind. 558; *Hamm v. Romine*, 98 Ind. 77; *Ohio*, etc., R. Co. *v. Cosby*, 107 Ind. 32; *Portland v. Taylor*, 125 Ind. 522.

**Iowa.** — In Iowa it is held that the husband has no interest in an action for a tort committed upon the person of the wife, and cannot be joined therein. *Pancoast v. Burnell*, 32 Iowa 394; *Musselman v. Galligher*, 32 Iowa 383; *Tuttle v. Chicago*, etc., R. Co., 42 Iowa 518.

**Kansas.** — Under Kansas Gen. Stat. 1889, § 4106, a married woman may

maintain in her own name an action for personal injury. *Townsdin v. Nutt*, 19 Kan. 282; *Campbell v. Stagg*, 37 Kan. 419.

**Michigan.** — Under Mich. Comp. Laws, § 3292, a wife may maintain an action in her own name for injury to her person or reputation. *Hyatt v. Adams*, 16 Mich. 180; *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440.

**Minnesota.** — Under the Minn. Gen. Stat., c. 66, § 29, a married woman may sue alone for personal injury to herself. *Colvill v. Langdon*, 22 Minn. 565.

**Nebraska.** — Under Neb. Acts of 1871, a married woman may sue in her own name for injury to her person. *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 481; *Chadron v. Glover*, 43 Neb. 732.

**New Hampshire.** — Under N. H. Acts 1876, an action for an injury to the person or reputation of a married woman must be brought in her name alone. *Harris v. Webster*, 58 N. H. 481.

**New York.** — Under the N. Y. Code Civ. Pro., § 450, a married woman must sue alone for personal injury to herself. *Ball v. Bullard*, 52 Barb. (N. Y.) 141; *Campbell v. Perry*, (Supreme Ct.) 9 N. Y. Supp. 330. See also *Haden v. Clarke*, (Supreme Ct.) 10 N. Y. Supp. 291; *Weld v. New York*, etc., R. Co., 68 Hun (N. Y.) 249. But compare *Ball v. Burleson*, 23 Abb. N. Cas. (N. Y. Supreme Ct.) 332, decided before the amendment of 1890.

**Ohio.** — Under Ohio Code, § 28, an action to recover for personal injuries to the wife is an action concerning her separate property, and in such case she may sue alone. *Stevenson v. Morris*, 37 Ohio St. 10.

**Vermont.** — Since Vt. Acts 1884, No. 140, the wife must sue alone to recover damages for injuries to her person or character. *Story v. Downey*, 62 Vt. 243.

**Virginia.** — Under the Va. Code, a

Volume X.

**Husband Must Be Joined in Some States.**—In some of the states the common-law rule has not been altered in this respect, and the husband is still required to be joined as a co-plaintiff.<sup>1</sup>

*bb. STATUTE PERMISSIVE OR MANDATORY.*—In most of the states, the statute allowing a married woman to sue alone for personal injuries to herself is held to be imperative, depriving the husband of any interest in the suit, and forbidding his joinder with the wife.<sup>2</sup> In *Indiana*, however, the statute is deemed permissive merely, allowing the wife either to sue alone or to join her husband at her election.<sup>3</sup>

(2) *For Consequential Damages.*—Where a tort is committed upon the person of a married woman, there arises, besides her right of action for her injury and suffering, a right of action for consequential damages for loss of service, medical attention, or other expenses. It is generally held that these causes of action

married woman must sue alone to recover damages for personal injury to herself, as section 2284 makes such damages her separate estate, and the husband has no interest therein. *Norfolk, etc., R. Co. v. Dougherty*, 92 Va. 372. See also *Richmond R., etc., Co. v. Bowles*, 92 Va. 738.

**Wisconsin.**—Under the Wis. Rev. Stat., § 2343, a married woman may maintain an action in her own name for any injury to her person or character. *Shanahan v. Madison*, 57 Wis. 276; *Fife v. Oshkosh*, 89 Wis. 540.

**Where Injury Sustained Prior to Passage of Act.**—In suing for damages for an injury sustained prior to the passage of such act, the husband is a necessary party. *Barker v. Anniston, etc., R. Co.*, 92 Ala. 314.

**1. California.**—An action to recover for personal injuries to a married woman does not fall within the cases named in Cal. Code Civ. Pro., § 30, and therefore such action must be brought in the names of husband and wife jointly. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 527; *Matthew v. Central Pac. R. Co.*, 63 Cal. 450; *McFadden v. Santa Anna, etc., St. R. Co.*, 87 Cal. 464; *Neale v. Depot R. Co.*, 94 Cal. 425; *Lamb v. Harbaugh*, 105 Cal. 680; *McKune v. Santa Clara Valley Mill, etc., Co.*, 110 Cal. 480.

**District of Columbia.**—Under Dist. of Columbia Rev. Stat., §§ 727-730, the wife is not given the right to sue in her own name for personal injuries sustained by her; such actions must be brought in the names of husband and wife. *Snashall v. Metropolitan R. Co.*, 19 D. C. 399.

**Kentucky.**—Except in cases where the wife has been deserted by the husband, the Ky. Civ. Code has not changed the common-law rule requiring the husband to be a party in suits for personal injuries to the wife. *Anderson v. Anderson*, 11 Bush (Ky.) 327.

**Maine** Rev. Stat., c. 61, has not changed the well-established doctrine of the common law that a married woman cannot sue alone for malicious prosecution. *Laughlin v. Eaton*, 54 Me. 156.

**Maryland.**—Under Md. Code, art. 45, § 7, a married woman cannot sue alone to recover for personal injury to herself. *Wolf v. Bauereis*, 72 Md. 481. Nor can she sue by next friend for personal injuries to herself, but must join her husband with her. *Treusch v. Kamke*, 63 Md. 278.

**2.** *Chicago v. Speer*, 66 Ill. 154; *Chicago, etc., R. Co. v. Dickson*, 67 Ill. 122; *Chicago, etc., R. Co. v. Button*, 68 Ill. 409; *Rock Island v. Deis*, 38 Ill. App. 409; *Musselman v. Galligher*, 32 Iowa 383; *Tuttle v. Chicago, etc., R. Co.*, 42 Iowa 518; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Campbell v. Perry*, (Supreme Ct.) 9 N. Y. Supp. 330; *Haden v. Clarke*, (Supreme Ct.) 10 N. Y. Supp. 291; *Story v. Downey*, 62 Vt. 243; *Norfolk, etc., R. Co. v. Dougherty*, 92 Va. 372; *Richmond R., etc., Co. v. Bowles*, 92 Va. 738. See also *infra*, III. 1. g. (3) *Statute Permissive or Mandatory*.

**3.** *Hamm v. Romine*, 98 Ind. 77, Ohio, etc., R. Co. v. Cosby, 107 Ind. 32. See also *infra*, III. 1. g. (3) *Statute Permissive or Mandatory*.

cannot be joined in a single suit,<sup>1</sup> and that such damages cannot be recovered in an action by the wife alone,<sup>2</sup> or by husband and wife jointly,<sup>3</sup> but the husband must sue therefor in his own name.<sup>4</sup> However, under the statutes of some states, where the wife is carrying on a separate business she may recover in her own name for such consequential damages.<sup>5</sup>

(3) *For Slander of Wife*—(a) **Words Actionable Per Se.**—In an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se* husband and wife must at common law join as plaintiffs.<sup>6</sup> Under the statutes

1. See *infra*, III. 6. a. (2) *Joinder of Causes of Action*.

2. Ohio, etc., R. Co. v. Cosby, 107 Ind. 32.

3. King v. Thompson, 87 Pa. St. 365; Ohio, etc., R. Co. v. Cosby, 107 Ind. 32.

**What Damages May Be Deemed Personal to Wife.**—In an action by husband and wife to recover for personal injuries to the wife, the court instructed the jury that in estimating the damages they were to consider the health and condition of the female plaintiff before the injury complained of, as compared with her condition at the time of the trial in consequence of the injury; and whether the injury in its nature was permanent, and how far it was calculated to disable her from engaging in those household pursuits and employments for which, in the absence of such injury, she would be qualified; and also the physical and mental suffering to which she was subjected by reason of the injury; and to allow such damages as in the opinion of the jury would be a fair and just compensation for the injury which she sustained. It was held that this instruction imposed nothing for which the husband could have sued alone, and was not ground for reversal. Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74.

4. Rogers v. Smith, 17 Ind. 323; Matthew v. Central Pac. R. Co., 63 Cal. 450; McKinney v. Western Stage Co., 4 Iowa 420; Newhirter v. Hatten, 42 Iowa 288; Berger v. Jacobs, 21 Mich. 215; Whitcomb v. Barre, 37 Vt. 148. See also Hennies v. Vogel, 66 Ill. 401.

5. **Kansas.**—Under the provisions of the act respecting the rights of married women, the earnings of a married woman from her own business, and from her labor or services performed on her sole and separate account, belong exclusively to her; and an injury which

prevents her from carrying on her separate business, or disables her from performing such labor or service, accrues to her alone, for which she may maintain an action against the wrong-doer in her own name. Campbell v. Stagg, 37 Kan. 419.

**New York.**—Since the N. Y. Laws of 1860, c. 90, § 2, the wife alone may sue for damages for loss of her earning power over and above such services as are usually performed by the wife in the household of her husband, occasioned by personal injuries to herself. London v. Cunningham, 1 Misc. Rep. (N. Y. City Ct.) 408.

**Where Wife Labors for Another.**—Although under N. Y. Laws of 1860, c. 90, as modified by the Laws of 1862, c. 172, the husband may still sue in his own name for consequential damages arising from personal injury to the wife, nevertheless, when the wife labors for another her services and earnings no longer belong to her husband, but to herself, and so far as she is disabled from performing such services she can recover for the loss in her own name. Brooks v. Schwerin, 54 N. Y. 343.

**Wisconsin.**—Under the Wisconsin Rev. Stat., § 2343, a married woman may sue in her own name for personal injuries to herself whereby she was prevented from attending to her separate business, and may recover damages for loss of her time, as well as for pain and suffering. Fife v. Oshkosh, 89 Wis. 540.

6. Smalley v. Anderson, 2 T. B. Mon. (Ky.) 56; Johnson v. Dicken, 25 Mo. 580; Klein v. Hentz, 2 Duer (N. Y.) 633; Williams v. Holdredge, 22 Barb. (N. Y.) 396.

**In Wisconsin** the action for slander by words actionable *per se* spoken against a woman, who has since married, must be brought in the name of

of some states, however, the wife is allowed to bring such action in her own name.<sup>1</sup>

(b) **Words Not Actionable Per Se.** — In an action to recover damages for slanderous words spoken of a married woman, where the words are not actionable *per se*, but only by reason of special damages, the husband must sue alone at common law.<sup>2</sup>

(4) **Where Damages Become Community Property.** — In those states in which damages recovered for a personal injury to the wife become community property, the husband alone is held to be the proper party plaintiff, he being the head and master of the community;<sup>3</sup> and it seems that the refusal of the husband to bring the action does not entitle the wife to sue alone.<sup>4</sup>

*c. CONCERNING WIFE'S REAL PROPERTY* — (1) *At Common*

husband and wife; and the rule is not changed by the statutes securing to the wife the enjoyment of her separate property as though she were a *feme sole*, and enabling her to sue alone in relation thereto. *Gibson v. Gibson*, 43 Wis. 23.

**Slanderous Reports Circulated at Instance of Husband.** — The wife cannot sue in her own name for slander, although the slanderous reports are circulated at the instance or by the management of her husband, and although, in consequence thereof, the action cannot be brought in the names of husband and wife jointly. *Tibbs v. Brown*, 2 Grant's Cas. (Pa.) 39.

**Joint Slander of Husband and Wife.** — A husband and wife cannot jointly sue for a joint slander upon both; the husband should sue alone for the injury to him, and the husband and wife should join for the injury to her. *Gazynski v. Colburn*, 11 Cush. (Mass.) 10.

1. *Georgia.* — *Pavlovski v. Thornton*, 89 Ga. 829.

*Iowa.* — Iowa Code, § 3767; *Pan-coast v. Burnell*, 32 Iowa 394. But formerly the husband was required to be joined. *Enders v. Beck*, 18 Iowa 86.

*Michigan.* — *Leonard v. Pope*, 27 Mich. 145.

*New Hampshire.* — N. H. Acts 1876; *Harris v. Webster*, 58 N. H. 481.

2. *Saville v. Sweeny*, 4 B. & Ad. 514, 24 E. C. L. 108; *Klein v. Hentz*, 52 Duer (N. Y.) 633; *Hemming v. Elliott*, 66 Md. 197; *Johnson v. Dicken*, 25 Mo. 580; *Harper v. Pinkston*, 112 N. Car. 293.

**Husband and Wife Living Apart.** — The suit should be in the name of the husband alone, though the husband and wife live apart under a deed of separa-

tion. *Beach v. Ranney*, 2 Hill (N. Y.) 309.

3. *Cooper v. Cappel*, 29 La. Ann. 213; *Ford v. Brooks*, 35 La. Ann. 157; *Holzap v. New Orleans, etc.*, R. Co., 38 La. Ann. 185; *Fournet v. Morgan, etc.*, R., etc., Co., 43 La. Ann. 1202; *Texas Cent. R. Co. v. Burnett*, 61 Tex. 638; *San Antonio St. R. Co. v. Helm*, 64 Tex. 147; *Gallagher v. Bowie*, 66 Tex. 265; *Rice v. Mexican Nat. R. Co.*, 8 Tex. Civ. App. 130. And see *infra*, III. 1. i. *Concerning Community Property.*

In *Wartelsky v. McGee*, 10 Tex. Civ. App. 220, it was held that where the wife brought an action joining the husband *pro forma* to recover damages against a liquor dealer for selling liquor to her minor son, the damages, when recovered, became part of the community property, and, therefore, the husband alone should have brought the action.

**Failure of Telegraph Company to Deliver Message.** — In *Texas* the husband is the proper party to bring suit for injury to the wife arising from the failure of a telegraph company to deliver a message calling a physician to attend the wife. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507.

**Husband and Wife Domiciled in Another State.** — In *Louisiana* a suit to recover damages for the malicious prosecution of a married woman must be brought in the name of the husband, even though the husband and wife were married and are domiciled in another state. *Myerson v. Alter*, 4 Woods (U. S.) 126, a case controlled by the Louisiana practice.

4. *Ezell v. Dodson*, 60 Tex. 331; *Rice v. Mexican Nat. R. Co.*, 8 Tex. Civ. App. 130.

**Law — (a) To Recover Possession — In General.** — Actions at common law to recover possession of real property belonging to the wife must be brought in the joint names of husband and wife.<sup>1</sup>

**Land Vested Jointly in Husband and Wife.** — It is held that where land is vested jointly in husband and wife, the husband may sue in his own name, without joining the wife, to recover the possession.<sup>2</sup> But the wife may properly be joined in such suit.<sup>3</sup>

**(b) For Injuries to Wife's Realty — aa. BEFORE MARRIAGE.** — In an action for injury to the wife's real property before marriage the wife must be joined with the husband.<sup>4</sup>

**bb. AFTER MARRIAGE — Writ of Waste.** — In a writ of waste for injuries to the wife's real property the wife must be joined with the husband.<sup>5</sup>

**Other Remedies.** — In actions other than a writ of waste to recover damages for injury to the wife's real estate, it is the rule of the common law that the husband may either sue alone<sup>6</sup> or join with his wife.<sup>7</sup>

**(c) Rents Accruing During Coverture.** — In suing to recover rents

1. *Odill v. Tyrrell*, 1 Bulstr. 21; 1 Chit. Pl. (16th Am. ed.) 64.

**In Ejectment** for the wife's land the wife must be joined with her husband, the cause of action being in her own right. *Atkinson v. Rittenhouse*, 5 Pa. St. 103; *Westcott v. Miller*, 42 Wis. 454.

**Contrary Doctrine in Missouri.** — In Missouri, prior to Rev. Stat. 1889, §§ 6864, 6869, allowing the wife to sue alone, it was held that during the marriage the husband had an exclusive right to the possession of the wife's real estate not held to her sole and separate use, and was consequently the only proper party plaintiff in a suit to recover possession thereof. *Cooper v. Ord*, 60 Mo. 420; *Kanaga v. St. Louis, etc., R. Co.*, 76 Mo. 213; *Gray v. Dryden*, 79 Mo. 106; *Mueller v. Kaessmann*, 84 Mo. 318; *Flesh v. Lindsay*, 115 Mo. 1; *Dyer v. Wittler*, 89 Mo. 81; *Peck v. Lockridge*, 97 Mo. 549; *Arnold v. Willis*, 128 Mo. 145; *Evans v. Kunze*, 128 Mo. 670.

**Husband May Dismiss Suit Without Wife's Consent.** — In *Gideon v. Hughes*, 21 Mo. App. 528, where the husband joined the wife with him "for conformity" in an action to recover possession of her real property, it was held that he was the substantial party to the action and could dismiss it without her consent.

2. It is not necessary that the wife should join with the husband in an action of ejectment for the recovery of land conveyed to husband and wife.

*Jackson v. Leek*, 19 Wend. (N. Y.) 339; *Park v. Pratt*, 38 Vt. 545.

3. **Writ of Entry.** — Husband and wife are properly joined in a writ of entry to recover possession of lands which were conveyed to them both during their natural lives, and the whole estate in which would survive to the wife. *Wentworth v. Remick*, 47 N. H. 226.

4. *Milner v. Milnes*, 3 T. R. 627; *Hair v. Melvin*, 2 Jones L. (N. Car.) 59.

5. *Thacher v. Phinney*, 7 Allen (Mass.) 146, wherein the court said: "It is well settled that in a writ of waste for injuries to the estate of the wife the husband and wife must join." Citing 1 Chit. Pl. (16th Am. ed.) 84; Com. Dig., Baron and Feme (V) (X), Plead (2 A. 1).

6. *Tallmadge v. Grannis*, 20 Conn. 296; *Allen v. Kingsbury*, 16 Pick. (Mass.) 235; *Adams v. Barry*, 10 Gray (Mass.) 361; *Smith v. Fitzgerald*, 59 Vt. 451; *Wallis v. Harrison*, 5 M. & W. 142.

7. *Tallmadge v. Grannis*, 20 Conn. 296; *Allen v. Kingsbury*, 16 Pick. (Mass.) 235; *Adams v. Barry*, 10 Gray (Mass.) 361; *Smith v. Fitzgerald*, 59 Vt. 451; *Deans v. Jones*, 6 Jones L. (N. Car.) 230.

In *Thacher v. Phinney*, 7 Allen (Mass.) 146, the court said: "In all actions for the recovery of damages to the land or other real property of the wife during coverture, they may be properly joined as plaintiffs."

arising from the wife's lands during coverture, the husband may either sue alone or jointly with the wife.<sup>1</sup>

(2) *Under Married Woman's Acts* — (a) *In General* — **Suits by Wife Alone.** — The common-law practice, requiring suits concerning the wife's real property to be brought by the husband and wife jointly, or, in some cases, by the husband alone, has been superseded by statute in almost all of the United States, and at present a married woman is allowed, in most jurisdictions, to sue alone when the suit concerns her separate property.<sup>2</sup>

**Injury to Right Appurtenant to Wife's Land.** — In an action by a husband and wife for an injury to a right belonging to the wife, and appurtenant to her land, to take water from a reservoir of the defendant, it was held that she was properly joined with her husband in the suit, as she was the meritorious cause of the action. *Taylor v. Knapp*, 25 Conn. 510.

**Obstruction of Way Appurtenant to Wife's Land.** — Husband and wife may join in an action on the case for an obstruction of a way appurtenant to the wife's land in their occupation or possession. *Cushing v. Adams*, 18 Pick. (Mass.) 110.

**Nuisance.** — In *Illinois* where an injury is done to the freehold of a married woman, as in the erection of a nuisance adjacent thereto, and the married woman acquired the title to the premises prior to the passage of the Act of February, 1861, and the land was in the joint occupancy of the husband and wife, then, in an action on the case for such injury, the husband and wife must join. *Illinois Cent. R. Co. v. Grable*, 46 Ill. 445.

**Land Owned Jointly by Husband and Wife.** — In an action for an injury done to a close owned jointly by the husband and wife, they may join as plaintiffs. *Armstrong v. Colby*, 47 Vt. 359.

**Tenants by Entirety.** — In an action to recover damages caused by a nuisance to premises owned by husband and wife as tenants by the entirety, the husband alone is the proper plaintiff. *Demby v. Kingston*, 60 Hun (N. Y.) 294.

**In Missouri** the wife was not a necessary nor a proper party in an action to recover for injuries to lands of which she had the legal title. *Gray v. Dryden*, 79 Mo. 106. But see *Burns's Annot. Pr. Code*, § 366, for the present law on this subject.

1. *Lewis v. Martin*, 1 Day (Conn.) 263; *Decker v. Livingston*, 15 Johns.

(N. Y.) 479; *Aleberry v. Walby*, 1 Stra. 229. But see *Clark v. Anjier*, 1 Ch. Ca. 41.

**Covenant to Pay Rent to Both.** — Where a lease is executed by husband and wife of land in which the wife has an estate for life, and the lessee covenants to pay rent to both, the husband and wife may join in an action to recover the rent. *Jacques v. Short*, 20 Barb. (N. Y.) 269.

2. As to what constitutes a married woman's separate estate, see Am. and Eng. Encyc. of Law (2d ed.), titles *Separate Property of Married Women*; *Husband and Wife*.

For a general discussion of parties to suits concerning married women's separate estates, see *infra*, III. 1. g. *Concerning Wife's Statutory Separate Estate*.

**For Partition of Land.** — Under the *New Jersey Married Women's Act*, Rev. 1874, p. 637, a married woman who has acquired an interest as tenant in common in land since July 4, 1852, may institute a suit for partition of the land without joining her husband as a party to it. *Castner v. Sliker*, 43 N. J. Eq. 8.

Under the *Missouri Partition Act*, Gen. Stat. 1865, c. 152, a married woman may bring a suit for partition without joining her husband. *Cochran v. Thomas*, 131 Mo. 258.

In *New York*, in a suit by husband and wife for partition of real property devised to the wife, it was held that as such property would become her separate estate the husband was improperly joined. *Brownson v. Gifford*, 8 How. Pr. (N. Y. Supreme Ct.) 389.

**To Quiet Title.** — Under *California Code Civ. Pro.*, §§ 370, 374, a married woman may maintain in her own name an action to quiet title to her separate property, although a homestead may have been declared upon the premises for the joint benefit of herself and her

**Joinder of Husband and Wife.** — In some states joinder of the husband in such suits is not permitted, but in others the wife may either sue alone or join the husband with her.<sup>1</sup>

**The Rule Summarized.** — It may be laid down as a general rule, that wherever the husband and wife have a joint interest in the subject-matter of the suit they may join as plaintiffs; but where they have not such joint interest their joinder is improper, as in case of other parties.<sup>2</sup>

husband. *Prey v. Stanley*, 110 Cal. 423.

In *Indiana*, in an action to quiet title to land owned solely by the wife, the husband and wife may join, as the husband has a contingent interest in the property. *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 294.

**To Remove Cloud from Title.** — In *Arkansas* a married woman may bring suit in her own name to have a cloud removed from the title to her separate real estate. *Chaplin v. Holmes*, 27 Ark. 414.

**For Fraudulent Representations.** — In *New York*, in an action by a married woman for fraudulent representations whereby she was induced to sell her separate real estate, it was held that the husband was not a necessary party. *Newbery v. Garland*, 31 Barb. (N. Y.) 121.

**Deceit in Procurement of Transfer.** — Under *Indiana* Rev. Stat. 1881, § 254, a married woman may sue alone for deceit in the procurement of a transfer by her of her separate real property. *Mills v. Winter*, 94 Ind. 329.

**To Restrain Sale of Land on Execution.** — In *Indiana* a married woman may institute in her own name, without joining her husband a suit to restrain the sale of her land on execution. *Adams v. Sater*, 19 Ind. 418.

**To Set Aside Sale of Lands.** — In *Alabama* an application to the Probate Court to set aside, as void, a sale of land belonging to the statutory separate estate of a married woman, made by her guardian before her marriage, should be in the name of the wife alone. *Mohon v. Tatum*, 69 Ala. 466.

**Louisiana, Maryland, and Texas.** — See *infra*, III. 1. g. (2) *Exceptions to General Rule*.

Under *Texas* Rev. Stat., art. 1204, providing that "the husband may sue either alone, or jointly with his wife, for the recovery of any separate property of the wife," the husband may sue alone to have declared a vendor's lien

for land alleged to have belonged to the husband and his wife, and to have been sold by them to the defendant. *Meyer v. Smith*, 3 Tex. Civ. App. 37.

And in a suit for breach of warranty brought by a husband and wife in right of the wife as equitable owner, where it was objected that, as the legal title to the land was in the husband, he only had a right to sue for breach of warranty, it was held that, under *Pasch. Tex. Dig.*, arts. 4636, 4641, suits for the wife's separate property might be brought in the name either of the husband, or of the husband and wife jointly. *Williams v. Turner*, 50 Tex. 137.

1. See *infra*, III. 1. g. (3) *Statute Permissive or Mandatory*.

2. In *Wrightsville, etc., R. Co. v. Holmes*, 85 Ga. 668, it was held that where the formal legal title was in the husband, while the equitable title was in the wife, the husband and wife could not maintain a joint action to recover for damages to the freehold, as there was no joint title in them.

**An Action of Trespass Quare Clausum Fregit** cannot be brought by husband and wife jointly unless it appears that the wife has some interest in the close. *Meador v. Stone*, 7 Met. (Mass.) 147.

**Premises Leased by Husband and Wife.**

— Where a trespass was committed upon premises leased by husband and wife, the rent being sometimes paid by the husband and sometimes by the wife, it was held in *Missouri* that an action to recover damages could be brought by the husband alone as the head of the family. *Hart v. Hicks*, 129 Mo. 99; *citing Kanaga v. St. Louis, etc., R. Co.*, 76 Mo. 207.

**Husband Tenant by Curtesy Initiate.** — In an action of ejectment for the wife's land, the husband, being tenant by the curtesy initiate, has an interest in the land, and is a necessary party to a suit respecting it; and in case he refuses to become a co-plaintiff, in an action by the wife to assert her right to the



(b) **To Recover Possession.** — Under the statutes now existing in most of the United States, the husband is no longer required to be joined with the wife, as at common law, in an action to recover her lands; but where such lands are her separate property she may sue therefor in her own name.<sup>1</sup> In two or three states, however, it seems that the wife cannot sue alone.<sup>2</sup>

property, he should be made a party defendant. *McGlennery v. Miller*, 90 N. Car. 215. But see *Wilson v. Arentz*, 70 N. Car. 670.

In an action under the code to recover real property, corresponding to the former action of ejectment, when the wife is the owner of the fee and the husband is tenant by the curtesy initiate, the husband and wife may join in the action. *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9.

**Tenants by the Entirety.** — In *Missouri*, where land is held by husband and wife as tenants by the entirety, the wife must be joined as a plaintiff in an action to recover for injury thereto. *Muldrow v. Missouri*, etc., R. Co., 62 Mo. App. 431. But compare *Hart v. Hicks*, 129 Mo. 99.

**Wife's Interest in Husband's Lands.** — *Indiana* Rev. Stat. 1881, § 2508, enlarges the wife's common-law right in her husband's lands into a fee which is not only contingent upon her husband's death, but may at any time become vested and absolute upon a judicial sale of the land, where her inchoate interest is not directed by the judgment to be barred or sold. In an action brought since the passage of this statute, to compel a railroad company to maintain a crossing over its right of way in accordance with a condition in a deed by husband and wife granting a strip of land for the said right of way, the wife, though perhaps not a necessary party, has such an interest as to make her a proper party plaintiff, along with her husband. *Lake Erie*, etc., R. Co. v. Priest, 131 Ind. 413.

**Actions Relating to Joint Property.** — For land vested jointly in husband and wife the latter cannot alone maintain an action. *Allie v. Schmitz*, 17 Wis. 169.

In an action to recover for the occupation of certain land the title to which was in the husband and wife jointly, it was held that the wife alone could not recover, but that both must join in the action. *Freeman v. Barber*, 1 Hun (N. Y.) 433.

1. *Alabama*. — Code 1887, § 2347; *Hurst v. Thompson*, 68 Ala. 560; *Parsons v. Woodward*, 73 Ala. 348; *Warren v. Wagner*, 75 Ala. 188.

*Arkansas*. — Gantt's Dig., §§ 4144, 4487; *Cairo*, etc., R. Co. v. Parks, 32 Ark. 131.

*California*. — Code Civ. Pro., § 370; *Calderwood v. Pyser*, 31 Cal. 333.

*Indiana*. — Rev. Stat., § 254; *Welch v. Bunce*, 83 Ind. 382; *Wright v. Wright*, 97 Ind. 444; *Myers v. Jackson*, 135 Ind. 136. But see *Bower v. Bowen*, 139 Ind. 31.

*Iowa*. — Code, § 2562; *Kramer v. Conger*, 16 Iowa 434.

*Kentucky*. — Civ. Code, § 49; *Petty v. Malier*, 14 B. Mon. (Ky.) 198.

*Maine*. — Rev. Stat., p. 524, § 5; *Webb v. Hall*, 35 Me. 336.

*Missouri*. — Burns's Annot. Pr. Code, § 366; *Bains v. Bullock*, 129 Mo. 117; *Bobb v. Taylor*, 25 Mo. App. 583. See also *Arnold v. Willis*, 128 Mo. 145.

*New Jersey*. — Gen. Stat., p. 2014, § 11; *Van Cleve v. Rook*, 40 N. J. L. 25.

*New York*. — Code Civ. Pro., § 450; *Hillman v. Hillman*, 14 How. Pr. (N. Y. Supreme Ct.) 456; *Darby v. Callaghan*, 16 N. Y. 71.

*North Carolina*. — Code, § 178; *McGlennery v. Miller*, 90 N. Car. 215.

*West Virginia*. — Code, c. 66, § 12; *Mathew v. Greer*, 21 W. Va. 694.

2. **In Maryland** a married woman may sue by next friend for the security or recovery of her property, but she is not allowed to sue alone. See cases cited *infra*, III. 1. g. (2) *Exceptions to General Rule*.

**In Rhode Island**, in ejectment to recover the real estate of a married woman whose husband is under guardianship, it was held that the husband by his guardian must join with the wife in bringing the suit. *Hamilton v. Colwell*, 10 R. I. 39. See R. I. Gen. Laws, c. 194, § 16, for the present practice.

**In Texas** the husband may sue alone, or jointly with his wife, for the recovery of her separate property, or for in-

(c) **For Injuries to Wife's Realty.**—Under the same statutes which allow a married woman to sue alone to recover the possession of her separate real property, she may also maintain an action in her own name for the recovery of damages for injuries thereto.<sup>1</sup>

(d) **Rents Accruing from Wife's Separate Realty.**—Under the statutory enactments in many of the states, removing the disabilities of married women, it is held that a wife may sue alone to recover the rents accruing from her separate real property.<sup>2</sup>

*f. CONCERNING WIFE'S PERSONAL CHATTELS*—(1) *At Common Law*—(a) **Property Owned by Wife Before Marriage.**—At common law all the personal chattels owned by the wife at the time of marriage vest absolutely in the husband,<sup>3</sup> and consequently he is the proper person to sue therefor.<sup>4</sup>

juries thereto. Texas, etc., *R. Co. v. Medaris*, 64 Tex. 92; *Houston v. Schrimpf*, 31 Tex. 667. And see cases cited *infra*, III. 1. g. (2) *Exceptions to General Rule.*

**Virginia.**—Formerly, in a suit in chancery under Va. Acts of 1876-77, pp. 333-334, to recover the wife's separate property, the husband and wife were required to join as complainants. *Burson v. Andes*, 83 Va. 445. But by the Va. Code 1887, § 2288, the necessity for joining the husband is dispensed with.

1. **Illinois.**—*Chicago v. McGraw*, 75 Ill. 566; *Indianapolis, etc., R. Co. v. McLaughlin*, 77 Ill. 275.

**Indiana.**—*Atkinson v. Mott*, 102 Ind. 431. See *Bellows v. McGinnis*, 17 Ind. 64, for former doctrine.

**Maine.**—*Davis v. Herrick*, 37 Me. 397; *Green v. North Yarmouth*, 58 Me. 54. See also *Woodman v. Neal*, 48 Me. 266.

**Minnesota.**—*Spencer v. St. Paul, etc., R. Co.*, 22 Minn. 29.

**New Hampshire.**—*Whidden v. Coleman*, 47 N. H. 297.

**New York.**—*Fox v. Duff*, 1 Daly (N. Y.) 196; *Hufnagel v. Mt. Vernon*, 49 Hun (N. Y.) 286, 15 Civ. Pro. Rep. (N. Y.) 148; *Draper v. Stouvenel*, 35 N. Y. 507.

**Vermont.**—*Swerdferger v. Hopkins*, 67 Vt. 136.

**Wisconsin.**—*Boos v. Gomber*, 23 Wis. 284, 24 Wis. 499; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 548.

**Texas Doctrine.**—Under Tex. Rev. Stat., art. 1204, the husband may either sue alone to recover for damages to the wife's separate property, or may join the wife with him. *Lee v. Turner*, 71 Tex. 264; *San Antonio, etc., R.*

*Co. v. Flato*, (Tex. Civ. App. 1896) 35 S. W. Rep. 859. And see cases cited *infra*, III. 1. g. (2) *Exceptions to General Rule.*

2. *Snyder v. Webb*, 3 Cal. 83; *Hayner v. Smith*, 63 Ill. 430; *Thompson v. Wiggins*, 109 N. Car. 508; *Cahoon v. Kinen*, 42 Ohio St. 190.

For general discussion of married women's separate estates, see *infra*, III. 1. g. *Concerning Wife's Statutory Separate Estate.*

**Alabama Doctrine.**—In Alabama it is held that where the rents, income, and profits of the wife's statutory separate estate are the mere incidents of a suit for the recovery of the *corpus*, the action is properly brought in her name as sole plaintiff. *Pickens v. Oliver*, 29 Ala. 528; *Boynton v. Sawyer*, 35 Ala. 497; *Lyles v. Clements*, 49 Ala. 445; *Williamson v. Baker*, 78 Ala. 590. But where they are the subject of a separate suit, and accrue after marriage, the husband may recover them by an action in his own name, as they do not then belong to the *corpus* of her separate estate. *Williamson v. Baker*, 78 Ala. 590, *overruling* *Boggs v. Price*, 64 Ala. 514; *Bentley v. Simmons*, 51 Ala. 165; *Hollifield v. Wilkinson*, 54 Ala. 275. See also *Holly v. Flournoy*, 54 Ala. 59.

**Husband May Sue as Trustee of Wife.**—In an action to recover the rents, income, and profits of the wife's separate estate, the husband is not bound to sue individually, but may sue "as trustee of his wife." *Bentley v. Simmons*, 51 Ala. 165.

3. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

4. *Trimble v. Stipe*, 5 T. B. Mon. (Ky.) 264; *Martin v. Poague*, 4 B. Mon.

(b) **Property Accruing to Wife During Coverture.** — All personal property accruing to the wife during the coverture vests absolutely in the husband at common law, and suits to recover it, or for injuries thereto, are properly brought in his name alone.<sup>1</sup>

(2) **Under Married Woman's Acts.** — In most of the United States the statutes relating to married women have abrogated the common-law rule which vested the personal chattels of the wife in the husband and required him to sue therefor in his own name. The personal property of the wife, whether accruing to her before or after marriage, is now generally made her separate estate, and she may sue in her own name for its recovery,<sup>2</sup> or for

(Ky.) 524; *Walker v. Mebame*, 1 Murph. (N. Car.) 41; *Brown v. Fitz*, 13 N. H. 283; *M'Neillage v. Holloway*, 1 B. & Ald. 218.

**Detinue for Wife's Chattel.** — Where a husband has procured, after marriage, actual or constructive possession of the wife's chattel, he cannot join his wife with him in detinue therefor, but must sue alone. *Spiers v. Alexander*, 1 Hawks. (N. Car.) 67.

**Property Held Under Bailment from Wife.** — Where a person has possession of personal property of a married woman under a bailment from her, made while sole, he is a trustee for the husband, and his possession is that of the husband, who may bring detinue therefor in his own name. *Armstrong v. Simonton*, 2 Murph. (N. Car.) 351.

**Sale of Wife's Chattel by Husband.** — Where a husband, with the wife's assent, sold personal property belonging to her, it was held that he could maintain an action in his own name to recover the value thereof. *Gillett v. Knowles*, 97 Mich. 77.

**Timber Cut on Joint Property of Husband and Wife.** — In *Fairchild v. Chaustelleux*, 8 Watts (Pa.) 412, it was held that an action of replevin would not lie in the name of husband and wife for timber cut on their joint property, but must be brought in the name of the husband alone; for the timber, when severed, becomes the personal property of the husband, and the wife has no interest therein.

1. *George v. English*, 30 Ala. 582; *Younge v. Moore*, 1 Strobb. L. (S. Car.) 48; *Rawlins v. Rounds*, 27 Vt. 17; *Moores v. Carter*, Hempst. (U. S.) 64.

**Chattel Bought with Wife's Earnings.** — In *Massachusetts*, before the statute of 1855, c. 304, as at common law, a chattel bought by the wife with her own earnings was the sole property of

the husband, and he alone must sue for its conversion. *Gerry v. Gerry*, 11 Gray (Mass.) 381.

**Distributive Share of Wife.** — If the right of a married woman to the distributive portion of a deceased person's estate accrues after marriage, the husband may sue for it alone. *Henderson v. Guyot*, 6 Smed. & M. (Miss.) 209.

In an action to recover a wife's distributive share previous to Acts of *New Jersey* passed March 25, 1852, for the better securing the property of married women, the action might be in the name of the husband alone. *Teneick v. Flag*, 29 N. J. L. 25.

**Gift to Wife.** — A. transferred a note to B. by delivery for a debt which was less than the amount of the note, and directed that the difference should be paid to his, B.'s, wife. It was held that the equitable title to the note passed to B. by the transfer, and that he might sue upon it without joining his wife as a plaintiff. *Speelman v. Culbertson*, 15 Ind. 441.

2. *Alabama.* — *McConeghy v. McCaw*, 31 Ala. 447; *Hutton v. Williams*, 35 Ala. 503; *Spear v. Lumpkin*, 39 Ala. 600; *Wortham v. Gurley*, 75 Ala. 356; *Meyer v. Sulzbacher*, 76 Ala. 120. See also *Gluck v. Cox*, 90 Ala. 331.

*Arkansas.* — *Berlin v. Cantrell*, 33 Ark. 611.

*California.* — *Guttman v. Scannell*, 7 Cal. 455; *Kays v. Phelan*, 19 Cal. 128; *Evans v. De Lay*, 81 Cal. 103.

*Illinois.* — *Emerson v. Clayton*, 32 Ill. 493; *Harris v. Brain*, 33 Ill. App. 510.

*Indiana.* — *Wilkins v. Miller*, 9 Ind. 100.

*Massachusetts.* — *Hennessey v. White*, 2 Allen (Mass.) 48; *Read v. Earle*, 12 Gray (Mass.) 423.

*Michigan.* — *Shepard v. Cross*, 33 Mich. 96.

injuries thereto.<sup>1</sup> In a few of the states, however, the wife is not allowed to prosecute such actions alone.<sup>2</sup>

**g. CONCERNING WIFE'S STATUTORY SEPARATE ESTATE —**  
(1) *General Rule.* — The common-law doctrine that a married woman has no separate existence in law has been overturned by statute to a greater or less extent in all of the United States, and it is now an almost universal practice to allow a married woman to sue alone where the action relates to her statutory separate estate.<sup>3</sup>

*Missouri.* — *Houx v. Shaw*, 25 Mo. App. 233; *Gentry v. Templeton*, 47 Mo. App. 55.

*New York.* — *Ackley v. Tarbox*, 31 N. Y. 564.

*West Virginia.* — *Robinson v. Woodford*, 37 W. Va. 377.

See also *supra*, III. 1. c. (2) *Under Married Woman's Acts*; and for a general discussion of married women's separate estate, see *infra*, III. 1. g. *Concerning Wife's Statutory Separate Estate*.

1. *Burns v. Campbell*, 71 Ala. 271; *Collen v. Kelsey*, 39 Me. 298; *Spies v. Accessory Transit Co.*, 5 Duer (N. Y.) 662; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

**Name of Husband Regarded as Surplusage.** — Where, in an action by the wife, the name of the husband appeared as co-plaintiff in the caption of her complaint, but no mention was made of him in the body of the complaint, and the property alleged to have been destroyed was averred to be her property, and no attempt was made to state a joint cause of action, it was held that the name of the husband in the caption must be regarded as surplusage, and that the complaint was not demurrable. *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

2. **In Texas** the husband may maintain, in his own name, an action to recover the separate property of the wife, or for wrongful conversion thereof. *Turnley v. Texas Banking, etc., Co.*, 54 Tex. 451; *Craddock v. Goodwin*, 54 Tex. 578. But it is not improper to join the wife in such action. *Craddock v. Goodwin*, 54 Tex. 578. See also cases cited *infra*, III. 1. g. (2) *Exceptions to General Rule*.

**In Maryland**, under the code, art. 45, § 4, a married woman may sue by her next friend to recover her property, without joining her husband. *Strasburger v. Barber*, 38 Md. 103. But this

section does not take away the right of the wife to join her husband in the action if she elects to do so. *Herzberg v. Sachse*, 60 Md. 426; *Barr v. White*, 22 Md. 259. See also cases cited *infra*, III. 1. g. (2) *Exceptions to General Rule*.

**In Pennsylvania** a suit to recover damages for personal property of the wife sold under execution as the property of the husband should be brought in the name of the husband and wife for the use of the wife, and not in the name of the wife alone. *Keeney v. Good*, 21 Pa. St. 349.

**In Georgia** the code substantially recognizes the rule of the common law respecting personal property acquired by the wife during coverture. Therefore, where a wife in Georgia purchased cotton during the absence of her husband, with means derived from his estate, but greatly increased by her sole management and skill, he could maintain an action in his own name under the Abandoned or Captured Property Act, for the proceeds in the treasury, although at the time of capture the wife claimed the cotton as her own. *Reilly's Case*, 7 Ct. of Cl. 504.

**In Connecticut**, by Act of 1873, the wife's personal property was vested in the husband as her trustee, and an action for its recovery was properly brought by husband and wife jointly. *Haman v. New Britain Nat. Bank*, 42 Conn. 141. That statute has been superseded by Conn. Gen. Stat., § 2796.

**In Virginia**, under the Acts of 1876-77, the husband was required to be joined with the wife in an action by her to recover her separate property. *Alexander v. Alexander*, 85 Va. 353. The code of 1887, § 2288, requires such actions to be brought by the wife alone.

3. **Alabama.** — Code of 1886, § 2347; *Pickens v. Oliver*, 29 Ala. 528; *McConeghy v. McCaw*, 31 Ala. 447; *Hutton v. Williams*, 35 Ala. 503; *Boynton v. Sawyer*, 35 Ala. 497; *Spear v. Lump-*

**Husband Authorized to Sue.**—While the effect of the Married Woman's Acts in the various states is to vest the wife's property and rights of action in her alone, and to deprive the husband of

kin, 39 Ala. 600; *Carter v. Owens*, 41 Ala. 217; *Lyles v. Clements*, 49 Ala. 445; *Hurst v. Thompson*, 68 Ala. 560; *Mohon v. Tatum*, 69 Ala. 466; *Burns v. Campbell*, 71 Ala. 271; *Parsons v. Woodward*, 73 Ala. 348; *Warren v. Wagner*, 75 Ala. 188; *Wortham v. Gurley*, 75 Ala. 356; *Meyer v. Sulzbacher*, 76 Ala. 120; *Wolfe v. Underwood*, 91 Ala. 523.

*Arizona*.—Rev. Stat., § 683.

*Arkansas*.—Gantt's Dig., §§ 4487, 4144; *Chaplin v. Holmes*, 27 Ark. 414; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Berlin v. Cantrell*, 33 Ark. 611.

*California*.—Code Civ. Pro., § 370; *Snyder v. Webb*, 3 Cal. 83; *Guttman v. Scannell*, 7 Cal. 455; *Van Maren v. Johnson*, 15 Cal. 308; *Kays v. Phelan*, 19 Cal. 128; *Calderwood v. Pyser*, 31 Cal. 333; *Corcoran v. Doll*, 32 Cal. 83; *Evans v. De Lay*, 81 Cal. 103; *Spargur v. Heard*, 90 Cal. 221; *Prey v. Stanley*, 110 Cal. 423. See also *Wren v. Wren*, 100 Cal. 276.

*Colorado*.—Mills's Annot. Code, c. 1, § 6; *Allen v. Eldridge*, 1 Colo. 287. See also *Denver, etc., R. Co. v. Frame*, 6 Colo. 382.

*Connecticut*.—Gen. Stat. 1888, § 986; *Rockwell v. Clark*, 44 Conn. 534.

*Delaware*.—Laws 1893, p. 600.

*District of Columbia*.—Comp. Stat., c. 30, § 25; *Candy v. Smith*, 6 Mackey (D. C.) 303. See also *Seitz v. Mitchell*, 94 U. S. 580.

*Florida*.—Rev. Stat., § 2074.

*Georgia*.—Code 1882, § 1774; *Meriwether v. Smith*, 44 Ga. 541; *Harper v. Whitehead*, 33 Ga. 138.

*Idaho*.—Rev. Stat. 1887, § 4093.

*Illinois*.—Starr & Curt. Annot. Stat., c. 68, § 1; *Emerson v. Clayton*, 32 Ill. 493; *Beach v. Miller*, 51 Ill. 206; *Hayner v. Smith*, 63 Ill. 430; *Chicago v. McGraw*, 75 Ill. 566; *Wing v. Goodman*, 75 Ill. 159; *Indianapolis, etc., R. Co. v. McLaughlin*, 77 Ill. 275; *McDavid v. Adams*, 77 Ill. 155; *Kase v. Painter*, 77 Ill. 543; *Harris v. Brain*, 33 Ill. App. 510; *Parker v. Parker*, 52 Ill. App. 333.

*Indiana*.—Rev. Stat. 1894, § 254; *Hollingsworth v. State*, 8 Ind. 257; *Wilkins v. Miller*, 9 Ind. 100; *Martindale v. Tibbetts*, 16 Ind. 200; *Adams v. Sater*, 19 Ind. 418; *Gee v. Lewis*, 20

Ind. 149; *Welch v. Bunce*, 83 Ind. 382; *Mills v. Winter*, 94 Ind. 329; *Atkinson v. Mott*, 102 Ind. 431; *Myers v. Jackson*, 135 Ind. 136. See also *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

*Iowa*.—Code, § 2562; *Kramer v. Conger*, 16 Iowa 434; *Malli v. Willett*, 57 Iowa 705.

*Kansas*.—Taylor's Civ. Code, § 29; *Knaggs v. Mastin*, 9 Kan. 547; *Furrow v. Chapin*, 13 Kan. 112; *Crowell v. Ward*, 16 Kan. 61.

*Kentucky*.—Civ. Code, § 49; *Petty v. Malier*, 14 B. Mon. (Ky.) 198; *Campbell v. Galbreath*, 12 Bush (Ky.) 459.

*Maine*.—Rev. Stat., p. 524, § 5; *Webb v. Hall*, 35 Me. 336; *Davis v. Herrick*, 37 Me. 397; *Collen v. Kelsey*, 39 Me. 298; *Walker v. Gilman*, 45 Me. 28; *Tunks v. Grover*, 57 Me. 586.

*Massachusetts*.—Pub. Stat., c. 147, § 7; *Hennessey v. White*, 2 Allen (Mass.) 48; *Read v. Earle*, 12 Gray (Mass.) 423; *Fowle v. Tidd*, 15 Gray (Mass.) 94; *Forbes v. Tuckerman*, 115 Mass. 115.

*Michigan*.—Howell's Annot. Stat., § 6297. See *Shepard v. Cross*, 33 Mich. 96.

*Minnesota*.—Minn. Stat. 1894, § 5530; *Nininger v. Carver County*, 10 Minn. 133; *Spencer v. St. Paul, etc., R. Co.*, 22 Minn. 29.

*Mississippi*.—Miss. Annot. Code, § 2289.

*Missouri*.—Burns's Annot. Pr. Code, § 366; *Boal v. Morgner*, 46 Mo. 48; *Gotcher v. Haefner*, 107 Mo. 270; *Cochran v. Thomas*, 131 Mo. 258; *Houx v. Shaw*, 25 Mo. App. 233; *Genetry v. Templeton*, 47 Mo. App. 55; *Bains v. Bullock*, 129 Mo. 117.

*Montana*.—Comp. Stat., tit. 2, c. 1, § 7.

*Nebraska*.—Consol. Stat. 1893, § 1413; *Omaha Horse R. Co. v. Doolittle*, 7 Neb. 486; *May v. May*, 9 Neb. 25.

*Nevada*.—Gen. Stat., § 3029.

*New Hampshire*.—Gen. Stat., c. 164, §§ 1, 13; *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172; *Alexander v. Goodwin*, 54 N. H. 423.

*New Jersey*.—Gen. Stat., p. 2014, § 11; *Van Cleve v. Rook*, 40 N. J. L. 25; *Lehman v. Hauk*, 42 N. J. L. 206; *Castner v. Sliker*, 43 N. J. Eq. 8; *Young v. Young*, 45 N. J. Eq. 27.

his common-law right to sue for them, still the husband may under certain circumstances be authorized by the wife to bring the action.<sup>1</sup>

**What Constitutes Statutory Separate Estate.** — A discussion as to what constitutes a married woman's separate estate is not within the

*New York.* — Code Civ. Pro., § 450; Fox v. Duff, 1 Daly (N. Y.) 196; Spies v. Accessory Transit Co., 5 Duer (N. Y.) 662; Brownson v. Gifford, 8 How. Pr. (N. Y. Supreme Ct.) 389; Rusher v. Morris, 9 How. Pr. (N. Y. Supreme Ct.) 266; Hillman v. Hillman, 14 How. Pr. (N. Y. Supreme Ct.) 456; Smart v. Comstock, 24 Barb. (N. Y.) 411; Newbery v. Garland, 31 Barb. (N. Y.) 121; Paine v. Hunt, 40 Barb. (N. Y.) 75; Darby v. Callaghan, 16 N. Y. 71; Palmer v. Davis, 28 N. Y. 242; Ackley v. Tarbox, 31 N. Y. 564; Draper v. Stouvenel, 35 N. Y. 507; Rawson v. Pennsylvania R. Co., 48 N. Y. 212; Stoneman v. Erie R. Co., 52 N. Y. 429; Hufnagel v. Mt. Vernon, 49 Hun (N. Y.) 286, 15 Civ. Pro. Rep. (N. Y.) 148; Stokes v. Pease, 79 Hun (N. Y.) 304.

*North Carolina.* — Code, § 178; McGlennery v. Miller, 90 N. Car. 215; Thompson v. Wiggins, 109 N. Car. 508.

*North Dakota.* — Rev. Code, 1895, § 5224.

*Ohio.* — Rev. Stat., § 4096; Stannus v. Walker, 1 Handy (Ohio) 537; Reinheimer v. Carter, 31 Ohio St. 579; Cahoon v. Kinen, 42 Ohio St. 190.

*Oklahoma.* — Stat. 1893, § 3901.

*Oregon.* — Hill's Annot. Laws, § 30.

*Rhode Island.* — Gen. Laws, tit. 20, c. 194, § 16.

*South Carolina.* — Code Civ. Pro., § 135.

*Utah.* — Comp. Laws, § 3172.

*Vermont.* — Acts 1884, No. 140; Wright v. Burroughs, 61 Vt. 390.

*Virginia.* — Code 1887, § 2288; Norfolk, etc., R. C. v. Dougherty, 92 Va. 372; Richmond R., etc., Co. v. Bowles, 92 Va. 738.

*Washington.* — Code Civ. Pro., § 136.

*West Virginia.* — Code, c. 66, § 12; Mathews v. Greer, 21 W. Va. 694; Fox v. Manufacturers' F. Ins. Co., 31 W. Va. 374.

*Wisconsin.* — Sanborn & Berryman Annot. Stat., § 2344; Norval v. Rice, 2 Wis. 22; Botkin v. Earl, 6 Wis. 393; Boos v. Gomer, 23 Wis. 284, 24 Wis. 499; Lyon v. Green Bay, etc., R. Co., 42 Wis. 548.

*Wyoming.* — Rev. Stat., § 1560.

**The Effect of the Married Woman's Acts** upon the common-law doctrines concerning the joinder of husband and wife has already been noticed.

See *supra*, III. i. b. (2), III. i. c. (2), III. i. d. (1) (b), III. i. e. (2), and III. i. f. (2), *Under Married Woman's Acts*.

**Separate Property Under Laws of Another State.** — Under *Alabama Code*, 1886, § 2347, a married woman must sue alone to recover property which is her separate property under the laws of another state. *Bagan v. Hamilton*, 90 Ala. 454.

**1. Where Wife Has Disappeared.** — Where a wife has authorized her husband to take charge of her separate property and to insure it, the husband may, by virtue of his authority as agent, sue in the wife's name on the policy of insurance, where the wife has disappeared and cannot be communicated with. *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210.

**Gift to Husband by Wife.** — While the wife's choses in action do not, by mere operation of law, either pass to the husband or authorize him against her consent to sue upon them either in his own name or in their joint names, she may give or deliver them to him, and this will authorize him to sue in his own name. *King v. Gottschalk*, 21 Iowa 512.

**Husband as the Wife's Attorney.** — Where a wife, by an instrument under seal and in terms irrevocable, appoints her husband her attorney, for her and in her name to collect and receive to his own use the rents and profits of her real estate already under lease, to make repairs, pay taxes, have the general oversight thereof during his life, without accounting to her, and to represent her before any court, the husband is thereby authorized to commence an action for an injury to the real estate, but only in her name. *Woodman v. Neal*, 48 Me. 266.

**In Maine**, under Rev. Stat., c. 61, § 3, the husband cannot, even with his wife's consent, maintain an action in his own name alone for a tort to the wife's property. *Green v. North Yarmouth*, 58 Me. 54.

scope of this work,<sup>1</sup> but it may be stated here that the statutes creating such estates are not retrospective in their application,<sup>2</sup> and do not apply to separate estates created otherwise than by statute.<sup>3</sup>

(2) *Exceptions to General Rule.* — As stated above, it is now the general practice to allow a married woman to sue alone, wherever the action relates to her separate property. In a few states, however, the disabilities of coverture have not been removed to such a great extent, and the wife is not allowed to sue alone.<sup>4</sup>

1. See Am. and Eng. Encyc. of Law (2d ed.), titles *Husband and Wife*; *Separate Property of Married Women*.

2. *Estate Created Before Passage of Act.* — The *Alabama Code*, § 2131, which authorizes the wife to sue alone when the suit relates to her separate estate, applies only to such estates created by statute, and not to those which were created by the parties before the existence of the statute. *Gerald v. McKenzie*, 27 Ala. 166. See also *Parish v. Balkum*, 40 Ala. 285; *McIlwain v. Vaughan*, 76 Ala. 489. And where a separate estate in a married woman was created by will before the adoption of the code, and no trustee was appointed, the legal title passed to the husband, and he alone had the right to sue for the recovery of the property. *Friend v. Oliver*, 27 Ala. 532.

*Chose in Action Accruing Prior to Passage of Act.* — The Act of Congress of April 10, 1869, relating to rights of married women in the District of Columbia, has not changed the rule of the common law so as to enable a married woman to maintain an action in her own name upon a chose in action which she had prior to the passage of that law. *Kimbrow v. Washington First Nat. Bank*, 1 MacArthur (D. C.) 61.

*Services Rendered Prior to Passage of Act.* — Under the *Illinois Act of 1869*, a wife may sue in her own name for her services rendered since the passage of that act, but she could not for services rendered prior to its passage, as the act is not retroactive. *McDavid v. Adams*, 77 Ill. 155; *Kase v. Painter*, 77 Ill. 543.

*Interest in Land Vested Before Passage of Act.* — Where an interest in remainder in land vested in a married woman before the adoption of the *South Carolina Constitution of 1868*, her husband is a necessary party to an action brought by her for its recovery. *Banister v. Bull*, 16 S. Car. 220.

3. *Equitable Separate Estates.* — In *Alabama* actions at law concerning equitable separate estates must be brought in the name of the trustee, if one has been appointed. *Parish v. Balkum*, 40 Ala. 285; *Holly v. Flournoy*, 54 Ala. 99; *McIlwain v. Vaughan*, 76 Ala. 489. Where no trustee has been appointed, the husband alone may bring the action. *Pickens v. Oliver*, 29 Ala. 528.

As to suits in equity concerning equitable separate estates, see *infra*, III. 1. *j. In Equity*.

*Estate Created by Laws of Another State.* — The provision of *Alabama Code*, § 2892, allowing the wife to sue alone when the suit relates to her separate estate, refers only to the estate created by the laws of Alabama, and not to those created by the laws of any other state; and where the wife has an interest in the suit under the laws of such state the husband is a proper party plaintiff. *King v. Martin*, 67 Ala. 177.

But see *Stoneman v. Erie R. Co.*, 52 N. Y. 429, wherein it was held that a married woman holding separate property in another state might sue for injury thereto in New York in her own name, according to the New York law.

4. *In Texas*, under Rev. Stat., art. 1204, the wife is not authorized to sue alone where the action concerns her separate property. Such action should ordinarily be brought by the husband alone, or by the husband and wife jointly. *Houston v. Schrimpf*, 31 Tex. 667; *Williams v. Turner*, 50 Tex. 137; *Turnley v. Texas Banking, etc., Co.*, 54 Tex. 451; *Craddock v. Goodwin*, 54 Tex. 578; *Texas, etc., R. Co. v. Medaris*, 64 Tex. 92; *Lee v. Turner*, 71 Tex. 264; *Meyer v. Smith*, 3 Tex. Civ. App. 37; *San Antonio, etc., R. Co. v. Flato*, (Tex. Civ. App. 1896) 35 S. W. Rep. 859.

(3) *Statute Permissive or Mandatory.* — In the construction of the statutes enabling a married woman to sue alone where the action concerns her separate property, there is a difference of opinion as to whether the statute is mandatory in its intent, making it absolutely necessary for the wife to sue alone, or merely permissive, allowing her to sue alone or join her husband at her election. In many of the United States the former view is adopted, and the husband is held to be not only an unnecessary but an improper party.<sup>1</sup> In other states, however, it is held that

*Where Wife Abandoned by Husband.*

— A married woman may sue alone to recover her separate property, where the husband has abandoned her and neglected to sue therefor. *Norton v. Davis*, 83 Tex. 32.

In an action by a married woman the petition alleged that "plaintiff had never been divorced from her said husband, but from whom she has been living separate and apart for a long time, to wit, more than two years before this suit was brought; and that about two years ago the said Gillum abandoned plaintiff, and had lived away from her ever since." This was held to state sufficient facts to authorize her bringing the suit alone. *San Antonio, etc., R. Co. v. Gillum*, (Tex. Civ. App. 1895) 30 S. W. Rep. 697.

*Violation by Husband of Wife's Marital Rights.* — Where, in consequence of any unauthorized act of the husband violative of the marital rights of the wife, it becomes necessary for her to resort to suit against a third person, there is no necessity that she should be joined by her husband, or that she should obtain the permission of the court to sue alone. *O'Brien v. Hilburn*, 9 Tex. 297.

*Attempt by Husband to Convey Wife's Separate Property.* — In *McKay v. Treadwell*, 8 Tex. 176, it was held that where the husband had attempted to convey away the separate property of the wife the suit should be brought in the name of the wife alone, the husband being joined as a co-defendant.

In *Louisiana* a wife can never sue alone unless she has been authorized by her husband, or, in case of the husband's refusal, by the judge, to bring the suit. *Schewer v. Klein*, 15 La. Ann. 303; *Pecquet v. Pecquet*, 17 La. Ann. 204; *Pomeroy's Succession*, 21 La. Ann. 576; *Somers v. Schmidt*, 25 La. Ann. 193.

*Authorization Must Be Shown.* — Where the husband does not appear in

a suit instituted by the wife the latter must show her authorization, else the suit must be dismissed. *Sommers v. Schmidt*, 25 La. Ann. 193; *Schewer v. Klein*, 15 La. Ann. 303; *Lacour v. Delamarre*, 2 La. Ann. 140; *Beigel v. Lange*, 19 La. Ann. 112.

The wife's own averments, or those of her counsel, that she has been duly authorized, are not sufficient to sustain the suit. *Sommers v. Schmidt*, 25 La. Ann. 193; *Lacour v. Delamarre*, 2 La. Ann. 140; *Pomeroy's Succession*, 21 La. Ann. 576; *Beigel v. Lange*, 19 La. Ann. 112.

An exception to an action by the wife on the ground that she has not been authorized to sue by her husband will not be sustained where the husband appears by counsel to signify his consent. It will be sufficient to produce the authority itself in time before the trial upon the merits. *Howard v. Copley*, 10 La. Ann. 504.

In *Maryland* a married woman is not allowed to sue alone, but under the code, art. 45, § 4, she may sue by next friend for the security or recovery of her property, without joining the husband. *Heck v. Vollmer*, 29 Md. 507; *Strasburger v. Barber*, 38 Md. 103; *Frazier v. White*, 49 Md. 1. See also *Barton v. Barton*, 32 Md. 214; *Neale v. Hermanns*, 65 Md. 474.

*Husband May Be Joined.* — The statute was not intended to take away from the wife the right to sue with her husband, as at common law, if she chose to do so. *Abrahams v. Tappe*, 60 Md. 317; *Herzberg v. Sachse*, 60 Md. 426; *Barr v. White*, 22 Md. 259.

1. *Alabama.* — The statute uses the word "must," and is, of course, mandatory. *Pickens v. Oliver*, 29 Ala. 528; *Boynton v. Sawyer*, 35 Ala. 497; *Hutton v. Williams*, 35 Ala. 503; *Spear v. Lumpkin*, 39 Ala. 600; *Carter v. Owens*, 41 Ala. 217; *Bell v. Allen*, 53 Ala. 125; *Hurst v. Thompson*, 68 Ala. 560; *Mohon v. Tatum*, 69 Ala. 466;



the statute is merely intended to give the wife the privilege of suing alone if she so desires, and does not deprive her of the right of joining her husband in the action.<sup>1</sup>

*Burns v. Campbell*, 71 Ala. 271; *Wortham v. Gurley*, 75 Ala. 356; *Wolfe v. Underwood*, 91 Ala. 523.

*Connecticut*. — *Rockwell v. Clark*, 44 Conn. 534, decided under the Conn. Gen. Stat. 1875, tit. 19, c. 5, § 11, providing that "when a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried."

*District of Columbia*. — *Candy v. Smith*, 6 Mackey (D. C.) 303.

*Illinois*. — *Hayner v. Smith*, 63 Ill. 430; *Indianapolis, etc., R. Co. v. McLaughlin*, 77 Ill. 275; *Harris v. Brain*, 33 Ill. App. 510.

*Maine*. — *Collen v. Kelsey*, 39 Me. 298.

*Massachusetts*. — *Hennessey v. White*, 2 Allen (Mass.) 48.

*New Hampshire*. — *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172; *Alexander v. Goodwin*, 54 N. H. 423.

*New Jersey*. — *Lehman v. Hauk*, 42 N. J. L. 206.

*New York*. — *Hillman v. Hillman*, 14 How. Pr. (N. Y. Supreme Ct.) 456; *Palmer v. Davis*, 28 N. Y. 242; *Hufnagel v. Mt. Vernon*, 49 Hun (N. Y.) 286, 15 Civ. Pro. Rep. (N. Y.) 148. But under the New York Code of 1848, § 114, it was held that an action concerning a married woman's separate property could be brought either by the wife alone or by the husband and wife jointly. *Rusher v. Morris*, 9 How. Pr. (N. Y. Supreme Ct.) 266.

*Vermont*. — Under Vt. Acts 1884, No. 140, a married woman *must* sue alone where the suit concerns her separate property; and this although the language of the statute is that she "may sue." The court said: "Although the statute may seem in form to be merely permissive, 'may sue and be sued,' and to leave it optional whether the husband shall join or not; yet when we consider that its purpose was to cut up by the roots the marital rights of the husband in the wife's personal property and rights of action, and to set her free from the thralldom of the common law in respect thereof, and confer upon her the rights and privileges of an independent legal existence,

it would be inconsistent with the spirit of the act to construe it as permissive merely and not mandatory. And, besides, by construing it as mandatory, we preserve the symmetry of the law by not having an unnecessary plaintiff who has no interest. We also get certainty in the law, which is always desirable though not always attainable. We also prevent the husband from being made a competent witness for the wife merely by joining him, and the defendant from being deprived of an offset against the wife alone." *Wright v. Burroughs*, 61 Vt. 390.

**Personal Injury to Wife.** — For the construction of the statutes allowing the wife to sue alone for injuries to her person or reputation, see *supra*, III. 1. *d. For Injuries to Wife's Person or Character.*

1. *California*. — *Kays v. Phelan*, 19 Cal. 128; *Calderwood v. Pyser*, 31 Cal. 333; *Corcoran v. Doll*, 32 Cal. 83; *Spargur v. Heard*, 90 Cal. 221; *Van Maren v. Johnson*, 15 Cal. 308, where the court said: "The statute provides that when a married woman is a party her husband shall be joined with her, except in certain specified cases. Cal. Prac. Act, § 7. In those exceptional cases the statute is not obligatory upon the wife to sue or defend alone; it confers only a privilege which in many instances it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded to her. When the action concerns her separate property, and is not between herself and husband, she may seek the aid of the court in company with him or without him."

*Indiana*. — *Hollingsworth v. State*, 8 Ind. 257; *Martindale v. Tibbetts*, 16 Ind. 200; *Bellows v. McGinnis*, 17 Ind. 64; *Gee v. Lewis*, 20 Ind. 149; *Welch v. Bunce*, 83 Ind. 382; *Atkinson v. Mott*, 102 Ind. 431. See also *Myers v. Jackson*, 135 Ind. 136.

*Michigan*. — *Shepard v. Cross*, 33 Mich. 96.

*West Virginia*. — *Robinson v. Woodford*, 37 W. Va. 377; *Fox v. Manufacturers' F. Ins. Co.*, 31 W. Va. 374.

*Wisconsin*. — *Norval v. Rice*, 2 Wis. 22; *Botkin v. Earl*, 6 Wis. 393.

*h.* BY WIFE IN REPRESENTATIVE CAPACITY. — At Common Law a married woman suing in a representative capacity must join her husband with her in the suit.<sup>1</sup>

Under Married Woman's Acts. — Under the statutes now in force in many of the states such suits can be brought by the wife alone.<sup>2</sup>

*i.* CONCERNING COMMUNITY PROPERTY — Husband Generally Sues Alone. — In those states wherein community property is recognized, it is generally held that the husband, being the head of the community, is the only necessary or proper party to sue therefor.<sup>3</sup>

Where the Wife Is Abandoned by Her Husband she may sue for community property in her own name.<sup>4</sup>

**Personal Injury to Wife.** — For the construction of statutes allowing the wife to sue alone for injuries to her person or reputation, see *supra*, III. 1. *d.* (1) (b) *bb.* Statute Permissive or Mandatory.

1. Com. Dig., Baron and Feme (V.); Thompson *v.* Pinchell, 11 Mod. 177; Mitchell *v.* Wright, 4 Tex. 283; Barber *v.* Bush, 7 Mass. 510; Lyman *v.* Albee, 7 Vt. 508; Williamson *v.* Hill, 6 Port. (Ala.) 184; Townshend *v.* Townshend, 10 Gill. & J. (Md.) 373. See also Cox *v.* Williamson, 11 Ala. 343; Buck *v.* Fischer, 2 Colo. 709; Anonymous, 1 Salk. 282.

**Marriage Pending Action.** — Formerly in *Massachusetts* it was held that the marriage of a *feme sole* executrix or administrator, pending an action commenced by her, abated the action. Swan *v.* Wilkinson, 14 Mass. 295. The rule was subsequently changed by statute. Newell *v.* Marcy, 17 Mass. 341.

**As Guardian in Socage.** — A married woman who in her representative capacity as guardian in socage brings an action of trespass must join her husband with her in the suit. Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66.

**In an Equity Suit** brought by a married woman as executrix the husband should be joined with her. Oliva *v.* Bunaforza, 31 N. J. Eq. 395.

2. Thus in *Indiana* a married woman may sue alone as executrix or administratrix without joining the husband. Moore *v.* McMillen, 23 Ind. 78.

3. Mott *v.* Smith, 16 Cal. 533; Barrett *v.* Tewksbury, 18 Cal. 334; Moseley *v.* Heney, 66 Cal. 478; Crow *v.* Van Sickle, 6 Nev. 146; Murphy *v.* Coffey, 33 Tex. 508; Jackson *v.* Cross, 36 Tex. 193; Edrington *v.* Newland, 57 Tex.

627; Jordan *v.* Moore, 65 Tex. 363; Gulf, etc., R. Co. *v.* Goldman, 8 Tex. Civ. App. 257; Texas, etc., R. Co. *v.* Alexander, (Tex. Civ. App. 1896) 35 S. W. Rep. 9. See also Beigel *v.* Lange, 19 La. Ann. 112. But see, *contra*, Parke *v.* Seattle, 8 Wash. 78.

**Damages for Personal Injury to the Wife** become community property when recovered, and therefore it is held that the husband is the proper party to sue for such damages. See *supra*, III. 1. *d.* (4) *Where Damages Become Community Property.*

**Recovery for Wife's Services.** — In the absence of an agreement between husband and wife making the proceeds of the wife's labor her separate property, the husband is the proper party plaintiff to recover for such services, they being community property. Moseley *v.* Heney, 66 Cal. 478.

**Minor Husband Suing by Next Friend.** — Where the husband is a minor he may sue by his next friend, and recover all that he could have recovered if *sui juris* and suing in his own name. Texas, etc., R. Co. *v.* Alexander, (Tex. Civ. App. 1896) 35 S. W. Rep. 9.

4. Leeds *v.* Reed, (Tex. Civ. App. 1896) 36 S. W. Rep. 347; Houston, etc., R. Co. *v.* Lackey, (Tex. Civ. App. 1896) 33 S. W. Rep. 768. For a general discussion of the effect of desertion see *infra*, III. 3. *Effect of Desertion or Separation.*

**Husband Absent or Refusing to Join.** — Although it is a general rule in *Texas* that where the suit concerns community property the husband must sue alone, nevertheless the wife may maintain an action in her own name to protect the homestead where the husband is absent or refuses to join in the suit.

*j.* IN EQUITY — (1) *Independently of Statute* — (a) *In General*. — Independently of statute a married woman cannot sue alone in equity.<sup>1</sup> Where the interests of the husband and wife are not adverse, a suit in equity in which the wife has an interest should be brought by the husband and wife jointly.<sup>2</sup> It is not necessary that the husband should have an interest in the suit,<sup>3</sup> but of course if the wife has no interest she is not a proper party.<sup>4</sup>

**Husband and Wife Holding Adverse Interests.** — It is well settled that a suit in equity brought by husband and wife jointly is to be considered the suit of the husband alone, and the decision in such suit does not bind the wife.<sup>5</sup> Therefore where the wife goes

Kelley v. Whitmore, 41 Tex. 647, *modifying* Murphy v. Coffey, 33 Tex. 509.

1. Bynum v. Frederick, 81 Ala. 489; Bradley v. Emerson, 7 Vt. 369; Smith v. Smith, 18 Fla. 789; Tunnard v. Littell, 23 N. J. Eq. 264. But see Wright v. Arnold, 14 B. Mon. (Ky.) 513.

**Husband Admitted to Prosecute Decree on Motion.** — Where a bill was filed by a *feme covert* describing her as a single woman, her solicitor being ignorant of her marriage, and her husband being ignorant of the suit until after the decree, on motion by consent the husband was admitted to prosecute the decree under terms. Farrer v. Wyatt, 5 Madd. 449.

2. *Alabama*. — Cherry v. Belcher, 5 Stew. & P. (Ala.) 133; Blackwell v. Vastbinder, 6 Ala. 218; Whitten v. Graves, 40 Ala. 578.

*Kentucky*. — Pyle v. Cravens, 4 Litt. (Ky.) 17; Thomas v. Kelsoe, 7 T. B. Mon. (Ky.) 523; Ringo v. Warder, 6 B. Mon. (Ky.) 517; Darnall v. Adams, 13 B. Mon. (Ky.) 273; Oldham v. Collins, 4 J. J. Marsh. (Ky.) 49; Triple v. Fryer, 5 J. J. Marsh. (Ky.) 179; Griffith v. Coleman, 5 J. J. Marsh. (Ky.) 600.

*New York*. — Clarkson v. De Peyster, 3 Paige (N. Y.) 336; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196.

*North Carolina*. — Harrington v. McLean, 5 Jones Eq. (N. Car.) 135; Kornegay v. Carroway, 2 Dev. Eq. (N. Car.) 403.

*South Carolina*. — Graydon v. Graydon, McMull Eq. (S. Car.) 63.

*West Virginia*. — Wyatt v. Simpson, 8 W. Va. 394.

*England*. — Bailey v. Dennett, 3 Jur. 844; Herring v. Yoe, 1 Atk. 290.

**Bill in Relation to Husband's Rights.** — Where the husband files a bill in relation to his own rights, if the wife has an interest in the subject-matter of the suit not adverse to him she may be

joined as a complainant. Clarkson v. De Peyster, 3 Paige (N. Y.) 336.

**Wife May Dismiss with Assent of Husband.** — In equity a married woman has the right to dismiss, with the assent of her husband, a suit brought to obtain her rights, and the heirs of the wife are bound by such dismissal. Fountleroy v. Crow, 5 B. Mon. (Ky.) 136.

**Decree Rendered in Favor of Husband and Wife.** — The decree for the wife's distributive share which was secured to her before coverture must be rendered in favor of the husband and wife, and not of the husband alone. Blackwell v. Vastbinder, 6 Ala. 218.

3. Burns v. Lynde, 6 Allen (Mass.) 305.

4. **In a Bill by a Husband to Cancel a Trust Deed** given by him alone upon his homestead, the wife is neither a necessary nor a proper party, she having no interest in the lands. Pounds v. Clarke, 70 Miss. 263.

**Proceedings to Enjoin Sale of Mortgaged Property.** — The wife is not a necessary party to a proceeding to enjoin the sale of property under a mortgage executed by her husband, with whom she joined for the purpose of releasing either her dower or homestead interest. Sloan v. Coolbaugh, 10 Iowa 31.

5. Gerald v. McKenzie, 27 Ala. 166; Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255; Stuart v. Kissam, 2 Barb. (N. Y.) 493; Johnson v. Vail, 14 N. J. Eq. 423; Barham v. Gregory, Phil. Eq. (N. Car.) 243; Dandridge v. Minge, 4 Rand (Va.) 397; Harrison v. Gibson, 23 Gratt. (Va.) 212; Blackwell v. Bragg, 78 Va. 529; Hughes v. Evans, 1 Sim. & S. 185; Hope v. Fox, 7 Jur. N. S. 186; Hanrott v. Cadwallader, 2 Russ. & M. 545; Wake v. Parker, 2 Keen. 59. See also cases cited *infra*, III. 1. j. (1) (b) *Equitable Separate Estate*.

into equity in a case in which the husband's interests are adverse to hers, she should sue by her next friend,<sup>1</sup> making the husband a party defendant.<sup>2</sup> And so if the suit is the husband's and the wife's interests are adverse to his, she should be made a defendant.<sup>3</sup>

(b) **Equitable Separate Estate.** — There are cases holding that the husband may properly join with his wife in a chancery suit concerning her equitable separate estate, if his interests are not in conflict with hers.<sup>4</sup> But the generally accepted doctrine is that such suits should be brought in the name of the wife by her next friend,<sup>5</sup> and the husband should be made a party

In *Davis v. Prout*, 7 Beav. 288, the Master of the Rolls said: "The difficulty in a suit constituted like the present is not so much in protecting the wife's interest against her husband, but because in such a record the suit is considered as that of the husband alone; and, if this bill were now dismissed on the merits, the wife might the next day file another bill for the very same object, and would not be bound by the former decree."

1. Story's Eq. Pl., § 61; 1 Daniell Ch. Pr. 109; *Hope v. Fox*, 7 Jur. N. S. 186; *Hughes v. Evans*, 1 Sim. & S. 185; *Heck v. Vollmer*, 29 Md. 507.

**No Order for Appointment of Next Friend Necessary.** — If a *feme covert* plaintiff is not an infant or lunatic, no order for leave to sue by next friend, or for the appointment of a next friend, is necessary. *Towner v. Towner*, 7 How. Pr. (N. Y. Supreme Ct.) 387.

**Change of Next Friend.** — On application of a married woman her next friend may be changed, the person substituted giving security for costs already accrued. *Fulton v. Roosevelt*, 1 Paige (N. Y.) 178.

**Verification of Bill by Next Friend.** — When a married woman sues by next friend the next friend is a proper party to make oath to the truth of the allegations. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

**Objection for Suing Personally.** — Where a married woman joining in a suit in equity with her trustee appears personally, instead of by next friend, the objection should be taken in the pleading, and not at the hearing for the first time by demurrer *ore tenus*. *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175; *Gilbert v. Lewis*, 1 De G. J. & Sm. 38.

2. *Wake v. Parker*, 2 Keen 59; *England v. Downs*, 1 Beav. 96; *Davis v. Prout*, 7 Beav. 288; *Bradley v. Emer-*

*son*, 7 Vt. 369. See also cases cited *infra*, III. 1. j. (1) (b) *Equitable Separate Estate*.

A suit in equity to set aside an invalid appointment by a married woman under a power vested in her alone should not be instituted by the husband and wife as co-plaintiffs, but by the wife, suing by next friend, and the husband should be made a defendant. *Hope v. Fox*, 7 Jur. N. S. 186.

3. *Hanrott v. Cadwallader*, 2 Russ. & M. 545; *Alston v. Jones*, 3 Barb. Ch. (N. Y.) 397; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 126.

4. *Smith v. Etches*, 10 Jur. N. S. 124; *Beardmore v. Gregory*, 11 Jur. N. S. 363; *Griffith v. Hood*, 2 Ves. 452; *Harper v. Whitehead*, 33 Ga. 138; *Bradley v. Emerson*, 7 Vt. 369; *Bein v. Heath*, 6 How. (U. S.) 228. See also *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; *Gerald v. McKenzie*, 27 Ala. 166.

5. *Bridges v. McKenna*, 14 Md. 258; *Johnson v. Vail*, 14 N. J. Eq. 423; *Kirkpatrick v. Buford*, 21 Ark. 268; *Robert v. West*, 15 Ga. 122; *Sherman v. Burnham*, 6 Barb. (N. Y.) 403; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Barham v. Gregory*, Phil. Eq. (N. Car.) 243; *Baker v. Baker*, Bailey Eq. (S. Car.) 165; *Key v. Snow*, 90 Tenn. 663; *Sigel v. Phelps*, 7 Sim. 239; *Griffith v. Hood*, 2 Ves. 452.

**Dismissal of Bill Against Wishes of Next Friend.** — Where a married woman files a bill in equity by her next friend in relation to her separate estate, she may dismiss the bill against the wishes of her next friend. *Brawner v. Bell*, 30 Ga. 334.

**Petition Amended by Inserting Next Friend.** — Where a *feme covert* filed a petition in a suit respecting her equitable separate estate without naming a next friend, the petition was directed to be amended by inserting the next

defendant.<sup>1</sup> The reason for this is that a suit by the husband and wife is considered the suit of the husband alone,<sup>2</sup> and a decree therein, adverse to the wife's claim, will not bar her from a subsequent suit for the same matter.<sup>3</sup>

(2) *As Affected by Statute.* — Under the statutes of many of the states a married woman is now allowed to sue alone in equity as well as at law.<sup>4</sup> On the other hand, some of the statutes are

friend. *Howard v. Prince*, 14 Beav. 28; *Wake v. Parker*, 2 Keen 59.

**Waiver of Objection.** — Where a married woman brought suit in her own name to quiet title to a parcel of land, it was held that as the defendant went to trial without objecting to the omission of a next friend, he could not afterwards complain of it. *Woog v. Barnhart*, 41 Ohio St. 177. See also *Bowers v. Smith*, 10 Paige (N. Y.) 193.

1. *Kirkpatrick v. Buford*, 21 Ark. 268; *Eddins v. Buck*, 23 Ark. 507; *Bridges v. McKenna*, 14 Md. 258; *Barrett v. Doughty*, 25 N. J. Eq. 379; *Johnson v. Vail*, 14 N. J. Eq. 423; *Tantum v. Coleman*, 26 N. J. Eq. 128; *Barham v. Gregory*, Phil. Eq. (N. Car.) 243; *Sherman v. Burnham*, 6 Barb. (N. Y.) 403; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Key v. Snow*, 90 Tenn. 663; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 126, wherein it was held that the rule of equity was that the husband must be made a defendant to all suits in respect of the wife's equitable separate estate, and not a complainant, although no question arose between him and the wife.

In *Wake v. Parker*, 2 Keen 59, Lord Langdale discussed the English authorities very fully, and, while admitting that it was not unusual in practice for the husband and wife to join in suits concerning the wife's equitable separate estate, held that the husband was not a proper party plaintiff, and sustained a demurrer to the bill on that account.

**Amendment Adding Next Friend and Making Husband Defendant.** — The practice, where the husband is improperly joined with his wife as a complainant in her suit in equity concerning her equitable separate estate, is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend and making the husband a defendant. *Johnson v. Vail*, 14 N. J. Eq. 423; *Barrett v. Doughty*, 25 N. J. Eq. 379; *Robert v. West*, 15 Ga. 122; *Garlick v. Strong*, 3 Paige (N. Y.) 440,

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*Stuart v. Kissam*, 2 Barb. (N. Y.) 493; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Wake v. Parker*, 2 Keen 73; *England v. Downs*, 1 Beav. 96. See also article AMENDMENTS, vol. 1, pp. 466, 467.

**Leave to Amend Discretionary.** — When a bill is filed in the name of husband and wife, respecting the wife's separate estate, and at the hearing the wife moves the court for leave to amend the bill by making her husband a defendant and inserting the name of some responsible person as next friend, the action of the chancellor upon the motion is discretionary, and his refusal to grant it not revisable on error. *Michan v. Wyatt*, 21 Ala. 813.

2. See cases cited *supra*, III. 1. j. (1) (a) *In General*.

3. In *Johnson v. Vail*, 14 N. J. Eq. 423, the court said: "If the husband and wife join in a suit as plaintiffs, or in an answer as co-defendants, it will be considered as the suit or the defense of the husband alone; and it will not prejudice a future claim by the wife in respect of her separate interest, nor will the wife be bound by any of the allegations therein in any future litigation."

In *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255, Chancellor Walworth said: "Where a bill is filed by the husband and wife in regard to her separate estate in which the husband has no common interest with her, the defendants, if they think proper to do so, may insist that the wife shall prosecute in her name by her next friend, so that the defendants may not be subjected to the expense of a further litigation in case they succeed in their defense to that suit." To the same effect see *Stuart v. Kissam*, 2 Barb. (N. Y.) 493; *Barham v. Gregory*, Phil. Eq. (N. Car.) 243.

4. The statutes of some of the states allow a married woman to sue in all cases as if a *feme sole*, while others allow her to sue alone only in certain cases, as where the suit concerns her separate property. See the general

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held to apply only to actions at law and not to suits in equity.<sup>1</sup> And where the wife is allowed to sue alone, if the husband has an interest in the suit it is, of course, proper that he should be made a party.<sup>2</sup>

**Federal Practice Not Affected by State Law.** — The state statutes do not affect the equity practice in the United States courts.<sup>3</sup>

discussion of suits relating to separate estates, *supra*, III. 1. *g. Concerning Wife's Statutory Separate Estate.*

**In Georgia** it is only necessary for a *feme covert* to sue in equity by *prochein ami* to secure costs, etc. When no such necessity exists she may in equity sue alone. *Harper v. Whitehead*, 33 Ga. 138.

**Illinois.** — Under *Starr & Curt. Annot.* Ill. Stat., c. 68, § 1, a married woman residing in another state may, in Illinois, maintain a suit in equity in her own name to set aside a fraudulent conveyance, though it would be advisable to join the husband as a co-complainant. *Johnson v. Huber*, 134 Ill. 511. See also *Wing v. Goodman*, 75 Ill. 159.

**Massachusetts.** — Under *Mass. Gen. Stat.*, c. 108, § 3, where a wife sues in equity concerning her separate property the husband need not be made a party to the bill. *Forbes v. Tuckerman*, 115 Mass. 115; *Conant v. Warren*, 6 Gray (Mass.) 562.

**New Jersey.** — Under *N. J. Rev.*, p. 638, § 11, a married woman may maintain a suit in equity for specific performance of a contract to convey land to her, without joining her husband. *Young v. Young*, 45 N. J. Eq. 28.

**1. Alabama.** — The *Ala. Code*, § 2892, which provides that a married woman "must sue or be sued alone, when the suit relates to her separate estate," applies only to actions at law, and has no reference to suits in equity. *Sawyers v. Baker*, 72 Ala. 49; *Skinner v. Chapman*, 78 Ala. 378.

*Under Rule of Chancery Practice.* — The 15th Rule of Chancery Practice, adopted in January, 1877, providing that "all bills and petitions filed by married women, in reference to their separate estate, if over twenty-one years of age, or relieved of the disabilities of coverture, shall be exhibited in their own names," (*Code*, p. 163), was intended to carry out the legislative policy indicated by the act approved March 4, 1876, since inoperative because omitted from the code of 1876; and while the rule applies equally to all separate

estates, whether statutory or equitable, it extends only to cases in which prior to its adoption it was necessary that a married woman should sue by her next friend, and does not apply to cases in which it was necessary or proper that she and her husband should join as co-complainants. *Sawyers v. Baker*, 72 Ala. 49.

**South Carolina.** — The sixteenth section of the *S. Car. Act of 1712*, authorizing a *feme covert* to prosecute in her own name by appointing an attorney, applies only to suits in courts of law. In equity she must sue by next friend. *Baker v. Baker*, *Bailey Eq. (S. Car.)* 165.

**2. Husband Party Plaintiff.** — Where lands belonging to a married woman are occupied by the husband and wife as a home, the husband has a sufficient interest to make him a proper co-plaintiff in a bill by the wife to restrain an illegal tax against the lands. *Henry v. Gregory*, 29 Mich. 68.

A husband who held a promissory note executed by another gave the same to his wife upon their separation, for her separate use and maintenance. The wife surrendered the note to the maker upon his agreement to give her a like note for the same amount. Afterwards the husband and wife became reconciled, and on a bill by the wife to compel a specific execution of the contract it was held that the husband was a proper party complainant with the wife, in order to bar himself from ever after asserting any claim to the new note. *McMullen v. Vanzant*, 73 Ill. 190.

**Husband a Defendant.** — Although in *Illinois* the wife may sue alone where the suit relates to her separate estate, still, where she seeks to enforce a vendor's lien on land conveyed by herself and husband, but which belonged to her, it is proper that the husband be made a defendant so that the decree may bind him and bar any future claim on his part for the purchase money. *Wing v. Goodman*, 75 Ill. 159.

**3.** See generally article UNITED STATES COURTS.

A statute in a state allowing a mar-

## 2. Effect of Nonjoinder or Misjoinder — a. NONJOINER OF WIFE.

— If the husband sues alone where the wife ought to be joined, the defect is fatal,<sup>1</sup> and the wife cannot be made a party by amendment.<sup>2</sup>

**b. NONJOINER OF HUSBAND — Plea in Abatement.** — Where a married woman sues alone in a case in which the husband should properly be joined with her, if the defect does not appear upon the face of the declaration or complaint, the objection is pleadable in abatement only,<sup>3</sup> and should not

ried woman to sue alone does not affect the equity practice in the United States courts, where she is required to sue by next friend. *Wills v. Pauly*, 51 Fed. Rep. 257.

**Suit for Infringement of Patent.** — Where a suit in equity in the United States Circuit Court for the Southern District of New York was brought by a married woman alone, for infringement of a patent of which she was the sole owner, objection was made that the husband should have been joined as a party plaintiff. It was held that, under §§ 629, 4919, and 4921 of U. S. Rev. Stat. and Equity Rule 90, in connection with the Married Woman's Law of New York, the husband need not be a party. *Lorillard v. Standard Oil Co.*, 18 Blatchf. (U. S.) 199.

**1. Nonsuit.** — If the error appears on the trial it is ground for nonsuit. *Brown v. Fifield*, 4 Mich. 322; *Rumsey v. George*, 1 M. & S. 176. But see *Wallis v. Harrison*, 5 M. & W. 142.

**Right of Action in Wife as Executrix.** — Where a husband sued alone to recover money due his wife as executrix, he was nonsuited for failing to join his wife. *Anonymous*, 1 Salk. 282.

**Demurrer, Arrest of Judgment, or Error.** — It seems that, if the defect appears upon the record, advantage may be taken of it by demurrer, motion in arrest of judgment, or writ of error. 1 Chit. Plead. 38; *Dicey on Parties* 186.

**Not Pledged in Abatement.** — The nonjoinder of the wife need not be pleaded in abatement. *Brown v. Fifield*, 4 Mich. 322. But see *Wallis v. Harrison*, 5 M. & W. 142.

**2. Courtney v. Sheehy**, 38 Mo. App. 290, wherein it was held that such an amendment would constitute a change of the cause of action, since there would be a complete change in party plaintiff, the wife being the real plaintiff after the amendment. See also article AMENDMENTS, vol. I, p. 545.

**3. Alabama.** — *James v. Stewart*, 9 Ala. 855.

*Illinois.* — *Young v. Ward*, 21 Ill. 223.

*Maryland.* — *Treusch v. Kamke*, 63 Md. 278.

*Massachusetts.* — *Hayden v. Attleborough*, 7 Gray (Mass.) 338.

*New Hampshire.* — *Jordan v. Cummings*, 43 N. H. 134; *Dutton v. Rice*, 53 N. H. 496.

*New Jersey.* — *Ball v. Consolidated Franklinite Co.*, 32 N. J. L. 102.

*North Carolina.* — *Newton v. Robinson*, Tayl. (N. Car.) 72; *Beville v. Cox*, 109 N. Car. 265.

*Pennsylvania.* — *Perry v. Boileau*, 10 S. & R. (Pa.) 208; *Sheidle v. Weishlee*, 16 Pa. St. 134; *Rangler v. Hummel*, 37 Pa. St. 130. *Compare Steer v. Steer*, 14 S. & R. (Pa.) 379.

*South Carolina.* — *Surtell v. Brailsford*, 2 Bay (S. Car.) 333.

*Vermont.* — *Lymn v. Albee*, 7 Vt. 508.

*England.* — *Milner v. Milnes*, 3 T. R. 627; *Dalton v. Midland Counties R. Co.*, 13 C. B. 474, 76 E. C. L. 474; *Guyard v. Sutton*, 3 C. B. 153, 54 E. C. L. 153; *Bendix v. Wakeman*, 12 M. & W. 97; *Morgan v. Cubitt*, 3 Exch. 612; *Gravenor v. Stephens*, 10 Mod. 166.

See also article ABATEMENT IN PLEADING, vol. I, p. 9.

**Sufficiency of Plea.** — Where a married woman sued in her own name upon a promissory note payable to herself, the defendant put in a plea alleging that the note was given for certain accounts transferred to the plaintiff directly by her husband, intending to show that the note was not her statutory separate estate, and that consequently she could not sue alone. The plea was held defective for not alleging that the transfer was made during coverture; for if made before coverture, the note was her statutory separate estate, and she could sue therefor in her own name. *Wofford v. Baker*, 80 Ala. 303.

be pleaded in bar.<sup>1</sup>

**Amendment.** — And it seems that the husband may be made a party by amendment.<sup>2</sup>

**Nonsuit.** — But where there is no legal right of action in the wife, she may be nonsuited.<sup>3</sup>

Where in a suit by a married woman the defendant puts in a plea in abatement for nonjoinder of the husband, the plea need not deny all the possible conditions under which the suit might be maintained by the wife; but it is upon her to show in reply that she is entitled to sue alone. *Dutton v. Rice*, 53 N. H. 496.

**Trial of Issue.** — If the wife improperly sues alone in a case where the husband should be joined, and the defect of parties is not apparent on the face of the petition, it must be taken advantage of by answer. It is then a question for the jury and cannot be determined by the court upon motion. If there is error in the verdict, the defendant's remedy is by appeal. *Enders v. Beck*, 18 Iowa 86.

1. In *Hayden v. Attleborough*, 7 Gray (Mass.) 338, the court said: "The objection that the plaintiff was a *feme covert* when this action was commenced, was not open to the defendants under their answer to her declaration. Coverture, as a disability to sue, must be pleaded in abatement. It is no defense in bar; and if it were, the answer should have set it forth as a fact intended to be relied on in avoidance of the action."

In *Morgan v. Cubitt*, 3 Exch. 612, which was an action against a sheriff for the escape of a debtor taken in execution under a *ca. sa.* the defendant pleaded in bar, that at the time of the accruing of the debt on which the judgment was recovered, and until the time of arrest and escape, "the plaintiff was and is married to H., who is still living." The plea was held bad as being properly pleadable in abatement only.

2. In *Georgia*. — Under the Code, § 3479, where the wife improperly sues alone the husband may be joined by amendment. *Eve v. Cross*, 76 Ga. 693.

In *Tennessee*, where a writ of replevin was improperly sued out by the wife alone, it was held that the writ might be amended by joining the husband with the wife as plaintiff upon the execution of a new bond. *Sherron v. Hall*, 4 Lea (Tenn.) 498.

**Amendment After Verdict.** — If a deed

of land, subject to a mortgage which the grantee assumes and agrees to pay, is executed by a husband and wife as grantors, the promise implied by law from the acceptance of the deed is to both, and an action for breach of the promise should be brought in the name of both, although the wife alone signed the mortgage note, and the husband joined "to give validity" thereto. But if, in an action by the wife alone, the merits of the case have been fully tried, she will be allowed to amend, after verdict in her favor, by joining her husband, taking no costs since the trial. *Fenton v. Lord*, 128 Mass. 466. See also article AMENDMENTS, vol. I, pp. 581, 582.

**Amendments Making Entirely New Plaintiff.** — In an action brought originally by a married woman suing alone, the complaint having been amended by adding the name of the husband as a co-plaintiff, under *Alabama* Code, § 2403, a second amendment, at a subsequent term, striking out the name of the wife, and making the husband, as trustee of his wife, the sole plaintiff, cannot be allowed. *Pickens v. Oliver*, 32 Ala. 626. See also article AMENDMENTS, vol. I, pp. 545, 546.

**Nonjoinder in Writ of Error.** — When it is admitted in the appellate court that a writ of error is prosecuted by a *feme covert* alone, and her counsel object to joining her husband with her in the writ, it must be dismissed. *McPhail v. Mosely*, 14 Ala. 740.

3. *James v. Stewart*, 9 Ala. 855; *Caudell v. Shaw*, 4 T. R. 361.

In *Steer v. Steer*, 14 S. & R. (Pa.) 379, it was held that coverture might be pleaded in abatement, or in bar, according to circumstances; and that where there was no legal right of action in the wife, the coverture was properly pleaded in bar.

**Substitution of Husband by Amendment.** — When the wife improperly sues in her own name for the recovery of her separate property, the complaint cannot be amended by striking out her name and inserting that of her husband. *Friend v. Oliver*, 27 Ala. 532.



**Demurrer.** — If it appears upon the face of the declaration or complaint that the plaintiff is a married woman, suing alone where the husband ought to be joined, the defendant may demur.<sup>1</sup>

**Waiver of Objection.** — If the defendant fails to take advantage of the nonjoinder of the husband by demurrer, or plea in abatement, he thereby waives the objection and cannot afterwards set it up.<sup>2</sup>

**c. MISJOINDER OF WIFE.** — If a suit is brought by husband and wife jointly where the husband should sue alone, it is the general doctrine that the misjoinder is fatal to the suit. If the defect appears upon the face of the declaration or complaint,

See also article AMENDMENTS, vol. I, p. 545.

1. *Jordan v. Gray*, 19 Ala. 618; *Treusch v. Kamke*, 63 Md. 278; *Barnett v. Leonard*, 66 Ind. 422.

In *Jordan v. Cummings*, 43 N. H. 134; it is held that where the declaration shows that the plaintiff has a husband living, and that the cause of action is one in which the husband and wife should ordinarily join, a demurrer will lie, unless the declaration also sets out facts which entitle the wife to sue alone.

**Special Demurrer Required.** — If a married woman improperly brings an action in her own name where the husband should be joined, a demurrer for defect of parties will lie to the complaint; but such defect is not presented by a demurrer for insufficiency. *Barnett v. Leonard*, 66 Ind. 422.

**Demurrer to Whole Declaration Too Broad.** — Where, in an action by a married woman, the defendant demurred to the whole declaration on account of the nonjoinder of the husband, it was held that, as the declaration showed some cause of action for which the wife might sue alone, the demurrer was too broad and must be overruled. *Hester v. Hester*, 88 Tenn. 270.

2. *Jordan v. Cummings*, 43 N. H. 134; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273; *Dillaye v. Parks*, 31 Barb. (N. Y.) 132; *Simmons v. Thomas*, 43 Miss. 31; *Tapley v. Tapley*, 10 Minn. 448; *Lyman v. Albee*, 7 Vt. 509; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

**Under General Issue.** — Where a married woman sues alone in a case where the law allows the husband and wife to sue jointly, her incapacity to sue should be pleaded in abatement, and evidence of such incapacity cannot be introduced under the general issue.

*Rangler v. Hummel*, 37 Pa. St. 130; *Beville v. Cox*, 109 N. Car. 268.

**On Motion to Exclude Evidence.** — When a married woman brings an action for loss of her own property, and it does not appear upon the face of the declaration that she is a married woman, the question of her right to maintain the action can only be raised by plea, and not by motion to exclude the evidence. *Quarrier v. Baltimore, etc., R. Co.*, 20 W. Va. 424.

**On Motion for Nonsuit.** — Where a *feme covert* sued in her own name for an amount due for services during coverture, it was held that her coverture must be pleaded in abatement, and that advantage could not be taken of it on a motion for nonsuit. *Newton v. Robinson*, Tayl. (N. Car.) 72.

**In Arrest of Judgment.** — If an action is brought by the wife alone where the husband should be joined, advantage must be taken of it by plea in abatement; the objection is not available in arrest of judgment. *Perry v. Boileau*, 10 S. & R. (Pa.) 208.

**Objection After Husband's Death.** — An objection for failure to join the husband in a suit by the wife comes too late after the husband's death. *Alexander v. Steele*, 84 Ala. 332.

**On Writ of Error.** — If a married woman sues alone in a case where the husband should be joined, and the defendant fails to take advantage of the defect by plea in abatement, the objection is not available on a writ of error. *Simmons v. Thomas*, 43 Miss. 31; *Perry v. Boileau*, 10 S. & R. (Pa.) 208; *Lyman v. Albee*, 7 Vt. 509; *Gravenor v. Stephens*, 10 Mod. 166.

**Objection First Made on Appeal.** — In *Snow v. Cable*, 19 Hun (N. Y.) 280, it was held that an objection to an action by a married woman that the husband should have been a party, cannot be first taken on appeal.

demurrer will lie thereto,<sup>1</sup> or the judgment may be arrested on motion,<sup>2</sup> or reversed on a writ of error;<sup>3</sup> and if the error is not apparent upon the face of the pleadings, advantage may be taken of it at the trial.<sup>4</sup>

**Amendment to Cure Defect.**—But in some states such misjoinder may now be remedied by striking out the name of the wife.<sup>5</sup>

**d. MISJOINDER OF HUSBAND.**—In some states it is held that the joinder of the husband, where the wife should sue alone, is fatal to a recovery in the action.<sup>6</sup> But in others, such joinder is

1. *Dunderdale v. Grymes*, 16 How. Pr. (N. Y. Supreme Ct.) 195; *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9; *Bartges v. O'Neil*, 13 Ohio St. 72; *Rawlins v. Rounds*, 27 Vt. 17; *Jones v. Tuttle*, 54 Vt. 488. See also *Tissot v. Throckmorton*, 6 Cal. 471.

In *Louisiana*, where suit was brought by the wife and by the husband for her use to recover for personal injuries to the wife, when, under art. 107, La. Code of Pr., it should have been instituted by the husband alone, it was held that an exception of no right of action was well founded. *Fournet v. Morgan, etc., R., etc., Co.*, 43 La. Ann. 1202. But see *Cooper v. Cappel*, 29 La. Ann. 213.

2. *Hemming v. Elliott*, 66 Md. 197; *Bartges v. O'Neil*, 13 Ohio St. 72; *Rawlins v. Rounds*, 27 Vt. 17.

3. *Bidgood v. Way*, 2 W. Bl. 1236; *Rawlins v. Rounds*, 27 Vt. 17; *McIlwain v. Vaughan*, 76 Ala. 489.

In *Bartges v. O'Neil*, 13 Ohio St. 72, the court said: "At common law, if the wife improperly join in the action with her husband, who ought to sue alone, the defendant might for that cause demur to the declaration, or the same might be taken advantage of after verdict, as a good cause for arrest of judgment; or if judgment in such a case should be entered, if the objection appeared upon the record, the same would constitute good cause for a reversal of the judgment, on a writ of error."

But compare *San Antonio St. R. Co. v. Helm*, 64 Tex. 147, wherein it was held that the overruling of the exception for misjoinder in an action by husband and wife, in which the wife was improperly joined, was not ground for reversal, unless the defendant had probably been injured thereby. See also *Tissot v. Throckmorton*, 6 Cal. 471.

4. *Bell v. Allen*, 53 Ala. 125; *Walker v. Fenner*, 28 Ala. 367; *Knights Tem-*

*plar, etc., L. Indemnity Co. v. Gravett*, 49 Ill. App. 252; *Gerry v. Gerry*, 11 Gray (Mass.) 381; *Fairchild v. Chausseux*, 8 Watts (Pa.) 412; *Owen v. Tankersley*, 12 Tex. 405. But see *Mott v. Smith*, 16 Cal. 533.

5. See generally article AMENDMENTS, vol. 1, p. 544.

In *Indiana*, under Rev. Stat., p. 48, § 99, where a husband and wife bring an action jointly, which should be brought by the husband alone, the proceedings may be amended by striking out the name of the wife. *Langdon v. Bullock*, 8 Ind. 341.

In *Missouri* an improper joinder of the wife with the husband affords no ground for reversal of the judgment, since the judgment may be corrected in the appellate court by striking out the wife's name and leaving the judgment to stand in the name of the husband alone. *Mueller v. Kaessmann*, 84 Mo. 318; *Evans v. Kunze*, 128 Mo. 670; *Mesker v. Cutler*, 51 Mo. App. 341.

In *Maine*, however, where an action which could be prosecuted only in the name of the husband was wrongfully begun in the name of the husband and wife, it was held that an amendment of the writ by striking out the name of the wife could not be allowed. *Roach v. Randall*, 45 Me. 439.

6. **Nonsuit.**—If the husband and wife join where the wife should sue alone the plaintiffs may be nonsuited. *Bell v. Allen*, 53 Ala. 125; *Chicago v. Speer*, 66 Ill. 154; *Whidden v. Coleman*, 47 N. H. 297; *Cooper v. Alger*, 51 N. H. 172.

**Reversal of Judgment.**—In *Chicago, etc., R. Co. v. Button*, 68 Ill. 409, it was held that the joinder of husband and wife in an action to recover for personal injuries to the wife was error for which a judgment in their favor must be reversed.

**Amendment Not Allowed.**—Where the

considered merely an irregularity which may be remedied at any time by striking out the name of the husband.<sup>1</sup>

**Demurrer.** — If the misjoinder appears upon the face of the declaration or complaint, the objection may be taken by demurrer.<sup>2</sup>

**3. Effect of Desertion or Separation.** — At common law the mere fact, that the husband and wife are living separate and apart is not of itself a sufficient ground for allowing the wife to sue alone.<sup>3</sup> But where the husband has deserted his wife and abjured the realm,<sup>4</sup> it is well settled that the wife may sue as a *feme*

husband was improperly joined as a plaintiff in an action by the wife for injury to her separate property, it was held that the writ could not be amended by striking out the name of the husband, or by allowing him to become nonsuit. *Whidden v. Coleman*, 47 N. H. 297. See also *Alexander v. Goodwin*, 54 N. H. 423.

1. *Colvill v. Langdon*, 22 Minn. 565; *Ackley v. Tarbox*, 31 N. Y. 564; *Palmer v. Davis*, 28 N. Y. 242; *Portland v. Taylor*, 125 Ind. 522. See also *Richmond R., etc., Co. v. Bowles*, 92 Va. 738.

**Dismissal as to Husband.** — If the husband is joined as a plaintiff with his wife, having no joint cause of action with her, the complaint as to him will be dismissed; but the wife may, if she have a cause of action, recover. *Palmer v. Davis*, 28 N. Y. 242; *Simar v. Canaday*, 53 N. Y. 298. And see *Enos v. Leach*, 18 Hun (N. Y.) 139.

**Objection by Supplemental Answer.** — Where, pending an action in the joint names of husband and wife to recover the wife's separate estate, the plaintiffs are divorced, and the wife marries again, the objection that there is a misjoinder of parties plaintiff must be taken by supplemental answer, or it is waived. *Calderwood v. Pyser*, 31 Cal. 333.

2. *Mann v. Marsh*, 35 Barb. (N. Y.) 68; *Hunt v. Johnson*, 19 N. Y. 279; *Palmer v. Davis*, 28 N. Y. 242; *Hackett v. Bonnell*, 16 Wis. 471.

**Waiver by Not Objecting.** — If it appears upon the face of the complaint that the husband is improperly joined, and the defendant fails to demur, he thereby waives the objection. *Hackett v. Bonnell*, 16 Wis. 471; *Hunt v. Johnson*, 19 N. Y. 279. See also *Palmer v. Davis*, 28 N. Y. 242.

**Notice of Objection.** — *New Jersey Rev.*, p. 853, § 37, provides that "the nonjoinder or misjoinder of a plaintiff

shall not be objected to by the defendant, unless he give written notice of such objection to the plaintiff, within five days after filing his plea or demurrer, and state in such notice the name of the person alleged to have been omitted or improperly joined." Where the defendant demurred for joinder of the husband in an action which the wife should have brought alone, without giving such notice, the demurrer was overruled. *Lehman v. Hauk*, 42 N. J. L. 206.

3. *Bogget v. Frier*, 11 East 301; *Tucker v. Scott*, 3 N. J. L. 510; *Ballard v. Russell*, 33 Me. 196; *Reddin v. Smith*, 65 Tex. 26. See also *Smith v. Smith*, 45 Pa. St. 403; *DeWahl v. Braune*, 1 H. & N. 178; *Lake v. Ruffle*, 6 N. & M. 684, 36 E. C. L. 445.

**4. Leaving State Equivalent to Abjuring Realm.** — Where the husband ceased to provide for his wife and family, renounced his marital relation, and went to live permanently in another state, it was held to be equivalent to abjuring the realm by the husband, at common law, so as to enable the wife to sue as a *feme sole*. *Osborn v. Nelson*, 59 Barb. (N. Y.) 375; *Chapman v. Lemon*, 11 How. Pr. (N. Y. Supreme Ct.) 235; *Gregory v. Pierce*, 4 Met. (Mass.) 478. See also *James v. Stewart*, 9 Ala. 855.

**Wife Deserted by Husband in Another State.** — Where a married woman who has been deserted by her husband in a foreign country, or in another state, comes into a state and takes up her residence there, she may sue as a *feme sole*. *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. (Mass.) 89; *Wagg v. Gibbons*, 5 Ohio St. 580.

In Kentucky, under Gen. Stat., c. 52, art. 2, § 10, a married woman residing in that state, whose husband is a non-resident, may sue as *feme sole*. This statute includes not only such married women as have come into the state since its passage, but also those al-

*sole*.<sup>1</sup> And in many of the states it is not now necessary that the husband shall have left the state, but the mere fact that the wife is living separate and apart from the husband, by reason of his desertion of her, is sufficient to entitle her to sue as a *feme sole*.<sup>2</sup>

ready residing there. *Maysville, etc., R. Co. v. Herrick*, 13 Bush (Ky.) 122. See also *Hannon v. Madden*, 10 Bush (Ky.) 664.

1. *Alabama*. — *Arthur v. Broadnax*, 3 Ala. 557; *Mead v. Hughes*, 15 Ala. 141.

*Maryland*. — *Wolf v. Bauereis*, 72 Md. 481.

*Massachusetts*. — *Abbot v. Bayley*, 6 Pick. (Mass.) 89; *Gregory v. Paul*, 15 Mass. 31.

*Missouri*. — *Rose v. Bates*, 12 Mo. 30; *Phelps v. Walther*, 78 Mo. 320. See also *Schooler v. Schooler*, 18 Mo. App. 69.

*New York*. — *Chapman v. Lemon*, 11 How. Pr. (N. Y. Supreme Ct.) 235; *Osborn v. Nelson*, 59 Barb. (N. Y.) 375; *Griffith v. Utica, etc., R. Co.*, (Supreme Ct.) 17 N. Y. Supp. 692.

*Ohio*. — *Wagg v. Gibbons*, 5 Ohio St. 580.

*Pennsylvania*. — *Dangler v. Hummel*, 37 Pa. St. 130. And see *Valentine v. Ford*, 2 Browne (Pa.) 193.

*South Carolina*. — *Bean v. Morgan*, 4 McCord; L. (S. Car.) 148.

*Texas*. — *St. Louis Southwestern R. Co. v. Griffith*, (Tex. Civ. App. 1896) 35 S. W. Rep. 741; *Texas, etc., R. Co. v. Fuller*, (Tex. Civ. App. 1896) 36 S. W. Rep. 319.

*Vermont*. — *Robinson v. Reynolds*, 1 Aik. (Vt.) 174.

*England*. — *Carrol v. Blencow*, 4 Esp. N. P. 27. See also *Postgate v. Barnes*, 9 Jur. N. S. 456.

In *Wolf v. Bauereis*, 72 Md. 481, the court said: "At this day, if the husband deserts the wife, and leaves the state, without intention of return, and thus in a *de facto* way rids himself of his marital duties, the wife, from the necessity and humanity of the case, must have the power of supporting and protecting herself, and therefore must have the right to contract, and enforce her contracts, and, above all, to invoke the remedies given by the law for the redress of personal wrongs; and this without any reference to what may be claimed to be, or set up as, the rights of the delinquent husband."

In *Gregory v. Pierce*, 4 Met. (Mass.) 478, *Shaw, C. J.*, said: "The princi-

ple is now to be considered as established in this state, as a necessary exception to the rule of the common law placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm."

**Joinder of Husband Not Ground for Reversal.** — Where a wife has been deserted by her husband, she may sue in her own name for personal injury to herself; but it is not reversible error to allow the suit to be prosecuted in the names of husband and wife, if the defendant was not prejudiced thereby. *Texas, etc., R. Co. v. Fuller*, (Tex. Civ. App. 1896) 36 S. W. Rep. 319.

2. *California*. — Under the Cal. Code Civ. Pro., § 370, a married woman may sue alone for personal injury to herself where she is "living separate and apart from her husband, by reason of his desertion of her." *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390.

In *Illinois*, if a husband compels his wife to live separate from him, permanently, without her fault, and fails to make a suitable provision for her support, she may acquire property, control it and her person, contract, sue and be sued, as a *feme sole*, during the continuance of such condition. *Love v. Moynihan*, 16 Ill. 277; *Burger v. Belsley*, 45 Ill. 72; *Mix v. King*, 55 Ill. 434.

In *Kentucky*, Rev. Stat., c. 47, art. 2, § 4, provides that when the husband abandons the wife and lives separate and apart from her, or abandons her and leaves the state without making sufficient provision for her maintenance, the wife may sue and be sued as a single woman. This statute is intended as a substitute for the common-law doctrine, and is not merely cumulative. *Hannon v. Madden*, 10 Bush (Ky.) 664.

**Use of Husband's Name.** — When a married woman is living separate and apart from her husband, she may use his name in a suit brought to protect her interest.<sup>1</sup> If the husband objects to the use of his name, as unauthorized and against his wishes, the proceedings may be stayed until he is indemnified against the costs;<sup>2</sup>

**In North Carolina,** under the Code, § 178, the wife is allowed to sue alone only when the action concerns her separate property, or when the action is between herself and her husband. But where the husband refused to join with his wife, they living separate and apart, and it appeared that he was hostile to her rights and the remedy by which she sought to assert the same, it was held that the action could not be dismissed upon the ground that the husband did not join in it with his wife. *Barnes v. Barnes*, 104 N. Car. 613.

**In Ohio** a wife who, by gross abuse of her husband, has been driven beyond the pale of his protection, so that a separation *de facto* exists, she living and maintaining herself as a single woman, and who has had specific property decreed to her as alimony, may maintain an action at law in regard to such property, without the joinder of her husband, although no divorce has been decreed. *Bena-dum v. Pratt*, 1 Ohio St. 403.

**In Texas,** where the husband abandons the wife and lives separate from her, she may sue alone to recover separate property. *Norton v. Davis*, 83 Tex. 32; *San Antonio, etc., R. Co. v. Gillum*, (Tex. Civ. App. 1895) 30 S. W. Rep. 697. And in such case she may also sue to recover community property. *Leeds v. Reed*, (Tex. Civ. App. 1896) 36 S. W. Rep. 347; *Houston, etc., R. Co. v. Lackey*, (Tex. Civ. App. 1896) 33 S. W. Rep. 768.

**What Amounts to Desertion.** — In a case where the wife had deserted her husband, but before the expiration of the statutory period sufficient to make the desertion a cause of divorce offered to return and resume the performance of her marital duties, and he informed her that he would not receive her, it was held that such refusal amounted to desertion on his part, and that she might sue alone to recover damages for personal injuries. *Andrews v. Runyon*, 65 Cal. 629.

**Divorce a Mensa.** — A wife divorced *a mensa et thoro* may sue and be sued as a *feme sole* for property acquired or

debts contracted by her subsequently to the divorce. *Dean v. Richmond*, 5 Pick. (Mass.) 461.

1. *Procter v. Brotherton*, 9 Exch. 486; *Morgan v. Thomas*, 2 Crompt. & M. 388. And see *Chambers v. Donaldson*, 9 East 471.

**In Alabama,** under section 2136 of the Code, which authorizes "the wife and mother," who has been deserted by her husband, to prosecute or defend, in his name, any action which he might have prosecuted or defended, it must appear that the wife is also a mother, and the husband a father; and if the husband is a nonresident at the commencement of the suit, security for the costs must be given before the issue of the summons, as in other cases where the plaintiff is a nonresident. *Ex p. Cole*, 28 Ala. 50.

**In Kentucky,** under Civ. Code, § 51, where a husband who is a father abandons his family, the wife, being a mother, may prosecute in his name any action which he might prosecute; and this right of the wife does not depend upon the husband's consent, but is a legal right secured to her in such cases free from, and beyond, the control of the husband. *Stith v. Patterson*, 3 Bush (Ky.) 132.

**Husband's Consent Presumed.** — The wife may use the name of the husband, especially when he is absent from the state, in any suit or controversy for the recovery of her separate estate to which the law requires him to be a party; and in such case the husband's consent will be presumed until his dissent is clearly shown. *Merrit v. Doss*, 31 Miss. 275.

2. *Burger v. Belsley*, 45 Ill. 72; *Morgan v. Thomas*, 2 Crompt. & M. 388; *Harrison v. Almond*, 4 D. P. C. 321.

*In Procter v. Brotherton*, 9 Exch. 486, an action having been brought by a married woman as executrix, in which her husband was made a co-plaintiff, the court refused to order the proceedings to be stayed altogether, but ordered that they should be stayed until security should be given to the husband by the attorney against the

but, after giving such indemnity, the wife may proceed in the husband's name,<sup>1</sup> and the suit will not be dismissed at his instance.<sup>2</sup>

**4. Effect of Marriage Pending Suit.** — At Common Law, where a woman marries pending an action commenced by her while single, the husband should be made a party.<sup>3</sup>

**Under Statute.** — In a case where, by statute, a married woman is allowed to sue alone, if a *feme sole* plaintiff marries pending suit,

costs of the action, the affidavit showing that the husband and wife were living separate and that the action was brought without his sanction and against his will.

1. Where husband and wife lived separate, and an action was brought by the wife for a debt due to herself in the name of husband and wife, without the husband's authority, the court, on application, ordered proceedings to be stayed, unless an indemnity was given to the husband. After giving such indemnity the wife was allowed to proceed in the husband's name. *Morgan v. Thomas*, 2 Crompt. & M. 388.

2. *Procter v. Brotherton*, 9 Exch. 486; *Stith v. Patterson*, 3 Bush (Ky.) 132; *Burger v. Belsley*, 45 Ill. 72. But see *Anderson v. Anderson*, 11 Bush (Ky.) 327.

**Attempted Dismissal Ineffectual.** — Where a husband has abandoned his wife, abjured the state, and is living in concealment, the suit instituted by the wife, wherein he is joined for conformity, will not be discontinued by his dismissing and withdrawing from it. *Schooler v. Schooler*, 18 Mo. App. 69.

**Defendant Cannot Raise Objection.** — If a wife living separate and apart from her husband makes him a co-plaintiff with her in a suit, and the husband does not object either at the trial or on appeal to the use of his name, the defendant cannot raise the objection for him. *Overspeck v. Thiemann*, 92 Mo. 475.

So a *feme covert* living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the ecclesiastical court, having brought trespass in the name of her husband against wrongdoers for breaking and entering her house and taking her goods, the court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be

indemnified against the risk of costs) that the action was brought without his authority. *Chambers v. Donaldson*, 9 East 471.

**3. Action by Feme Sole Executrix.** — Where a *feme sole* executrix obtains a judgment from which there is an appeal, and pending the appeal she marries, an execution on the judgment after affirmance cannot issue without a *scire facias* making the husband a party. *Townshend v. Townshend*, 10 Gill & J. (Md.) 373.

**In Massachusetts** it was held that, if a *feme sole* administratrix married pending an action commenced by her, the suit abated. *Swan v. Wilkinson*, 14 Mass. 295. But where the *feme sole* was one of several administrators, and married pending an action brought by them, the suit was held not to abate, but, under Mass. Stat. 1783, c. 24, was continued in the names of the other administrators. *Newell v. Marcy*, 17 Mass. 341.

**Husband Made Party on Motion.** — When a *feme sole* plaintiff marries pending a suit, the husband may make himself a party by motion; and where a suggestion is made that such a plaintiff is married, and a *scire facias* issues calling upon the husband to show cause why he shall not be made a party, it is equivalent to a motion. *James v. Tait*, 8 Port. (Ala.) 476.

**Error to Refuse Application.** — Where an action for slander, begun by a woman before her marriage, is pending after the marriage, it is error for the court to refuse an application by the husband to be made a plaintiff. *Gibson v. Gibson*, 43 Wis. 23.

**Coverture Pleadable in Abatement.** — At common law, if a woman marries after suing out the writ and before the declaration, the defendant cannot give her coverture in evidence under the general issue, but must plead it in abatement, if he wishes to take advantage of it. *Morgan v. Painter*, 6 T. R. 265; *Comyns's Dig.* 80.

the husband need not be made a party.<sup>1</sup> The proceedings may be amended by substituting the plaintiff's married name.<sup>2</sup>

**5. Effect of Death** — *a. DEATH OF HUSBAND.* — It was formerly held at common law, that a suit brought jointly by a husband and wife abated upon the death of the husband.<sup>3</sup> But in modern practice, if the wife is joined with the husband, and, pending suit, the husband dies, the action survives to the wife and is properly prosecuted in her name alone.<sup>4</sup> However, if the husband sues

**Failure to Plead in Abatement.** — Where a *feme sole* plaintiff marries pending a suit, and no proceeding is had under the statute with regard to marriages, and the defendant failing to plead the coverture in abatement suffers a default in the action, he cannot afterwards avoid the judgment by writ of error. *Bates v. Stevens*, 4 Vt. 545.

**1. Separate Estate.** — Where a *feme sole* instituted an action for breach of promise of marriage, and pending the action married, it was held that the husband need not be made a party plaintiff, as the right of action was the wife's separate property, under the *North Carolina* Constitution, art. 10, § 6, in which case the wife may sue alone. *Shuler v. Millsaps*, 71 N. Car. 297.

**Marriage in Another State.** — In *Indiana*, in an action by a *feme sole* for money alleged to have been received for her, an answer alleging that since the commencement of the suit the plaintiff had removed to the state of Illinois and had married, but not stating that the marriage took place in Illinois, was held to be bad, as there was no reason to presume that the marriage had not taken place in Indiana, in which case her right to sue alone was not impaired. *Putnam v. Tennyson*, 50 Ind. 456.

**2. In Iowa,** under the Code, §§ 1758, 1759, where a woman marries after beginning an action in her maiden name, the proceedings may, on leave of the court, be amended by substituting her married name. *Glick v. Hartman*, 10 Iowa 410.

**Change of Name Not Brought to Notice of Court.** — Where, pending an action commenced by a *feme sole*, the plaintiff marries, judgment may be rendered in her favor by her original name, unless the change of name be brought in some way to the notice of the court. *Wilson v. McKenna*, 52 Ill. 43.

**3.** 1 Comyns's Dig. 72.

**4.** *Weagle v. Hensley*, 5 J. J. Marsh. (Ky.) 378; *Little v. Downing*, 37 N. H. 355; *Jacques v. Short*, 20 Barb. (N. Y.) 269; *King v. Little*, 77 N. Car. 138; *Gibson v. Todd*, 1 Rawle (Pa.) 452; *Vaughan v. Wilson*, 4 Hen. & M. (Va.) 452; *Oglander v. Baston*, 1 Vern. 396; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Pary v. Juxon*, 3 Ch. Rep. 40.

The common-law doctrine that the suit abated on the death of the husband was changed in England by 8 & 9 Wm. III., c. 11.

**Not in Name of Husband's Administrator.** — An action on a judgment obtained by husband and wife should, after the death of the husband, be brought in the name of the wife, as surviving plaintiff, and not in the name of the administrator of the husband. *Gibson v. Todd*, 1 Rawle (Pa.) 452; *Vaughan v. Wilson*, 4 Hen. & M. (Va.) 452. To the same effect see *Oglander v. Baston*, 1 Vern. 396.

**Wife Entitled to Execution Without Scire Facias.** — When a judgment, on the death of the husband, survives to the wife, she is entitled, without *scire facias*, to have execution issued on the judgment in the names of herself and husband. *Weagle v. Hensley*, 5 J. J. Marsh (Ky.) 378.

**Scire Facias by Wife's Executors.** — A bond was given to husband and wife jointly for their maintenance during their joint and several lives. After a judgment had been obtained on such bond by husband and wife, the husband died, and afterwards the wife died. It was held that the executors of the wife were the proper parties to revive the judgment on *scire facias*. *Schoonmaker v. Elmendorf*, 10 Johns. (N. Y.) 49.

**A Judgment for Costs,** in a suit prosecuted by husband and wife *causa uxoris*, survives to the wife whenever the cause of action or judgment in chief would survive to her. *Weagle v. Hensley*, 5 J. J. Marsh. (Ky.) 378.

alone where he might properly join the wife, the action survives to his personal representative, and not to his wife.<sup>1</sup>

**b. DEATH OF WIFE.** — At Common Law an action brought by husband and wife in right of the wife abates by her death.<sup>2</sup> But if judgment is obtained before the wife's death the husband may issue execution or maintain an action of debt thereon.<sup>3</sup>

By Statute in many of the states it is now provided that such action shall not abate, but may be prosecuted by the personal representative of the wife,<sup>4</sup> or in some instances by the husband.<sup>5</sup>

**6. Declaration or Complaint** — *a. IN SUITS BY HUSBAND AND WIFE JOINTLY* — (1) *In General* — Showing Joint Right. — In an action brought by husband and wife jointly, the declaration or complaint should allege sufficient facts to show a joint right of action in the plaintiffs.<sup>6</sup>

1. *Fischer v. Hess*, 9 B. Mon. (Ky.) 614. See also *Griswold v. Penniman*, 2 Conn. 564.

2. *Ryder v. Robinson*, 2 Me. 127; *Pettingill v. Butterfield*, 45 N. H. 195; *Stroop v. Swarts*, 12 S. & R. (Pa.) 76; *Earl v. Tupper*, 45 Vt. 275; *Archer v. Colly*, 4 Hen. & M. (Va.) 410; *Meese v. Fond du Lac*, 48 Wis. 323; *Cecchi v. Powell*, 6 B. & C. 253, 13 E. C. L. 163. But see *Baker v. Red*, 4 Dana (Ky.) 158.

In *Buck v. Goodrich*, 33 Conn. 37, it is held that where a suit is brought by husband and wife for an injury solely to her interest in land, and during the pendency of the suit and before judgment the wife dies, the husband cannot proceed alone with the suit.

3. 1 Chit. Plead. (16th Am. ed.) 36; *Pettingill v. Butterfield*, 45 N. H. 195.

**Award of Execution upon Scire Facias.** — A judgment was recovered by a *feme sole*, who afterwards married and joined her husband with her, sued out a *scire facias*, and had an award of execution; but before execution executed the wife died. It was held that the award upon the *scire facias* survived to the husband. *Woodyer v. Gresham*, 1 Salk. 116.

4. *Norcross v. Stuart*, 50 Me. 87; *West v. Jordan*, 62 Me. 484; *Pattee v. Harrington*, 11 Pick. (Mass.) 221; *Saltmarsh v. Candia*, 51 N. H. 71; *Earl v. Tupper*, 45 Vt. 275. See also *Allen v. Wilkins*, 3 Allen (Mass.) 321.

**Husband as Administrator.** — Where, pending a suit brought by husband and wife, the wife dies, the husband may come in and prosecute the suit as her administrator. *Norcross v. Stuart*, 50 Me. 87; *West v. Jordan*, 62 Me. 484;

*Pattee v. Harrington*, 11 Pick. (Mass.) 221.

5. **Trespass to Try Title.** — In *South Carolina* an action of trespass by husband and wife to try title to land belonging to the wife is not abated by the death of the wife. *Syme v. Sanders*, 2 Strobb. L. (S. Car.) 332.

**Obstruction of Way Appurtenant to Wife's Land.** — Where husband and wife join in an action on the case for obstructing a right of way appurtenant to the wife's inheritance, and the wife dies pending the action, the suit does not abate, but the husband may go on and obtain judgment. *Jefcoat v. Knotts*, 11 Rich. L. (S. Car.) 649.

**Injury to Wife's Land.** — Where an action to recover for injury to the wife's land is commenced by the husband and wife in the wife's right, and she afterwards dies, the action may still be prosecuted by the husband. *Wood v. Griffin*, 46 N. H. 230.

6. **In Ejectment** for land to which the wife had title at the time of marriage, the husband must join the wife as plaintiff, alleging title to be in them both in right of the wife. *Westcott v. Miller*, 42 Wis. 454.

**Sufficient Showing of Joint Title.** — Where a husband and wife, in an action of ejectment, alleged that the plaintiffs were well seized and possessed of the demanded premises; and on the trial the evidence offered in support of their title proved that the wife was seized in her own right, and the husband only in her right; it was held that it was not necessary for the plaintiffs to state in what manner they were interested; and as the evidence



**Allegation of Marriage.**—Where husband and wife join in an action, the declaration or complaint should allege the fact of their marriage in order to show their joint interest in the suit.<sup>1</sup>

showed that both "were well seized and possessed," it supported the declaration. *Kelsey v. Hanmer*, 18 Conn. 311.

**Defect Cured by Statute of Jeofails.**—In an action of waste by husband and wife against the alienee of the husband's interest in his wife's land, the declaration alleged that the reversion in fee was in the wife. It was held that this was in effect an averment that the reversion in fee was in the husband and wife; and that if the omission to aver that they were so jointly seized was a defect, it was cured after the verdict by the statute of jeofails. *Dejarnatte v. Allen*, 5 Gratt. (Va.) 499.

**Time When Cause of Action Arose.**—In *Rawlins v. Rounds*, 27 Vt. 18, the husband and wife joined in an action of trespass, alleging in their declaration that the property belonged to the wife, but not stating whether the trespass was committed before or after her marriage. It was held that the declaration was insufficient for not showing when the cause of action arose, for the court could not presume that the trespass was committed before coverture, and, if committed during coverture, the cause of action was the husband's and the wife was not a proper party.

**Presumption After Verdict.**—In trespass by husband and wife, the declaration contained two counts, one for an assault and battery of the wife, the other *de bonis asportatis*, "the property of the plaintiffs." It was held that after verdict for the plaintiffs, the court would presume that the taking was before coverture, and therefore the cause of action joint. *Williams v. Hudson*, 7 J. J. Marsh. (Ky.) 268.

**Variance Between Allegation and Proof.**—In a suit by husband and wife, the petition alleged that the damages sued for were the separate property, while the proof showed that they were community property. The variance was held to be fatal. *Middlebrook v. Zapp*, 73 Tex. 29.

**1. Wife as Administratrix.**—In an action by husband and wife, on a promissory note payable to the wife as administratrix, the plaintiffs must be described in the complaint as husband

and wife at the time the note was given, or the complaint must show that they sue as administrator and administratrix and that the note is assets in their hands; if the complaint shows that they sue as individuals, and does not describe them as husband and wife, and does not allege to whom the note is payable, a note payable to the wife as administratrix will not authorize a recovery by them. *Milton v. Haden*, 32 Ala. 30.

**Action for Slander of Wife.**—Where a joint action was brought by a man and woman for the slander of the woman, and the complaint contained no allegation that they were husband and wife, the complaint was held to be demurrable, as not showing a joint right of action in the plaintiffs. *Paddock v. Speidel*, (Supreme Ct.) 16 N. Y. Supp. 750.

**Action for Personal Injuries to Wife.**—In an action by husband and wife to recover for personal injury to the wife, under *Texas* Rev. Stat., art. 1204, which allows the husband to sue alone in such cases, an allegation in the petition that the woman was his wife at the time of bringing the action is sufficient; and no allegation that she was his wife at the time the injuries were received is necessary. *San Antonio, etc., R. Co. v. Corley*, (Tex. Civ. App. 1894) 26 S. W. Rep. 903.

In *Atchison, etc., R. Co. v. Dickey*, 1 Kan. App. 770, an action by the husband and wife to recover for loss of services, etc., arising out of the personal injury to the wife, it was held that the petition should not only allege the marital relation, but also such other facts as indicate that at the time of the injury the relations of the plaintiff and his wife were such as to entitle him to her services.

**Insufficient Allegation of Marriage.**—Where a writ in assumpsit on a note given to a married woman, called defendant to answer to the suit of W., and E. W., "husband of" said W., it was held that this description of E. W. was mere *descriptio personæ*, and merely referred to the time of pleading; that consequently it was not an allegation that the plaintiffs were husband and wife at the time the note was given, nor

But, independently of statutes allowing the wife to sue alone and making the husband an improper party, an allegation that the plaintiffs are married is a sufficient showing of the husband's interest in the suit.<sup>1</sup>

**Showing Wife's Interest.** — Where the wife is joined in an action with the husband, the declaration or complaint should state distinctly and affirmatively her interest in the subject matter of the suit.<sup>2</sup> If the wife's interest is not disclosed, nor any reason

at the time the statute was passed, whereby the common-law disability of a married woman had been removed. *Wright v. Burroughs*, 61 Vt. 390.

**Bill of Exceptions Not Proof of Marriage.** — In an action by husband and wife, if the declaration does not disclose that the plaintiffs are man and wife, although the bill of exceptions is so entitled, such caption cannot be regarded as proof of the fact so recited. *Strickland v. Burns*, 14 Ala. 511.

**When Proof Necessary in Chancery.** — A bill of foreclosure of a mortgage executed to an unmarried woman, filed by her and her husband, subsequently married, alleging the marriage, to which there is an answer not admitting the marriage, and a replication to such answer filed, cannot be sustained at the hearing without proof of the marriage. The marriage being a fact not charged to be within the personal knowledge of the defendant, must be proved, to sustain the allegations of the bill and show the rights of the complainants. *Jacobs v. Vandervoort*, Clarke Ch. (N. Y.) 165.

**1. Action Concerning Separate Property.** — A husband may unite with his wife in an action concerning her separate property; and where the complaint shows the existence of the marital relation, it is not necessary to make a further statement of the husband's interest in the subject matter of the action. *Roller v. Blair*, 96 Ind. 203.

**Averment that Husband Has No Interest.** — Under *Virginia Acts of 1876-77*, p. 333, providing that in actions by a married woman concerning her separate estate the husband must be joined with her, an averment in the declaration that the husband has no interest in the action and is made a party plaintiff merely for conformity, does not vitiate the declaration. *Tate v. Perkins*, 85 Va. 169.

**Action for Fraud on Wife.** — In an action by husband and wife, for fraud upon the wife in relation to her separ-

ate property, it is not necessary to allege in the complaint that the husband was also deceived. *Roller v. Blair*, 96 Ind. 203, where the court said: "A cause of action is shown when it is made to appear that the wife was deceived and defrauded, and the wrongdoer cannot escape the consequences of his fraud by asserting that he did not also deceive and overreach the husband."

**2. Alabama.** — *Quarles v. Waldron*, 20 Ala. 217.

**Arkansas.** — *Lewis v. Moore*, 25 Ark. 63.

**Connecticut.** — *Edwards v. Sheridan*, 24 Conn. 165.

**Kentucky.** — *Ducket v. Crider*, 11 B. Mon. (Ky.) 188.

**Maryland.** — *Ridgeley v. Crandall*, 4 Md. 435; *Barr v. White*, 22 Md. 259.

**Missouri.** — *Haile v. Palmer*, 5 Mo. 403.

**New Hampshire.** — *Pickering v. De Rochemont*, 45 N. H. 67; *Alexander v. Goodwin*, 54 N. H. 423.

**New York.** — *Staley v. Barhite*, 2 Cai. (N. Y.) 221; *Thorne v. Dillingham*, 1 Den. (N. Y.) 254.

**South Carolina.** — *Creiger v. Smith*, 2 McMull. L. (S. Car.) 279.

**Vermont.** — *Rawlins v. Rounds*, 27 Vt. 18; *Baird v. Fletcher*, 50 Vt. 603; *Williams v. Brainerd*, 52 Vt. 392; *Jones v. Tuttle*, 54 Vt. 488.

**Wisconsin.** — *Botkin v. Earl*, 6 Wis. 393; *Foote v. Carpenter*, 7 Wis. 395.

**England.** — *Bidgood v. Way*, 2 W. Bl. 1236; *Johnson v. Lucas*, 1 El. & Bl. 659, 72 E. C. L. 659; *Serres v. Dodd*, 2 B. & P. N. R. 405.

**Contra in Indiana.** — In *Langdon v. Bullock*, 8 Ind. 341, it was held that in an action by a husband and wife the complaint need not show that the wife was the meritorious cause of action.

**Wife Not Named in Declaration.** — In *Atkinson v. Rittenhouse*, 5 Pa. St. 103, it is held that the wife is not a party to the action unless named in the declaration.

shown why she should be joined, advantage may be taken of the defect by demurrer,<sup>1</sup> motion in arrest of judgment,<sup>2</sup> or writ of error;<sup>3</sup> but it is not available under a plea of the general issue.<sup>4</sup>

**Conclusion.** — In actions *ex delicto* by husband and wife the declaration should conclude to the damage of both plaintiffs.<sup>5</sup>

(2) *Joinder of Causes of Action* — (a) *In General.* — In a declaration or complaint by husband and wife, it is improper to join with the cause of action in right of husband and wife jointly a cause of action for which the husband should sue alone.<sup>6</sup>

**Injury to Wife's Person or Reputation.** — Thus, in an action by husband and wife for an injury to the person or reputation of the wife, it is improper to unite with their joint claim for the direct injury to the wife a claim by the husband for consequential damages.<sup>7</sup>

ration, although she be named in the title of the action.

**Sufficient Statement of Wife's Interest.** — A declaration by husband and wife stated that by an agreement between them and the defendant — reciting that L. had been arrested at their suit, and that the defendant had become bail to the sheriff, that the bail had been forfeited, and that L. had given a *cognovit* for the debt and costs — it was agreed between the plaintiffs and defendant, and the defendant promised, in consideration that the plaintiffs would not enter up judgment or suit out of the execution against L. until a certain day, that he would render L. at that day, or, in default, would pay the debt and costs. It was held that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of the *cognovit* by L. to all the plaintiffs was an admission by the defendant of such joint interest. *Nurse v. Wills*, 4 B. & Ad. 739, 24 E. C. L. 148.

1. *Williams v. Brainerd*, 52 Vt. 392; *Quarles v. Waldron*, 20 Ala. 217; *Seres v. Dodd*, 2 B. P. N. R. 405.

**After Default Opened on Terms.** — In assumpsit by husband and wife jointly, for the use of the wife, when the declaration does not aver that the promise was made to the wife *dum sola*, nor that she was in any way the meritorious cause of action, it is demurrable; but if judgment is rendered by default against the defendant, and afterwards set aside on condition that he shall plead to the merits, the condition is not complied with by filing a demurrer, and assigning as cause of demurrer the want of such necessary

averments in the declaration. *Quarles v. Waldron*, 20 Ala. 217.

2. *Edwards v. Sheridan*, 24 Conn. 165; *Alexander v. Goodwin*, 54 N. H. 423; *Thorne v. Dillingham*, 1 Den. (N. Y.) 254.

Thus where an action of assumpsit is brought in the name of husband and wife jointly, and the declaration alleges the promise to have been made jointly, without stating what interest the wife had, or showing any reason why she should have been joined, it is such a defect as cannot be cured by verdict, and is fatal upon a motion in arrest of judgment. *Creiger v. Smith*, 2 McMull. L. (S. Car.) 279.

3. *Staley v. Barhite*, 2 Cal. (N. Y.) 221.

4. *Baird v. Fletcher*, 50 Vt. 603.

5. *Collis v. Bowen*, 8 Blackf. (Ind.) 262; *Throgmorton v. Davis*, 3 Blackf. (Ind.) 383; *Smalley v. Anderson*, 2 T. B. Mon. (Ky.) 56.

6. *Pickens v. Oliver*, 29 Ala. 528; *Lee v. Chambers*, 1 Strobb. L. (S. Car.) 112.

**For Services of Husband and Wife.** — A joint action cannot be sustained in the name of husband and wife for both her services and his; the husband should sue alone for his own services. *Avogadro v. Bull*, 4 E. D. Smith (N. Y.) 384.

**For Battery of Husband and Wife.** — Husband and wife cannot join for a battery of both. The battery of the husband is a distinct cause of action for which he must sue alone. *Chapman v. Hardy*, 2 Brev. (S. Car.) 170.

7. **Injury to Wife's Person.** — *Tell v. Gibson*, 66 Cal. 247; *McKune v. Santa Clara Valley Mill, etc., Co.*, 110 Cal. 480; *Northern Cent. R. Co. v. Mills*, 61 Md. 355; *Barnes v. Hurd*, 11 Mass. 59;

But by statute in some states it is now permissible to join such claims.<sup>1</sup>

(b) **Objection for Misjoinder, How Taken.** — Where, in a declaration or complaint by husband and wife, a cause of action for which the husband should sue alone is joined, the objection may be taken by demurrer,<sup>2</sup> and, if the defendant fails to demur, it seems that he cannot afterwards object.<sup>3</sup>

*Dailey v. Houston*, 58 Mo. 361; *Harrison v. Newkirk*, 20 N. J. L. 176; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Wheeling v. Trowbridge*, 5 W. Va. 353; *Shanahan v. Madison*, 57 Wis. 276; *Mosier v. Beale*, 43 Fed. Rep. 358. See also *Burnham v. Webster*, 54 N. Y. Super. Ct. 30.

**Injury to Wife's Reputation.** — *Eber-soll v. Krug*, 3 Binn. (Pa.) 555; *Hart v. Crow*, 7 Blackf. (Ind.) 351; *Dengate v. Gardiner*, 4 M. & W. 5.

**Special Damages.** — In a suit by the husband alone for special damages resulting to him from an injury to the person or character of the wife, he must allege and prove such special damages. *Johnson v. Dicken*, 25 Mo. 580; *Wertz v. Singer Mfg. Co.*, 35 Hun (N. Y.) 116; *Harper v. Pinkston*, 112 N. Car. 293.

1. **In Iowa**, under Rev. Stat., § 2771, in actions by husband and wife to recover damages for personal injury to the wife, the husband may join a claim and recover for loss of services, etc., along with damages for the injury. *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124.

**In Maine**, under Rev. Stat., c. 25, § 89, in an action by husband and wife to recover for personal injury to the wife, they may also recover for loss of services and for expenses resulting from such injury. *Sanford v. Augusta*, 32 Me. 536.

**In Pennsylvania**, under P. L. 126, in an action brought in the name of husband and wife, for the use of the wife, to recover for personal injury sustained by her, recovery may also be had for loss of services and for expenses, providing that, at the time of bringing such action, the husband shall file a stipulation in writing, disclaiming all right on his part to recover damages for such injury by an action in his own name. Where the husband filed his disclaimer at the time of the trial, it was held to be too late, and the right to combine the causes of action did not arise. *Du Bois v. Baker*, 120 Pa. St. 266.

2. *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Wheeling v. Trowbridge*, 5 W. Va. 353; *Mosier v. Beale*, 43 Fed. Rep. 358.

**Abandonment of Misjoined Claim.** — The overruling of a demurrer in such case will warrant a reversal, notwithstanding the plaintiffs abandon at the trial all claim for such damages as the husband should have sued for alone, if evidence of such damages was given to the jury. *Tell v. Gibson*, 66 Cal. 247.

3. **Waiver by Not Demurring.** — A cause of action in the husband and wife for personal injury to the wife, and a cause of action in the husband for consequential damages arising out of the injury, cannot properly be joined; but if they are joined, and the defendant fails to demur for misjoinder, he is conclusively deemed to have waived the objection, and cannot object to the evidence of the husband's necessary disbursements for physicians and nurses attending his wife, in proof of the allegations of the complaint. *McKune v. Santa Clara Valley Mill, etc., Co.*, 110 Cal. 480.

In *Dailey v. Houston*, 58 Mo. 361, it is held that where a petition contains a cause of action for personal injury to the wife and one for consequential damages to the husband, the defect must be taken advantage of by demurrer or answer, or it is waived.

**Objection Not Available on Motion in Arrest.** — If in an action by husband and wife for injury to the wife before marriage, the declaration is defective, in that it contains, besides the count for direct injury to the wife, a count for consequential damages to the husband, such defect is cured by verdict, and is not available on motion in arrest of judgment. *Harrison v. Newkirk*, 20 N. J. L. 176; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Hamm v. Romine*, 98 Ind. 77. But see *Barnes v. Hurd*, 11 Mass. 59; *Northern Cent. R. Co. v. Mills*, 61 Md. 355; *Chapman v. Hardy*, 2 Brev. (S. Car.) 170.

**b. IN SUITS BY WIFE ALONE.** — When a married woman sues alone, her declaration or complaint need not allege her coverture,<sup>1</sup> nor the facts which entitle her to sue alone.<sup>2</sup> But if she alleges herself to be a married woman, she must state such other facts as are necessary to entitle her as such to maintain the action.<sup>3</sup>

**Consequential Damages Considered as Descriptive.** — Where the declaration by husband and wife for a personal injury to the wife, after stating the nature and extent of the injury complained of, proceeded to allege that by means of such injury she became sick, and was prevented from attending to her necessary affairs, and that the plaintiffs were thereby forced to, and did, necessarily expend two hundred dollars in endeavoring to effect a cure, it was held that, although the plaintiffs could not recover in the same action for the wife's personal injury and also for the expenses of her cure, yet, in this case, the ground of damages was the wife's personal injury alone, and the statement regarding the expenses of her cure was to be considered as descriptive of the extent of her injury, and not as a distinct and substantive ground of damages, and in that aspect, though unnecessary, still it was very proper; but if otherwise, yet as the gist of the action was the breach of contract in not carrying the wife safely, and this was a ground on which the plaintiffs could recover, it would be presumed, after verdict, that the court confined the evidence to that ground. *Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

**Objection Not Available on Appeal.** — Where husband and wife joined in an action to recover for services rendered by both, it was held that an objection to such misjoinder of causes must be taken at the trial, and was not available on appeal. *Avogadro v. Bull*, 4 E. D. Smith (N. Y.) 384.

1. *Shumway v. Leakey*, 67 Cal. 458; *Jordan v. Cummings*, 43 N. H. 134; *Stimpson v. Pfister*, 18 Wis. 275. See also *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

In *Peters v. Fowler*, 41 Barb. (N. Y.) 467, the court said: "The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman, in respect to her separate property; and the allegation of coverture in the complaint is no longer necessary."

**A Bill in Chancery** filed by a woman need not show whether she is married or single. *Paige v. Broadfoot*, 100 Ala. 610.

**Allegation of Coverture Immaterial.** — In an action by a married woman to recover her separate property, an allegation as to whether she is married or not, or whether she is the wife of a particular man, is immaterial, and a failure to find thereon is no ground for a reversal. *Evans v. De Lay*, 81 Cal. 103.

2. *Stimpson v. Pfister*, 18 Wis. 275.

In an action by a married woman it is not necessary that she allege in the writ or declaration her right to sue as such. It is sufficient if the facts disclosed at the trial establish her right to recover. *Hubert v. Fera*, 99 Mass. 198; *Shumway v. Leakey*, 67 Cal. 458.

**Need Not Show that Property Is Separate Estate.** — In an action by a married woman to recover her separate property, it was held that, under the *Washington* statute, the evidence of ownership need not be pleaded so as to show that she held the property as her separate estate. *Freeburger v. Caldwell*, 5 Wash. 769; *Freeburger v. Gazzam*, 5 Wash. 772.

3. *Shumway v. Leakey*, 67 Cal. 458; *Cowand v. Pulley*, 9 La. Ann. 12; *Neale v. Hermanns*, 65 Md. 474.

**Suit Relating to Separate Estate.** — A married woman cannot sue alone to recover personal property wrongfully taken from her possession, unless the property thus taken is shown to be her separate property. In such a suit the pleading should show that it was her separate property. *Thomas v. Desmond*, 63 Cal. 426.

An averment in a complaint that a married woman and another were seized of an estate in land in fee simple at the time they contracted to sell is a sufficient averment that it was her separate estate. *Ramash v. Scheuer*, 81 Wis. 269.

An allegation in a complaint by a married woman, on a promissory note payable to another, that it was "duly

**Action for Personal Injury.**—If a married woman suing for damages for an injury to her person wishes to recover special damages, she must allege them in her complaint.<sup>1</sup>

assigned, transferred, sold, and delivered" to her, and still is her property "in her sole right and possession," is equivalent to alleging that the note is her separate property, and is sufficient. *Kennedy v. Williams*, 11 Minn. 314.

**Deraignment of Title.**—In an action to recover a married woman's separate estate the complaint need not state the person from whom, or the manner in which, her separate estate was derived. *Gluck v. Cox*, 90 Ala. 331; *Schurman v. Marley*, 29 Ind. 458; *Levy v. Darden*, 38 Miss. 57. See also *Johnson v. Vail*, 14 N. J. Eq. 423.

**Motion to Make More Certain.**—A complaint in an action by a married woman, which states that a carrier undertook to carry her and her baggage from California to New York, and that the baggage was her separate property and was stolen on the passage, was held good in substance. If further particulars as to the time and manner of her acquisition of the baggage as separate property, or to show it to be such, were material, the remedy was by motion to make more definite and certain under the code. N. Y. Code, § 160. The defect, if any, could not be reached by demurrer. *Spies v. Accessory Transit Co.*, 5 Duer (N. Y.) 662. See also article DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.

**Action by Married Woman Carrying on Business.**—Under *Connecticut* Gen. Stat. 1875, tit. 19, c. 5, § 11, providing that "when a married woman shall carry on any business and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried," it was held that a declaration in trespass for goods taken, which described the plaintiff as a "married woman carrying on business," but did not allege that the goods were used by her in her business, or that the cause of action resulted from her business, was insufficient; and such defect was not cured by verdict. *Smith v. New England Bank*, 45 Conn. 416.

**Sufficient Showing of Right to Sue Alone.**—In an action by a married woman, suing alone, a count which averred that the money sought to be recovered was due to her, by account, on the 1st of January, 1857, and secured

to her as a separate estate, under the code of laws of the state of Alabama, showed with sufficient certainty that her separate estate was held under the *Alabama* Code of 1852, and that the money sued for belonged to the corpus of that estate; and a count which averred that the money was "secured to her, as her sole and separate estate, by the Act of 1848," before her marriage with her said husband, also showed a right of action in her alone. *Spear v. Lumpkin*, 39 Ala. 600.

**Sufficiency of Averment in Bill in Equity.**

—A married woman, by her next friend, filed a bill alleging that she was to hold certain slaves, which she claimed under a deed of gift, agreeably to a statute of Mississippi for the protection of the property of married women. The terms of the Mississippi statute were not more particularly recited, but it was alleged that the slaves were given by the deed, to be held by the complainant to her separate use, benefit, etc., during life, and afterwards to the heirs of her body. It was held that the bill was not demurrable for not setting out the provisions of the statute, especially as the interest set up by complainant was alleged to be an estate to her separate use. *Calhoun v. Cozens*, 3 Ala. 498.

1. Thus where a married woman sues to recover damages for personal injury, if she wishes to recover special damages for loss to her separate business she must allege in her complaint that she is carrying on such special business, or evidence to that effect will not be allowed. *Uransky v. Dry Dock, etc., R. Co.*, 118 N. Y. 304; *Woolsey v. Ellenville*, (Supreme Ct.) 15 N. Y. Supp. 647.

**Impairment of Capacity to Labor.**—In an action by a married woman for personal injury, an averment in the declaration that she was incapacitated to work without crutches embraces, by necessary implication, the impairment of her capacity to labor. *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647.

**Consequential Damages to Husband.**—Where a married woman sues for personal injury, she cannot recover for expenses incurred by the husband in consequence of such injury; for such

c. IN SUITS BY HUSBAND ALONE. — In an action by the husband upon a cause of action which accrued to him by reason of his marriage, his declaration should show that the right of action is in him.<sup>1</sup>

7. **Plea — Denying Marriage.** — In an action by husband and wife, if the defendant wishes to set up the fact that the plaintiffs are not married, and consequently are improperly joined, he should plead it in abatement.<sup>2</sup>

**Nonjoinder and Misjoinder.** — The modes of taking advantage of misjoinder and nonjoinder have already been discussed.<sup>3</sup>

8. **Judgment.** — In a joint action by husband and wife judgment should be rendered in favor of both plaintiffs.<sup>4</sup>

consequential damages the husband must sue alone. *Burnham v. Webster*, 54 N. Y. Super. Ct. 30.

1. **Rent Arising from Wife's Land.** — When the husband distrains and avows for rent arising from the land of his wife, without joining her in the proceedings, he must show affirmatively that the rent accrued after marriage, for this cannot be intended; if that fact be not shown, the objection may be taken at the trial. *Decker v. Livingston*, 15 Johns. (N. Y.) 479.

**Must State Exact Title.** — In an action on a covenant by the husband of the tenant in fee, he must declare on a seizin in fee in himself and his wife, in right of his wife. If he states that he is seized in his demesne as of freehold in right of his wife, it will be bad on special demurrer. *Polyblank v. Hawkins*, Doug. 329.

**Ownership of Note in Suit.** — A complaint declaring in the name of the husband alone on a promissory note payable to a person averred to be his wife, and alleging that the note was given for rent of lands belonging to her statutory separate estate, is not demurrable because it does not allege that the husband was the owner of the note. *Hollifield v. Wilkinson*, 54 Ala. 275.

2. *Coombs v. Williams*, 15 Mass. 243; *Benner v. Fowles*, 31 Me. 305; *Winslow v. Gilbreth*, 49 Me. 578; *Dickenson v. Davis*, 1 Stra. 480.

**Not Available Under General Issue.** — In an action brought by husband and wife, the defendant will not be allowed to introduce under the general issue evidence to show that the plaintiffs are not married. *Coombs v. Williams*, 15 Mass. 243; *Winslow v. Gilbreth*, 49 Me. 578.

In *Dickenson v. Davis*, 1 Stra. 480,

when the defendant attempted to disprove the marriage under the general issue, Pratt, C. J., said: "I can never allow it; you might have pleaded this in abatement, and then they would have had an opportunity to meet you upon that question; whereas, if I was to let you into it now, the honestest couple in the world may be branded for adulterers."

**Plaintiffs' Never Joined in "Lawful Marriage."** — A plea that the plaintiffs have "never been joined in lawful matrimony" is not good either in bar or in abatement; for the lawfulness of the marriage is not material, a marriage *de facto* being sufficient. *Benner v. Fowles*, 31 Me. 305; *Alleyne v. Grey*, 2 Salk. 437. See also *Norwood v. Stevenson*, Andr. 227.

3. See *supra*, III. 2. *Effect of Nonjoinder or Misjoinder.*

**As to Pleading the Coverture of the Wife in Abatement,** see article ABATEMENT IN PLEADING, vol. I, p. 9.

4. *Bartow v. Draper*, 5 Duer (N. Y.) 130; *Neale v. Depot R. Co.*, 94 Cal. 425; *Reinheimer v. Carter*, 31 Ohio St. 579.

**For Wife Alone — Waiver of Objection.** — In an action by husband and wife, special verdict was rendered for the wife without mentioning the husband, and judgment was rendered thereon; it was held that, under *Indiana Rev. Stat.*, § 568, the judgment was properly rendered for the wife, and the defendant, having failed to request at the proper time that the verdict be made to speak as to the husband, could not afterwards object. *Nicodemus v. Simons*, 121 Ind. 564.

**For Husband for Use of Wife.** — Under *Wagn. Missouri Stat.* 1039, § 6, and 1037, § 20, where a judgment is rendered for the husband for the use of the wife instead of for the husband

#### IV. SUITS AGAINST HUSBAND AND WIFE — 1. Parties to Suits —

*a. IN GENERAL*—Husband Usually a Necessary Defendant. — At common law a married woman cannot, as a general rule, be sued alone.<sup>1</sup> If her liability arises before the marriage the husband and wife should be joined as defendants;<sup>2</sup> and for a liability accruing during the coverture the husband should generally be sued alone.<sup>3</sup> However, in some cases the wife may have a suffi-

alone, the appellate court will not reverse the cause, but will amend the judgment by striking out the name of the wife. *Cruchon v. Brown*, 57 Mo. 38.

**Decree in Chancery.** — A decree for a distributive share secured to the wife before coverture should be rendered in favor of the husband and wife, and not of the husband alone. *Blackwell v. Vastbinder*, 6 Ala. 218.

**1. Husband Residing Abroad.** — At common law the wife cannot be sued alone, although the husband is residing abroad, unless he is accounted as civilly dead. *Williamson v. Dawes*, 9 Bing. 292, 23 E. C. L. 280; *Stretton v. Busnach*, 1 Bing. N. Cas. 139, 27 E. C. L. 335; *Kay v. De Pienne*, 3 Campb. 123.

**Wife Living Separate from Husband.** — A married woman cannot be sued alone, although living separate and apart from her husband, and having a separate maintenance secured to her by deed. *Marshall v. Rutton*, 8 T. R. 545; *Ellah v. Leigh*, 5 T. R. 679; *McDermott v. French*, 15 N. J. Eq. 78; *Brown v. Killingsworth*, 4 McCord L. (S. Car.) 429; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174.

**Divorce a Mensa.** — The fact that the wife is living separate from the husband under a divorce *a mensa et thoro* does not make her liable to suit without joinder of the husband. *Faithorne v. Blaquiere*, 6 M. & S. 73; *Lewis v. Lee*, 3 B. & C. 291, 10 E. C. L. 84.

In *Massachusetts*, however, the contrary doctrine is maintained. *Pierce v. Burnham*, 4 Met. (Mass.) 303, citing *Dean v. Richmond*, 5 Pick. (Mass.) 461.

**Married Woman a Sole Trader.** — No suit can be brought by or against a *feme covert* sole trader, unless her husband be joined. *Starr v. Taylor*, 4 McCord L. (S. Car.) 413. See also *Beard v. Webb*, 2 B. & P. 93.

**Partition of Lands Held by Husband and Wife.** — The husband is a necessary party to a bill filed by the grantee of the husband against the wife for the partition of lands alleged to have been

held by the husband and wife as tenants in common. The wife can only defend the suit jointly with her husband, except under special circumstances. *McDermott v. French*, 15 N. J. Eq. 78.

**2.** As to the wife's ante-nuptial contracts, see *infra*, IV. 1. b. (1) *Ante-nuptial Contracts of Wife*. As to the wife's ante-nuptial torts, see *infra*, IV. 1. c. (1) *Ante-nuptial Torts of Wife*.

**3.** As to the wife's post-nuptial contracts, see *infra*, IV. 1. b. (2) *Post-nuptial Contracts of Wife*. As to the wife's post-nuptial torts, see *infra*, IV. 1. c. (2) *Post-nuptial Torts of Wife*.

**Insufficient Interest to Make Wife Proper Party.** — In a bill against a husband and wife for the specific performance of an agreement, made by the husband, for the sale of an estate to the plaintiff, it was alleged as the grounds for making the wife a co-defendant, that she claimed an interest in the purchase money, and had taken forcible possession of the title deeds, and refused to part with them until her claim was satisfied. The court held that she was improperly made a defendant, and allowed a demurrer by her for want of equity. *Muston v. Bradshaw*, 15 Sim. 192.

**Wife's Rights Not Affected by Judgment.** — Where the husband was sued for cutting and carrying away timber, it was held that as no judgment was sought or could have been rendered against the wife, and as her rights were in no wise affected by the judgment, she had no right to become a party to the action on the ground that she claimed the land. *Leach v. Millard*, 9 Tex. 551.

**Wife's Inchoate Right of Dower.** — Where the transferee of a promissory note, given for the purchase money of land, filed a bill in equity to enforce a vendor's lien, it was held that the wife of the vendor, who did not sign the deed, and whose inchoate right of dower was expressly recognized by the averments of the bill, and against



cient interest to make her a necessary party, notwithstanding the liability accrues during coverture.<sup>1</sup>

**When Wife May Be Sued Alone.** — Where the husband is accounted in law as *civilitur mortuus* the wife may be sued as if single.<sup>2</sup> And under the statutes of most of the United States she may now be sued alone in many instances.<sup>3</sup>

In Louisiana, where suit is brought against a married woman the husband must generally be made a co-defendant.<sup>4</sup> To enable the wife to appear and defend the suit, she must be duly authorized by her husband or by the court, else no valid judgment can be rendered against her.<sup>5</sup>

whom no relief was sought, was not a proper party defendant. *Sims v. National Commercial Bank*, 73 Ala. 248.

The wife's inchoate right of dower in the husband's lands is not such an interest as makes her a necessary party defendant to a bill to set aside the husband's title. *Kusch v. Kusch*, 143 Ill. 353.

1. Where a creditor brings a bill to set aside the husband's assignment of his wife's distributive share of her father's estate, the wife must be a party. *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338.

**In a Suit to Foreclose a Mortgage** executed by husband and wife jointly, the wife is a proper party defendant. *Swan v. Wiswall*, 15 Pick. (Mass.) 126; *Kimbrell v. Rogers*, 90 Ala. 339; *Conde v. Shepard*, 4 How. Pr. (N. Y. Supreme Ct.) 75. See article FORECLOSURE OF MORTGAGES, vol. 9, p. 316 *et seq.*

2. **Where the Husband Has Abjured the Realm** the wife is considered as a *feme sole*, and may sue and be sued alone. *Brown v. Killingsworth*, 4 McCord L. (S. Car.) 429; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174; *Cole v. Seeley*, 25 Vt. 220.

In the United States a desertion of the wife by the husband is generally considered as equivalent to abjuring the realm at common law. See *supra*, III. 3. *Effect of Desertion or Separation.*

3. See the following sections.

**In Massachusetts** an action under Gen. Stat., c. 137, to recover possession of leased premises, may be maintained against a married woman who hired the premises on her own credit for the occupation of herself and family, although her husband, who lives out of the state, occasionally visits and contributes to the support of the household. *Fiske v. McIntosh*, 101 Mass. 66.

In California the seventh section of the Practice Act places married women, in respect to the cases therein mentioned, upon a common level with all other parties to actions, and imposes on them the responsibilities it imposes on other parties. *Leonard v. Townsend*, 26 Cal. 435.

**Conflict of Laws.** — In an action against a married woman on a contract made in another state, under the laws of which she may be sued thereon alone, the husband need not be joined as a co-defendant, although by the law of the state wherein the action is brought such joinder is necessary. *Evans v. Cleary*, 125 Pa. St. 204.

4. *Saunders v. Burns*, 38 La. Ann. 367.

**In Tax Cases** it is not necessary to make the husband a party to the suit, or to notify him of the proceedings in it. A married woman can be sued and stand alone in court in such cases. *Roberts v. Zansler*, 34 La. Ann. 205.

5. *Adle v. Anty*, 1 La. Ann. 260; *Hedrick v. Banister*, 10 La. Ann. 208; *Rils v. Hamilton*, 15 La. Ann. 182; *Washington v. Hackett*, 19 La. Ann. 146; *Champlin v. Lee*, 19 La. Ann. 148; *Dirmeyer v. O'Hern*, 39 La. Ann. 961. But see *Francis v. Martin*, 28 La. Ann. 404.

**A Judgment by Default** rendered against her before she is so authorized produces no effect. *Rils v. Hamilton*, 15 La. Ann. 182; *Tillett v. Upton*, 12 La. Ann. 146.

**Reversal of Judgment.** — If the wife has not been duly authorized to appear and defend the suit, a judgment against her will be reversed. *Adle v. Anty*, 1 La. Ann. 260; *Champlin v. Lee*, 19 La. Ann. 148; *Dirmeyer v. O'Hern*, 39 La. Ann. 961.

**Sufficiency of Authorization.** — If a wife duly cited files an answer the same

*b. ARISING OUT OF CONTRACT — (1) Ante-nuptial Contracts of Wife — (a) At Common Law.* — At common law, to recover on a contract made by the wife before marriage the action must be brought against the husband and wife jointly;<sup>1</sup> for, in the event of

day and by the same counsel as her husband, and alleges therein that she has been duly authorized, it is sufficient. *Woodward v. Lurty*, 11 La. Ann. 280.

If the wife's counsel admits in his brief that the party who filed her answer below was at the time her agent, having the husband's full authority, the court will presume the proceedings fully authorized. *Butcher v. Ricker*, 11 La. Ann. 489.

**Husband's Appearance Equivalent to Authorization.** — When the husband has been sued and cited jointly with the wife, and has appeared with her in any manner in the case, his authorization of her defense is implied. *Hill v. Tippet*, 10 La. Ann. 554; *Favaron v. Rideau*, 14 La. Ann. 817; *Jordan v. Anderson*, 29 La. Ann. 749; *Lehman v. Broussard*, 45 La. Ann. 346.

In a suit against a married woman, where both she and her husband are cited, and default is taken against both, although she alone afterwards appeared and answered, the authorization of her husband will be presumed. *Zuberbier v. Prudhomme*, 34 La. Ann. 1048.

**When Court May Authorize.** — It is only in case the husband is absent or refuses his authorization that the judge can validly authorize the wife to stand in judgment alone. Where the husband was not sued and had not appeared, and there was no allegation or pretense that he was absent or had refused, the judge's authorization was held to be invalid. Nor was the vice cured by going to trial without excepting on this ground, and objections to evidence on the ground that the wife was not legally authorized to stand in judgment should have been sustained. *Saunders v. Burns*, 38 La. Ann. 367.

**Absence of Husband.** — A married woman, though a public merchant, cannot be proceeded against by suit in the absence of her husband, without an authorization of the judge before whom the suit is brought. *Hedrick v. Banister*, 10 La. Ann. 208.

**Marriage Pending Suit.** — When a married woman who had been authorized by her first husband to defend a

suit marries a second time, while the suit is pending, it is not necessary that the authorization of her second husband should be obtained. *Favaron v. Rideau*, 14 La. Ann. 817.

1. *Arkansas.* — *Ellis v. Clarke*, 19 Ark. 420.

*Georgia.* — *Nicholson v. Wilborn*, 13 Ga. 467.

*Indiana.* — *Tobin v. Connery*, 13 Ind. 65; *Shore v. Taylor*, 46 Ind. 345; *Crawford v. Thompson*, 91 Ind. 266.

*Iowa.* — *Reunecker v. Scott*, 4 Greene (Iowa) 185.

*Kentucky.* — *Fultz v. Fox*, 9 B. Mon. (Ky.) 499; *Beaumont v. Miller*, 1 Metc. (Ky.) 68.

*Maine.* — *Hamlin v. Bridge*, 24 Me. 145.

*Missouri.* — *Benjamin v. Bartlett*, 3 Mo. 86; *Walker v. Deaver*, 79 Mo. 664; *Wisdom v. Newberry*, 30 Mo. App. 241; *Todd v. Works*, 51 Mo. App. 267.

*New York.* — *Angel v. Felton*, 8 Johns. (N. Y.) 149; *Gage v. Reed*, 15 Johns. (N. Y.) 403.

*Pennsylvania.* — *Nutz v. Reutter*, 1 Watts (Pa.) 229.

*Texas.* — *Nash v. George*, 6 Tex. 234; *Roundtree v. Thomas*, 32 Tex. 286.

*Vermont.* — *Cole v. Seeley*, 25 Vt. 220.

*Virginia.* — *Coles v. Hurt*, 75 Va. 380.

*Wisconsin.* — *Platner v. Patshin*, 19 Wis. 333.

*England.* — *Mitchinson v. Hewson*, 7 T. R. 344; *Garrard v. Guibilei*, 15 C. B. N. S. 832, 106 E. C. L. 832; *Robinson v. Hardy*, 1 Keb. 281.

**Action for Use and Occupation.** — Where a *feme sole* occupied certain premises, and after marriage she and her husband continued the occupation, it was held that to recover for the period when she occupied the premises as a *feme sole* the action should be brought against husband and wife. *Tobin v. Connery*, 13 Ind. 65.

**Breach of Contract After Marriage.** — When the plaintiff declares on the common counts against husband and wife for work and labor at the instance of the wife, a recovery is proper, though the evidence discloses a contract with the wife when sole, and the performance of the service after the

the husband's death, the cause of action survives against the wife.<sup>1</sup>

(b) **Under Married Woman's Acts.** — Under the statutes in some of the states, enlarging the powers and liabilities of married women, the husband is relieved of all liability on the wife's ante-nuptial contracts, and an action therefor may be brought against her alone.<sup>2</sup> Under some of the statutes, however, it is held that the husband is still properly joined with the wife as at common law.<sup>3</sup>

marriage. *Sprague v. Morgan*, 7 Ala. 952.

**Effect of Ante-nuptial Agreement.** — Where a man and woman, before their marriage, entered into an agreement that the property of each should be liable for his or her debt, it was held that in a suit brought after the marriage to charge the wife's property for a debt contracted by her before marriage the husband was a necessary party defendant. *Coles v. Hurt*, 75 Va. 380.

**Husband a Bankrupt.** — Where a bill in equity is brought against a married woman, with the view of obtaining payment of a debt contracted by her before her marriage, from her property fraudulently conveyed while sole, still the husband, although a certified bankrupt, should be joined as a party. *Hamlin v. Bridge*, 24 Me. 145.

**Return of Non Est Inventus Against Husband.** — A suit against the husband and wife for the debt of the wife contracted *dum sola* is like any other joint suit, and must be against both, unless one or the other has abjured the realm, and thus become, as to the domestic jurisdiction, *civiliter mortuus*; and a *non est inventus* return of the officer is held, in *Vermont* practice, equivalent to the common-law outlawry. *Cole v. Seeley*, 25 Vt. 220.

**Scire Facias to Revive Judgment Against Wife.** — The husband is a proper party to a *scire facias* on a justice's transcript of a judgment rendered against the wife while sole. *Campbell v. Baldwin*, 6 Blackf. (Ind.) 364.

**After the Coverture Has Ceased,** a woman may be proceeded against at law for a debt which she owed previous to the marriage. *Clarke v. Windham*, 12 Ala. 798.

1. See *infra*, IV. 3. *Effect of Death*.

2. In *Alabama*, under the provisions of the Code, § 1981, the husband is not liable for debts contracted by the wife before marriage, but the liability is hers alone. Consequently, in an

action founded on a contract made by the wife before marriage, the husband is not a proper party defendant. *Madden v. Gilmer*, 40 Ala. 637; *Zachary v. Cadenhead*, 40 Ala. 236.

For a general discussion of parties to suits to subject a married woman's separate estate to the payment of her obligations, see *infra*, IV. 1. *d. Concerning Wife's Separate Property*.

3. In *Indiana*, under Rev. Stat. 1881, § 5127, as at common law, the husband is a proper party defendant in an action upon a liability of the wife contracted while single. *Crawford v. Thompson*, 91 Ind. 266.

In *Kentucky* the statute of 1848 did not change the common-law mode of proceeding to recover a debt contracted by the wife before coverture, and the husband had still to be joined as a defendant. *Fultz v. Fox*, 9 B. Mon. (Ky.) 499. But by Ky. Stat. 1894, § 2128, the wife may now be sued alone in such cases.

In *New York*, under the Act of 1853, § 576, the husband was not a necessary party defendant in an action to recover a debt contracted by the wife while single, but such joinder was not improper. *Heller v. Rosselle*, 6 Hun (N. Y.) 631; *Lennox v. Eldred*, 65 Barb. (N. Y.) 410, 1 Thomp. & C. (N. Y.) 140. These cases are probably not authority under the Code Civ. Pro., § 450, now in force.

In *Missouri*, under Rev. Stat., § 6870, exempting the husband's property, except such as may be acquired from the wife, from all debts of the wife contracted before marriage, and Rev. Stat., § 6869, subjecting the wife's personal property to levy for such debts, the husband is properly joined with the wife in an action on a contract made by her while single. *Todd v. Works*, 51 Mo. App. 267; *Wisdom v. Newberry*, 30 Mo. App. 241. But under *Burns's* Annot. Pr. Code, § 366, the wife may now be sued in all cases as a *feme sole*.

(2) *Post-nuptial Contracts of Wife* — (a) **At Common Law.** — At common law a married woman has, in general, no power to bind herself by a personal contract during the coverture, and where a contract of hers is considered valid, its validity is based upon the agency of the wife for the husband.<sup>1</sup> Hence an action thereon must be brought against the husband alone.<sup>2</sup>

(b) **Under Married Woman's Acts.** — By statute in most of the states the wife is at present allowed to make valid and binding contracts during the coverture, and, in consequence, is liable to be sued thereon.<sup>3</sup> In many of the states the action may be brought against the wife alone without joining the husband.<sup>4</sup> But under

1. As to the power of a married woman to contract, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

**Husband Residing Abroad.** — At common law a married woman could not be sued alone on a contract made during coverture, although before the cause of action accrued the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts. *Williamson v. Dawes*, 9 Bing. 292, 23 E. C. L. 280.

Nor could the wife be sued alone on a contract made after marriage, although the husband was an alien residing abroad at the time of the contract, and the plaintiff contracted with the defendant as a *feme sole*. *Stretton v. Busnach*, 1 Bing. N. Cas. 139, 27 E. C. L. 335.

**Wife Living Separate from Husband.** — A married woman could not be sued alone on a contract made after marriage, notwithstanding she was separated from her husband, and obtained the credit and made the promises on her own account as a *feme sole*, and not on the credit of her husband. *Ellah v. Leigh*, 5 T. R. 679.

2. In *Nutz v. Reutter*, 1 Watts (Pa.) 229, the court said: "I consider it a well-settled principle that a wife cannot be joined with her husband as a defendant in an action founded upon a contract or promise, either express or implied, except where she has made the contract or promise, or done the act upon which it is to be implied, before coverture."

**Goods Furnished Wife on Husband's Credit.** — The wife should not be joined as a defendant in an action to recover for goods furnished at her request for the support of herself and family, for

the obligation is the husband's, and he should be sued therefor alone. *Valentine v. Lloyd*, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 371; *Main v. Stephens*, 4 E. D. Smith (N. Y.) 86; *Fallwick v. Keith*, 1 Heisk. (Tenn.) 360; *Walling v. Hanning*, 73 Tex. 580.

3. As to the power of a married woman to make a contract, and her liability thereon, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

4. For a general discussion of parties to suits to charge married woman's separate estate, see *infra*, IV. 1. d. *Concerning Wife's Separate Property*.

**In Alabama**, under the Code of 1886, §§ 234-151, a married woman may be sued alone on any of her contracts or engagements, where any person *sui juris* could be sued alone under the same state of facts. *Ramage v. Towles*, 85 Ala. 588.

**In Illinois**, under the Acts of 1861 and 1869, where a married woman, by her husband's consent, engages in business, an action for the price of goods bought in relation thereto may be brought against the wife alone. *Haight v. McVeagh*, 69 Ill. 624.

**In Iowa**, under the code, a married woman may be sued upon her contracts in the same manner as any other person. But her liability upon such contracts extends only to her separate property. *Rodemeyer v. Rodman*, 5 Iowa 426.

**In Maryland**, in an action against husband and wife, under Acts of 1867, c. 223, on a covenant in a lease by the wife, it was held to be erroneous to join the husband as a defendant. *Worthington v. Cooke*, 52 Md. 297.

**In Massachusetts**, under the Gen. Stat., c. 108, § 3, a married woman may be sued alone on a promissory note made

some of the statutes the husband is required to be made a co-defendant with her.<sup>1</sup>

(3) *Joint Contracts of Husband and Wife* — At Common Law. — In consequence of the common-law doctrine that a married woman can make no binding contract during coverture, an action on a

and given by her to pay for real estate purchased as her separate property. *Estabrook v. Earle*, 97 Mass. 302.

In New Jersey a married woman can be sued alone under the Act of 1875 on contracts entered into by her since the passage of that act. But in other actions against her the husband must be joined. *Wilson v. Herbert*, 41 N. J. L. 455. See also *Powers v. Totten*, 42 N. J. L. 442.

In New York an action on a contract made by the husband for the benefit of the wife, to pay for the keep of horses which were part of her separate estate, should be brought against the wife alone, and not against the husband. *Brennan v. Chapin*, (C. Pl.) 19 N. Y. Supp. 237. Under the N. Y. Laws of 1853, however, an action for a debt contracted by the wife during coverture could be brought either against the husband and wife jointly, or against the husband alone. *Smith v. Scribner*, 12 How. Pr. (N. Y. Supreme Ct.) 501.

In Ohio, in an action to charge the separate property of a married woman doing business with her husband, with a debt contracted on the understanding that her separate property was to be liable, it is not necessary to make the husband a co-defendant. *Fisher v. McMahon*, 3 Cinc. Wkly. L. Bul. 52.

In Rhode Island, under Pub. Stat., c. 166, § 4, as amended by R. I. Pub. Laws, c. 1204, § 1, a married woman may be sued alone to recover the price of goods sold and delivered to her. *Merriam v. White*, 18 R. I. 727.

In Vermont, under Acts of 1880, No. 105, a married woman may be sued alone on a contract made in relation to her separate business. *Holmes v. Reynolds*, 55 Vt. 39.

1. In Mississippi. — Since the Acts of 1846, relating to married women, a married woman may be sued at law jointly with her husband upon contracts executed by her during the coverture. The husband is joined for conformity only, and that he may assist the wife in the protection of her interests. *Robertson v. Ward*, 12 Smed.

& M. (Miss.) 490; *Bacon v. Bevan*, 44 Miss. 294; *Travis v. Willis*, 55 Miss. 557. Under Mississippi Code, § 2289, the wife may now be sued in all cases as if sole.

In Missouri, under Rev. Stat., § 3296, in any action to subject the wife's separate property to execution for the payment of the husband's debt contracted for necessities for her or her family, husband and wife should be joined as defendants. *Gabriel v. Mullen*, 30 Mo. App. 464; *Bedsworth v. Bowman*, 31 Mo. App. 116. But under Burns's Annot. Pr. Code, § 366, a married woman may now be sued as a *feme sole*.

In Pennsylvania, in an action to charge the separate estate of the wife under the Act of 1848, the husband was properly joined as a defendant. *Murray v. Keyes*, 35 Pa. St. 384; *Lippincott v. Hopkins*, 57 Pa. St. 328; *Wireman v. Ervin*, 14 Phila. (Pa.) 198. Under P. L. 1893, 344, § 3, a married woman may be sued in all cases as if unmarried.

*Appeal by Wife Alone.* — In an action against a married woman for necessary repairs to her separate property the husband should be joined; but if the wife alone appeals from the judgment, the case can be tried on her pleas and a separate recovery had against her, without any issue joined as to the husband. *Lippincott v. Hopkins*, 57 Pa. St. 328.

In Texas, in an action to subject the separate property of the wife to a claim for necessities, the wife should be made a defendant along with the husband. *Milburn v. Walker*, 11 Tex. 329; *Booth v. Cotton*, 13 Tex. 359.

In *Carothers v. McNese*, 43 Tex. 221, the court said: "Whatever may be the nature or character of a demand against a married woman, it is a well-settled general rule that her husband must be joined in the action. If in any case he need not be made a party, certainly the facts and circumstances which excuse his being joined in the suit must be alleged and shown in the petition."

joint contract of the husband and wife cannot be brought against them jointly, but the husband must be sued alone.<sup>1</sup>

**Under Married Woman's Acts.** — Where, by statute, a married woman is allowed to make binding contracts, an action upon a joint contract of the husband and wife may be brought against them jointly.<sup>2</sup>

*c. SOUNDING IN TORT* — (1) *Ante-nuptial Torts of Wife.* — At Common Law an action for a tort committed by the wife before coverture must be brought against the husband and wife jointly.<sup>3</sup>

**Under the Married Woman's Acts** in many of the states the wife is alone liable for her ante-nuptial torts, and may be sued therefor without the husband being joined.<sup>4</sup>

(2) *Post-nuptial Torts of Wife* — (a) **At Common Law** — **Husband and Wife Sued Jointly.** — The general rule of the common law is that where a tort is committed by the wife alone, without the presence or direction of her husband, an action therefor must be brought against the husband and wife jointly.<sup>5</sup>

1. *Gibson v. Marquis*, 29 Ala. 668; *Childress v. Mann*, 33 Ala. 206; *Tobin v. Connery*, 13 Ind. 65; *Davis v. Millett*, 34 Me. 429; *Harrington v. Thompson*, 9 Gray (Mass.) 65; *Leslie v. Harlow*, 18 N. H. 518; *Hennessey v. Ryan*, 7 R. I. 548.

2. **California.** — In an action to recover the value of work and labor alleged to have been performed by the plaintiff for the defendants, who were husband and wife, the defendants objected to the joinder of the husband. It was conceded by both defendants that the plaintiff had performed labor for which he had not been paid, and the testimony introduced by him showed that he worked for the defendants in and about a business which they were jointly engaged in carrying on, and that the property used in that business was the separate property of the wife. It was held that the evidence showed that the husband and wife were jointly liable, and therefore properly joined as defendants. *Silva v. Holland*, 74 Cal. 530.

**Iowa.** — Under the Iowa Code, § 2214, husband and wife are jointly and severally liable for debts incurred for family expenses, and they may be sued together or either may be sued alone. *Smedley v. Felt*, 43 Iowa 607.

**Texas.** — In an action on a contract executed by husband and wife for the benefit of the wife's separate property the husband and wife are properly joined as defendants. *Smotridge v. Lovell*, 35 Tex. 58.

**Vermont.** — Under the Vermont Acts of 1884, No. 140, allowing a married woman to be sued alone, joint assumption can be maintained against husband and wife upon their joint promise, whether made before or during coverture; and a declaration on the common counts will be sustained against them on general demurrer. *Reed v. Newcomb*, 59 Vt. 630.

3. *Brown v. Kemper*, 27 Md. 666; *Hawk v. Harman*, 5 Binn. (Pa.) 43; *Overholt v. Ellswell*, 1 Ashm. (Pa.) 200. See also *Horton v. Payne*, 27 How. Pr. (N. Y. Supreme Ct.) 374.

In *Jillson v. Wilbur*, 41 N. H. 106, it was held that where a woman obtained possession of a watch belonging to another, and after her marriage sold it, an action of trover was properly brought against husband and wife jointly.

4. As to a married woman's liability for her torts, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

5. *Baker v. Young*, 44 Ill. 42; *McElfresh v. Kirkendall*, 36 Iowa 224; *Luse v. Oaks*, 36 Iowa 562; *Marshall v. Oakes*, 51 Me. 308; *Whitmore v. Delano*, 6 N. H. 543; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90; *Clark v. Bayer*, 32 Ohio St. 299; *Henderson v. Wendler*, 39 S. Car. 555; *Park v. Hopkins*, 2 Bailey L. (S. Car.) 411; *McKeowen v. Johnson*, 1 McCord L. (S. Car.) 578; *McQueen v. Fulgham*, 27 Tex. 463.

**Slander by Wife.** — Where the wife alone speaks slanderous words of an-

**Husband Sued Alone.** — Where the wife commits a tort in the presence of, or by the direction of, the husband, the action should be against him alone.<sup>1</sup>

(b) **Under Married Woman's Acts.** — In many of the states the necessity for joining the husband in an action for a tort of the wife has been obviated by statute, and she may now be sued alone.<sup>2</sup>

other person, husband and wife must be jointly sued, and the verdict must go against both. *Baker v. Young*, 44 Ill. 42; *McQueen v. Fulgham*, 27 Tex. 463.

**Judgment Against Wife Alone.** — A judgment in an action of trespass brought against the wife without joining the husband is erroneous and will be reversed on error, notwithstanding it was entered by agreement of the attorney who appeared for her in the defense. *Whitmore v. Delano*, 6 N. H. 543.

1. *Kosminsky v. Goldberg*, 44 Ark. 401; *Estill v. Fort*, 2 Dana (Ky.) 238; *Park v. Hopkins*, 2 Bailey L. (S. Car.) 411.

**The General Rule of the Common Law** is that the husband is liable for the torts of the wife where the act is done by her alone; and whenever in such a case she is sued for the tort the husband must be joined in the suit. If the wrongful act of the wife be committed in the presence and by the direction of the husband, he alone must be sued therefor. *Carleton v. Haywood*, 49 N. H. 314.

**Presumption of Husband's Authority.** — A wife cannot commit a trespass (so as to be made liable to an action) in the presence of and in connection with her husband. In such case she is supposed to act under his authority, and he alone must be sued. *McKeowen v. Johnson*, 1 McCord L. (S. Car.) 578.

2. **Illinois.** — Where a wife borrowed property which was injured before its return, it was held that an action to recover for the injury was properly brought against the wife alone. *Hagebush v. Ragland*, 78 Ill. 40.

**Michigan.** — Under the Michigan Comp. L., §§ 6129, 7382, a married woman should be sued alone for her torts. Therefore where a married woman knowingly perpetrated a fraud in her husband's behalf, and as his agent, it was held that the husband need not be made a co-defendant unless both were sued as wrongdoers. *Weber v. Weber*, 47 Mich. 569.

**New Hampshire.** — Under the New Hampshire Act of 1876 the husband is not a proper party defendant in an action against the wife for slanderous words spoken by her. *Harris v. Webster*, 58 N. H. 481.

**New York.** — Under N. Y. Code Civ. Pro., § 450, as amended by Laws of 1890, c. 51, § 2, the husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate, or character of another on account of the wrongful acts of his wife committed without his instigation.

*Prior to the Amendment of 1890* there was a difference of opinion as to whether the husband was a necessary party to such action, some cases holding that it was neither necessary nor proper to join him. *Trebing v. Vetter*, 12 Abb. N. Cas. (Brooklyn City Ct.) 302, note; *Muser v. Miller*, 12 Abb. N. Cas. (N. Y. Super. Ct.) 308, note; *Gillies v. Lent*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 455. But the weight of authority held that he must be joined. *Fitzgerald v. Quann*, 109 N. Y. 441, affirming 33 Hun (N. Y.) 652, reversing 62 How. Pr. (N. Y.) 331; *Austin v. Bacon*, 49 Hun (N. Y.) 386; *Horton v. Payne*, 27 How. Pr. (N. Y. Supreme Ct.) 374; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; *Tait v. Culbertson*, 57 Barb. (N. Y.) 9. However, where the tort, related to her separate estate, as an injury committed by animals belonging to her, the husband was held not to be a proper party. *Quilty v. Battie*, 135 N. Y. 201, reversing 61 Hun (N. Y.) 164; *Rowe v. Smith*, 55 Barb. (N. Y.) 417, 45 N. Y. 230. But see *Genenz v. De Forest*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 145.

**Vermont.** — Under the Vermont Acts of 1884, No. 140, the husband should not be joined as a defendant in an action against the wife for slanderous words spoken by her, unless they were spoken by his authority and direction. And if spoken by his direction and authority, the declaration should allege that fact. *Story v. Downey*, 62 Vt. 243.

(3) *Joint Torts of Husband and Wife*.—The husband and wife can be jointly sued for a tort when it is such as, in legal contemplation, may be committed by two persons conjointly, and the wife does not act under the husband's coercion.<sup>1</sup> But they cannot be jointly sued for a slander spoken by both.<sup>2</sup>

d. CONCERNING WIFE'S SEPARATE PROPERTY.—The common-law doctrine that the husband must always be joined in actions concerning the wife's property has been generally superseded by statute, and in nearly all of the United States at present a married woman may be sued as if sole in all matters relating to her separate property.<sup>3</sup>

1. *Handy v. Foley*, 121 Mass. 259; *Carleton v. Haywood*, 49 N. H. 314; *Vine v. Saunders*, 4 Bing. N. Cas. 96, 33 E. C. L. 290; *Anonymous*, 1 Vent. 93. See also *Keyworth v. Hill*, 3 B. & Ald. 685, 5 E. C. L. 422.

In *Smith v. Sanders*, 56 N. H. 339, the court said: "On principle, as the husband and wife must at common law be joined in actions for the independent torts of the wife, and as the husband and wife may together be guilty of torts in which the wife, as matter of fact, does not act under the control of her husband, the court cannot say, looking at this writ and declaration, that this is one of those cases where the husband and wife cannot be joined. For this reason, as the declaration sets out, and the demurrer admits, a joint disseizin, the court cannot see, as matter of law, that this may not be; and the demurrer, so far as this objection goes, must be overruled."

**Joint Assault.**—A joint action of trespass, assault, and battery lies against husband and wife for an assault committed conjointly by both. *Roadcap v. Sipe*, 6 Gratt. (Va.) 213.

**Joint Conversion.**—Where a conversion is by husband and wife jointly, the action may be against the husband alone or against both jointly. If they are joined the declaration must allege that the conversion was to the husband's use. *Estill v. Fort*, 2 Dana (Ky.) 238.

**Fraud in Sale of Chattel.**—At common law a joint action cannot be maintained against husband and wife for a fraud in the sale of a chattel. The action should be against the husband alone, as the wife has no legal interest in the chattel and no legal power to sell or exchange it. *Owens v. Snodgrass*, 6 Dana (Ky.) 229.

2. *Baker v. Young*, 44 Ill. 42. The

husband must be sued alone for the slander spoken by him, and the husband and wife jointly for the slander spoken by the wife. *Blake v. Smith*, (R. I. 1896) 34 Atl. Rep. 995.

3. *Alabama*.—Code of 1886, § 2347; *Madden v. Gilmer*, 40 Ala. 637; *Zachary v. Cadenhead*, 40 Ala. 236; *Ramage v. Towles*, 85 Ala. 588; *Marshall v. Marshall*, 86 Ala. 383; *Bogan v. Hamilton*, 90 Ala. 454; *Kimbrell v. Rogers*, 90 Ala. 339.

*Arkansas*.—Sand. & Hill's Dig., § 4946; *Trieber v. Stover*, 30 Ark. 727.

*Illinois*.—Starr & Curt. Annot. Stat., c. 68, § 1; *Haight v. McVeagh*, 69 Ill. 624; *Halley v. Ball*, 66 Ill. 250; *Martin v. Robson*, 65 Ill. 129.

*Iowa*.—Rev. Code, § 2562; *Rodemeyer v. Rodman*, 5 Iowa 426.

*Maryland*.—Acts 1867, c. 223; *Worthington v. Cooke*, 52 Md. 297.

*Massachusetts*.—Gen. Stat., c. 108, § 3; *Estabrook v. Earle*, 97 Mass. 302; *Labaree v. Colby*, 99 Mass. 559.

*Missouri*.—Burns's Annot. Pr. Code, § 366. Under the earlier statutes the wife was required to defend by next friend. *Claffin v. Van Wagoner*, 32 Mo. 252.

*New Jersey*.—*Wilson v. Herbert*, 41 N. J. L. 455. See also *Powers v. Tottem*, 42 N. J. L. 442.

*New York*.—Code Civ. Pro., § 450; *Walker v. Swayzee*, 3 Abb. Pr. (N. Y. C. Pl.) 136; *Morrell v. Cawley*, 17 Abb. Pr. (N. Y. Supreme Ct.) 76; *Lore v. Dierkes*, 51 N. Y. Super. Ct. 144; *Eagle v. Swayze*, 2 Daly (N. Y.) 140; *Porter v. Mount*, 45 Barb. (N. Y.) 422; *Brennan v. Chapin*, (C. Pl.) 19 N. Y. Supp. 237; *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Quilty v. Battie*, 135 N. Y. 201. Some of the New York cases hold, however, that the husband is a proper party in such actions. *Francis v. Ross*, 17 How. Pr.



**Property in Hands of Trustee.** — If the separate property of the wife is vested in a trustee, he should be joined as a defendant in an action to charge the same.<sup>1</sup>

**Construction of Statute.** — In some of the states the statutes allowing a married woman to be sued alone are considered as mandatory, making it improper to join the husband; but in others they are looked upon as merely permissive, and the husband is not an improper though not a necessary party.<sup>2</sup> It is generally held that such statutes are not retroactive in their effect.<sup>3</sup>

(N. Y. C. Pl.) 561; *Goelet v. Gori*, 31 Barb. (N. Y.) 314; *Genenz v. De Forest*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 145; *Heller v. Rosselle*, 6 Hun (N. Y.) 631; *Lennox v. Eldred*, 65 Barb. (N. Y.) 410.

*Ohio.* — Rev. Stat., § 4996; *Fisher v. McMahon*, 3 Cinc. Wkly. L. Bul. 52.

*Rhode Island.* — Pub. Stat., c. 166, § 4; *Merriam v. White*, 18 R. I. 727.

*South Carolina.* — Code, § 137; *Lowry v. Jackson*, 27 S. Car. 318.

*Vermont.* — Acts 1880, No. 105; *Holmes v. Reynolds*, 55 Vt. 39.

*Wisconsin.* — Sanborn & Berryman, Annot. Stat., § 2608. Prior to the amendment of 1872, the husband was a necessary party defendant, notwithstanding the action related to the wife's separate property. *Oatman v. Goodrich*, 15 Wis. 589; *Owsley v. Case*, 16 Wis. 606.

**Actions Sounding in Tort.** — Where, by statute, the wife may be sued alone concerning her separate estate, an action for a tort committed by means of her separate property should be brought against her alone without joining the husband. *Rowe v. Smith*, 45 N. Y. 230; *Warner v. Warren*, 46 N. Y. 228; *Baum v. Mullen*, 47 N. Y. 577; *Quilty v. Battie*, 135 N. Y. 201. But see *Porter v. Mount*, 41 Barb. (N. Y.) 561; *Genenz v. De Forest*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 145.

**Suit in Partnership Name.** — In *Alabama* a married woman carrying on business under the assumed name of a partnership as "S. & Co.," may be sued in the partnership name. *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123.

1. *Palmer v. Rankins*, 30 Ark. 771; *Prentiss v. Paisley*, 25 Fla. 927; *Clafflin v. Van Wagoner*, 32 Mo. 252.

**Property in Husband's Hands.** — Where a bill was filed to reach the separate estate of the wife in the hands of the husband, it was held that the husband

was a proper party defendant, because the property was in his hands. *Robinson v. Trofitter*, 109 Mass. 478. See also *Sims v. National Commercial Bank*, 73 Ala. 248.

2. See *supra*, III. 1. g. (3) *Statute Permissive or Mandatory*.

In *South Carolina* the Code, § 137, provides that "when a married woman is a party her husband must be joined with her, except that, when the action concerns her separate property, she may sue or be sued alone," though neither the husband nor his property can be made liable for any recovery against her in such a suit. Under this statute it is not improper to join the husband as a defendant even in actions concerning the wife's separate property, the language of the statute being permissive merely. *Lowry v. Jackson*, 27 S. Car. 318.

3. In *Alabama* the Code of 1886, §§ 2341-2356, defining rights and liabilities of husband and wife, does not retroact upon suits pending at the date of its approval, to enforce statutory liabilities created before that time; the former remedies in such cases being expressly preserved by statute. *Jordan v. Smith*, 83 Ala. 299.

In *Maryland* the Act of 1872, c. 270, provided that "any married woman may be sued jointly with her husband in any of the courts of this state, or before any justice of the peace, on any note, bill of exchange, single bill, bond, contract, or agreement, which she may have executed jointly with her husband, and may employ counsel and defend such action or suit, separately, or jointly with her husband, and judgments recovered in such cases shall be liens on the property of defendants, and may be collected by execution or attachment, in the same manner as if the defendants were not husband and wife." It was held that this Act was not retrospective in its

*c.* AGAINST WIFE IN REPRESENTATIVE CAPACITY. — At Common Law, actions on claims against the wife as executrix or administratrix must be brought against the husband and wife jointly.<sup>1</sup>

Under the Married Woman's Acts in some of the states such actions may now be brought against the wife alone.

*f.* CONCERNING COMMUNITY PROPERTY. — It is a general rule of the law governing community property that the husband is the head and master of the community, and actions brought to charge it should usually be against him alone.<sup>2</sup> But if the wife has separate interests she should be joined in the suit.<sup>3</sup>

*g.* CRIMINAL PROCEEDINGS. — An indictment may be brought against the husband and wife jointly, if it appears that they are both guilty of the offense charged and it is not shown that the wife acted under the husband's coercion.<sup>4</sup>

**2. Effect of Misjoinder or Nonjoinder — Misjoinder of Wife.** — Under the common law, if the wife is improperly joined in a suit against

operation, and did not authorize a suit at law against a husband and wife, upon their joint note, executed prior to the passage of the act. *Herbert v. Gray*, 38 Md. 529.

**Contra in Connecticut.** — The Act of 1872, which provided that "actions at law may be sustained against any married woman, upon any contract made by her upon her personal credit, for the benefit of herself, her family, or her estate," was held to apply to such contracts made before the passage of the act as well as to those made after. *Buckingham v. Moss*, 40 Conn. 461.

**1. Dacey on Parties**, 297; *M'Kenna v. Everitt*, 1 Beav. 134; *Ludlow v. Marsh*, 3 N. J. L. 538; *Williamson v. Hill*, 6 Port. (Ala.) 184, wherein it is held that by the marriage of a *feme sole* administratrix the husband becomes joint administrator with her, and if the husband sue or be sued as administrator the wife must be joined with him. Therefore a decree against such administrator cannot be regular unless the wife be embraced in it; though, in cases where the administrator may be charged in his own right, the action lies against the husband alone.

**Marriage Pending Suit.** — If an administratrix marries pending a suit against her in that capacity, the plaintiff may proceed to judgment without making the husband a party. *Bohe v. Frowner*, 18 Ala. 89.

**2. Althof v. Conheim**, 38 Cal. 230; *Shelby v. Perrin*, 18 Tex. 515; *Robinson v. McWhirter*, 52 Tex. 201; *Jergens v. Schiele*, 61 Tex. 255. But see *Swain*

*v. Burnette*, 76 Cal. 299. See in general Am. and Eng. Encyc. of Law, tit. *Community Property*.

**Contra in Washington.** — It is held in Washington that the wife is a necessary party defendant in suits to charge the community property. *Littell, etc., Mfg. Co. v. Miller*, 3 Wash. 480; *McDonough v. Craig*, 10 Wash. 239; *Sagmeister v. Foss*, 4 Wash. 320.

**3. Homestead.** — Where, in an action to charge community property, the wife has a defense growing out of her homestead rights, she should be joined as a defendant. *Jergens v. Schiele*, 61 Tex. 255. See generally article *HOMESTEADS AND EXEMPTIONS, ante*, p. 55.

**Foreclosure of Mortgage.** — In a suit to foreclose a mortgage on community property executed jointly by husband and wife, the wife is a proper party defendant. *Anthony v. Nye*, 30 Cal. 402. But compare *Powell v. Ross*, 4 Cal. 197. And see generally article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 316 *et seq.*

**4. Goldstein v. People**, 82 N. Y. 231.

**For a Joint Assault and Battery** committed by the husband and wife, they may be jointly indicted. *Com. v. Ray*, 1 Va. Cas. 262.

**Illegal Sale of Liquor.** — Husband and wife may be jointly indicted for a single act of retailing ardent spirits. *Com. v. Hamor*, 8 Gratt. (Va.) 698.

**For Keeping Bawdy-House.** — The wife, as well as the husband, may be indicted for keeping a bawdy-house. They may be jointly indicted. *State v. Bentz*, 11 Mo. 27.

the husband, the defect is considered fatal to a recovery unless amended.<sup>1</sup> It is the general practice now to allow the plaintiff to discontinue as to the wife, and proceed to judgment against the husband.<sup>2</sup>

**Misjoinder of Husband.**—If the husband is joined in a suit which should be against the wife alone, judgment cannot be rendered against both defendants.<sup>3</sup> But the plaintiff may be allowed to amend by discontinuing as to the husband.<sup>4</sup>

**Nonjoinder of Wife.**—Failure to join the wife as a defendant in a suit in which she should properly be joined is fatal to a recovery.

1. Dicey on Parties (2d Am. ed.) 304; Gibson v. Marquis, 29 Ala. 668; McLean v. Griswold, 22 Ill. 218; Page v. De Leuw, 58 Ill. 85; Thomas v. Lowy, 60 Ill. 512; Owens v. Snodgrass, 6 Dana (Ky.) 229; Carleton v. Haywood, 49 N. H. 314; Hennessey v. Ryan, 7 R. I. 548; Porter v. Bradley, 7 R. I. 538; Risley v. Stafford, Palmer 312.

**Defect Not Remedied by Nolle Prosequi.**—Where the wife is improperly joined as a defendant, the plaintiff cannot avoid the objection by entering a *nolle prosequi* as to the wife, but must discontinue and commence a fresh action, omitting the wife. Page v. De Leuw, 58 Ill. 85; McLean v. Griswold, 22 Ill. 218. See also Hennessey v. Ryan, 7 R. I. 548; Porter v. Bradley, 7 R. I. 538.

**No Judgment Against Husband Alone.**—If the wife is improperly joined in an action as a defendant, judgment cannot be rendered against the husband alone. Thomas v. Lowy, 60 Ill. 512.

**Advantage Taken by Demurrer.**—Where the wife is improperly joined as a co-defendant with her husband, and the objection appears on the face of the complaint, she may demur. Gibson v. Marquis, 29 Ala. 668; Owens v. Snodgrass, 6 Dana (Ky.) 229; Carleton v. Haywood, 49 N. H. 314. See also May v. House, 2 Chit. Rep. 697, 18 E. C. L. 461.

2. Harrington v. Thompson, 9 Gray (Mass.) 65; Williams v. Hay, 120 Pa. St. 485; Shelby v. Perrin, 18 Tex. 515.

In Hennessey v. Ryan, 7 R. I. 548, the wife was improperly joined in the action, but, as the evidence showed that the husband had no defense to the suit, the plaintiff was allowed to amend his writ and declaration by striking out the wife as a party defendant, and to take judgment against the husband

without costs. To the same effect see Porter v. Bradley, 7 R. I. 538.

**On a Demurrer** for misjoinder of the wife, she should be discharged from the action, but the plaintiff should be allowed to proceed against the husband. Hall v. Cannte, 22 Ala. 650; Gibson v. Marquis, 29 Ala. 668.

**Amendment of Erroneous Judgment.**—Where the wife is erroneously joined as a defendant and judgment is rendered against her, the Supreme Court can amend the same by striking out her name. Crispen v. Hannovan, 86 Mo. 160.

3. Madden v. Gilmer, 40 Ala. 637, wherein it is held that in an action under Alabama Code, § 1981, against husband and wife, founded on a promissory note which is averred in the complaint to have been executed by the wife *dum sola*, the husband only being served with process, a judgment by default against both of the defendants is erroneous, and will be reversed on a joint assignment of error by them.

4. In an action against husband and wife to recover for certain commissions claimed to have been earned by the plaintiffs in negotiating the sale of certain real estate owned by the wife, it appeared that there was no joint promise and the wife was alone liable. It was held that the plaintiffs might discontinue as to the husband, amend the declaration in that respect, and recover verdict against the wife alone. Codd v. Seitz, 94 Mich. 191.

**Dismissal as to Husband on Appeal.**—In Illinois, where suit is brought against husband and wife before a justice of the peace in a case where the wife should be sued alone, it is not error for the court to allow a dismissal as to the husband, on appeal. Hagebush v. Ragland, 78 Ill. 40.

ery,<sup>1</sup> and the wife cannot be made a defendant by amendment.<sup>2</sup>

**Nonjoinder of Husband.**—If the wife is sued alone where the husband should properly be joined with her, the nonjoinder should be pleaded in abatement at common law.<sup>3</sup> But where a statute requires the husband to be joined as a defendant, the nonjoinder will defeat a recovery, if the defect is properly presented.<sup>4</sup>

**3. Effect of Death—Death of Husband.**—In an action against the husband and wife jointly, if the husband dies pending suit, it abates as to him but may be continued against the wife.<sup>5</sup>

1. *Gage v. Reed*, 15 Johns. (N. Y.) 403; *Gruen v. Bamberger*, 11 Mo. App. 261; *Garrard v. Guibilei*, 13 C. B. N. S. 832, 106 E. C. L. 832.

**Arrest or Reversal of Judgment.**—Failure to join the wife in an action against the husband for a debt contracted by her before marriage is ground for arrest or reversal of the judgment. *Gage v. Reed*, 15 Johns. (N. Y.) 403.

**Failure to Plead Nonjoinder.**—Where the husband is sued alone on a debt contracted by the wife before marriage, failure to plead specially the nonjoinder of the wife, and the submission of the cause upon an agreed statement of facts, do not operate as a waiver of the defect. *Gruen v. Bamberger*, 11 Mo. App. 261.

2. *Garrard v. Guibilei*, 13 C. B. N. S. 832, 106 E. C. L. 832; *Dacey on Parties*, 304.

3. *Sheppard v. Kindle*, 3 Humph. (Tenn.) 80; *Kennard v. Sax*, 3 Oregon 263; *Dacey on Parties*, (2d Am. ed.) 304.

4. *Bogart v. Woodruff*, 96 Cal. 609, wherein it was held that the objection must be taken by demurrer or it would be considered as waived. The court said: "If the wife suffers a judgment to be rendered against her in an action in which she is a sole defendant, without making any objection to the nonjoinder of her husband, whether such judgment is rendered after a trial on the merits or by default, she is bound by the judgment to the extent of her separate estate, and cannot thereafter, in an action upon such judgment, make the objection of such nonjoinder, which should have been presented in the former action."

**Waiver of Objection.**—Where the wife is sued upon contracts other than for her necessary support, the husband is a formal and not a substantial party, and objection to his nonjoinder is waived when not taken by answer or

demurrer. *Ross v. Linder*, 12 S. Car. 592.

5. *Crook v. Tull*, 111 Mo. 283; *Nicholson v. Wilborn*, 13 Ga. 467; *Gage v. Reed*, 15 Johns. (N. Y.) 403; *Parker v. Steed*, 1 Lea (Tenn.) 206; *Cozens v. Long*, 3 N. J. L. 331; *Nutz v. Reutter*, 1 Watts (Pa.) 229. See also *Wilson v. Garaghty*, 70 Mo. 517.

**Husband's Administrator Not Necessary Party.**—Where the husband is joined as a co-defendant in compliance with the statute, and dies pending the suit, it may be continued against the wife without making the husband's administrator a party. *Crook v. Tull*, 111 Mo. 283.

**Action for Tort of Wife.**—A suit against husband and wife for a tort committed by the wife does not abate upon the husband's death, unless the tort was committed by her in his presence or by his coercion. *Douge v. Pearce*, 13 Ala. 127.

**An Action for an Assault and Battery,** brought against a husband and wife jointly, does not abate upon the husband's death, under the common-law rule that an action of tort against two does not abate upon the death of one of them. *Baker v. Braslin*, 16 R. I. 635.

**After Judgment in Ejectment Against a man and his wife,** if the husband dies the action does not abate, as the execution of the judgment cannot operate on the deceased defendant. *Norris v. Sullivan*, 47 Conn. 474. But see *Wilson v. Garaghty*, 70 Mo. 517.

**In Equity,** as at law, a suit against the husband and wife, upon the husband's death abates as to him, but may be continued against the wife. *Shelberry v. Briggs*, 2 Vern. 249; *Field v. Sowle*, 4 Russ. 112; *Mole v. Smith*, Jac. 495.

In *Mole v. Smith*, 1 Jac. & W. 645, it was held that where a husband and

**Death of Wife.** — When suit is brought against the husband and wife on a demand against the wife, her death abates the suit.<sup>1</sup>

**4. Effect of Marriage Pending Suit.** — Where a *feme sole* defendant marries pending suit, the suit does not abate, but the plaintiff may proceed to judgment against her alone without noticing the marriage.<sup>2</sup>

wife are defendants, and, by the death of the husband, a new interest arises to the wife, the suit becomes defective and a supplemental bill is necessary. But this case was doubted in *Mole v. Smith*, Jac. 495. See also *Anonymous*, 3 Salk. 84, where it was held that a suit would abate on the death of the husband, when the death had occurred after answer.

1. *Jackson v. Rawlins*, 2 Vern. 195; *Williams v. Kent*, 15 Wend. (N. Y.) 360, wherein it is held that an action against husband and wife, for the debt of the wife contracted *dum sola*, abates by the death of the wife after commencement of suit and before declaration.

But see *Obrian v. Ram*, 3 Mod. 186, in which it is held that, if judgment be obtained against a *feme sole*, and on her subsequent coverture the plaintiff obtains a judgment on a *scire facias* against the husband and wife, and after a year and a day the wife dies, the plaintiff may bring a new *scire facias quare executionem non* against the husband alone; for he cannot plead the former judgment on the first *scire facias* in bar.

**To Charge Wife's Separate Realty.** — Where a married woman dies pending a suit to charge her separate realty, the suit cannot proceed against her personal representative. The cause of action not being a personal one against the wife, but against the land only, it can be prosecuted only against those who succeed to her title. *Clifton v. Anderson*, 40 Mo. App. 616; *Boatmen's Sav. Bank v. McMenamy*, 35 Mo. App. 198. And see *Davis v. Smith*, 75 Mo. 219.

2. *Sackett v. Wilson*, 2 Blackf. (Ind.) 85; *Evans v. Lipscomb*, 28 Ga. 71; *Roe v. Miller*, 1 B. Mon. (Ky.) 227; *Com. v. Phillipsburg*, 10 Mass. 78; *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581; *King v. Jones*, 2 Ld. Raym. 1525; *Cooper v. Hunchin*, 4 East 521; *Hartley v. O'Flaherty*, 1 Moll. 5; *Evans v. Chester*, 2 M. & W. 847. See also *Parker v. Steed*, 1 Lea (Tenn.) 206.

In *Bobe v. Frowner*, 18 Ala. 89, *Chilton, J.*, said: "It is a general rule, that when a *feme sole* is sued for a debt contracted *dum sola*, and she marries pending the action, such marriage cannot be pleaded, either in bar or in abatement of the suit. The plaintiff, if he elects to do so, may proceed in the action, without regarding the marriage, and take judgment against the wife."

In *Phillips v. Stewart*, 27 Ga. 402, it was held that the marriage of a *feme sole* defendant pending the action is not a ground for a new trial on motion of the plaintiff, nor even a ground for a plea in abatement.

**Husband Not Made Party by Scire Facias.** — Where a suit is pending against a *feme sole*, and she intermarries, the suit does not abate, neither can the husband be made a party by *scire facias*, but the case proceeds to judgment and execution without noticing the husband. *Evans v. Lipscomb*, 28 Ga. 71.

**Judgment by Default.** — If a *feme sole* tenant in possession be served with declaration in ejectment, and notice, it is not error to render judgment by default against her, though she may marry before judgment. *Roe v. Miller*, 1 B. Mon. (Ky.) 227.

In *Kentucky*, during the pendency of an action against a woman to recover certain personal property or the value thereof, she married, and the marriage was suggested on the record, without either allegation or proof that any property had come to the husband by the marriage; a judgment was rendered against him as well as the wife for the full value of the property claimed. It was held that the judgment was in conflict with Ky. Rev. Stat., c. 47, art. 2, § 3, and could not therefore be sustained. *Husbands v. Bullock*, 1 Duv. (Ky.) 21.

**Judgment against Husband and Wife Jointly.** — If a woman while single executes a warrant of attorney to confess a judgment, and afterwards marries before judgment enters, it may be

5. **Service of Process.** — See article SERVICE OF PROCESS.

6. **Appearance.** — See article APPEARANCES, vol. 2, p. 669.

7. **Declaration, Bill, or Complaint** — *a.* **ALLEGING THE MARRIAGE.** — At Common Law, in an action against husband and wife, the plaintiff should aver the marriage of the defendants.<sup>1</sup> But it has been sometimes held that proof of that fact at the trial is sufficient.<sup>2</sup>

**When Allegation of Marriage Unnecessary.** — Where, by statute, the wife is liable to be sued alone as a single woman, there need be no averment of the marriage although the husband be also a defendant.<sup>3</sup>

entered against husband and wife jointly. *Eneu v. Clark*, 2 Pa. St. 234.

1. **Wife's Ante-nuptial Contract.** — In an action against husband and wife for a cause of action against the wife, which arose before marriage, the declaration must allege the marriage of the defendants. *Tanner v. White*, 15 Ala. 798; *Bohe v. Frowner*, 18 Ala. 89; *People v. Judges*, 21 Wend. (N. Y.) 20.

**Slander by Wife.** — In an action against husband and wife for a slander uttered by the wife, the complaint must allege that the defendants were husband and wife, else it will be bad on demurrer. *Paddock v. Speidel*, (Supreme Ct.) 16 N. Y. Supp. 750.

**Matter in Abatement.** — In an action against husband and wife, failure to aver that the defendants are husband and wife is matter in abatement. *Corn v. Brazelton*, 2 Swan (Tenn.) 273.

**When Defect Not Amendable.** — Where the complaint, in an action against a man and woman, charged the defendants with the receipt of usurious interest, and did not state that they were husband and wife, and the jury found a verdict against the wife alone, not rendering any verdict for or against the husband, it was held that no judgment could be entered upon the verdict; and that the plaintiff could not be permitted to amend his complaint by the proper statements alleging that the defendants were husband and wife, so that the verdict might stand, retaining the husband's name in the record as husband, but without any judgment against him. *Porter v. Mount*, 45 Barb. (N. Y.) 422. But see *Dailey v. Houston*, 58 Mo. 361.

**Sufficiency of Averment.** — An averment that the defendants, at the time of the sale and delivery of the goods, "were living together as man and wife in lawful wedlock," is a sufficient aver-

ment of their marriage. *Eskridge v. Ditmars*, 51 Ala. 245.

A declaration commencing "J. C., plaintiff, complains of M. J. and his wife S. J., formerly S. M., defendants" — in which the instrument sued on is described as having been executed "by the said S. before her intermarriage with the said M." — and which avers that "the said defendant S., and the said defendant M. since his intermarriage, have not regarded," etc., sufficiently discloses the character in which the parties are sued, and that the instrument was executed by the wife whilst sole. *Johnson v. Collins*, 17 Ala. 318.

**Put in Issue by Non-assumpsit.** — Where in assumpsit against husband and wife on a promissory note made by the wife *dum sola*, non-assumpsit is pleaded, the plaintiff must prove the marriage. *Wallace v. Jones*, 7 Blackf. (Ind.) 321.

2. Where the husband and wife were sued for an assault and battery by the wife, it was held that, although it did not appear in the declaration that the defendants were husband and wife, proof of that fact at the trial was sufficient, and a motion in arrest of judgment could not be sustained. *Phillips v. Phillips*, 7 B. Mon. (Ky.) 268.

**Petition Amended After Verdict.** — Where, in an action against husband and wife the averment of marriage was technically insufficient, but the evidence clearly showed that the defendants were married, and it did not appear that they were misled by the defective averment, it was held that the petition might be amended after verdict. *Dailey v. Houston*, 58 Mo. 361.

3. **Action Against Wife Alone.** — In an action against a married woman alone on a contract made by her, it is not

*b. IN SUITS ON WIFE'S CONTRACTS*—(1) *In General*.—In an action against the husband and wife on a contract made by the wife, the declaration should state the ground of her liability,<sup>1</sup> and allege whether the contract was made before or during coverture;<sup>2</sup> for it is a rule of the common law that the wife cannot bind herself by contract during the coverture,<sup>3</sup> and if such contract has any validity it is valid against the husband alone and should be declared on as his contract.<sup>4</sup>

necessary to allege that she is a married woman; if her coverture is available as a defense she may set it up in her answer. *Smith v. Dunning*, 61 N. Y. 249; *Van Buren v. Swan*, 4 Allen (Mass.) 380. See also *Hier v. Staples*, 51 N. Y. 136; *Frecking v. Rolland*, 53 N. Y. 422.

**On Note by Husband and Wife.**—The petition on a note made by a married woman and her husband need not aver the coverture of the wife. *City Nat. Bank v. Holden*, 14 Cinc. Wkly. L. Bul. 399.

**Ejectment Against Husband and Wife.**—Under the *Oregon Act* of October 21, 1880, where husband and wife unlawfully occupy the land of another, if they are both in possession they may be joined as defendants in an action to recover the same, as though they were unmarried; and an allegation in the complaint that they are husband and wife is immaterial and may be disregarded. *Tilton v. Barrell*, 8 Sawy. (U. S.) 412; *Barrell v. Tilton*, 119 U. S. 637.

1. The contracts of a married woman are *prima facie* void by reason of her coverture, and when she is sued upon a contract her liability must be made to appear; but if the declaration shows that the contract was made when she was a widow, or *dum sola*, her coverture at the time of the suit is no obstacle to the recovery of such judgment against her as might be rendered against any other defendant. *Travis v. Willis*, 55 Miss. 557.

**Defect Not Cured by Verdict.**—The omission to state such ground of liability is a defect not cured by verdict. *Gaylord v. Payne*, 4 Conn. 190.

**Cause of Action Against Husband Alone.**—In assumpsit against husband and wife, a declaration is demurrable which shows that the cause of action is against the husband alone. *Henry v. Hickman*, 22 Ala. 685.

**Sufficiency of Prayer for Judgment Generally.**—In an action against the hus-

band and wife for the recovery of a debt contracted by the wife before marriage, it is sufficient to pray for judgment generally. *Nash v. George*, 6 Tex. 234.

**Wife Sued by Christian Name.**—In an action against husband and wife for a debt due from the wife while sole, it was held that it was no objection to the declaration that the Christian name only of the wife was stated: *Cox v. Rynnion*, 5 Blackf. (Ind.) 176.

2. *France v. White*, 1 M. & G. 731, 39 E. C. L. 626; *Cumming v. Montgomery*, 6 Ir. C. L. 170.

**Promise After Marriage.**—If a declaration against husband and wife for a debt of the wife contracted before marriage allege a promise of the wife made after marriage to pay the debt, it is demurrable. *Morris v. Norfolk*, 1 Taunt. 212.

3. See Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

**Joint Promise by Husband and Wife.**—A declaration which shows upon its face that the action is against husband and wife, and founded upon their joint promise during the coverture, is bad upon demurrer. *Leslie v. Harlow*, 18 N. H. 518; *Tobey v. Smith*, 15 Gray (Mass.) 535; *Edwards v. Davis*, 16 Johns. (N. Y.) 281; *Morris v. Norfolk*, 1 Taunt. 212. See also *Sprague v. Daniels*, 31 Ala. 444.

**Motion in Arrest.**—A note or obligation executed by a *feme covert* creates no cause of action, and where the declaration shows this fact such declaration is bad on general demurrer, and the defect may be taken advantage of in arrest of judgment. *Sheppard v. Kindle*, 3 Humph. (Tenn.) 80.

4. In *Simon v. Scott*, 53 Cal. 74, which was an action against the husband for goods sold to the wife, the court said: "If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law

**Wife's Ante-nuptial Debts.** — Where there is a statute exempting the husband's property, except such as may have been acquired from the wife, from the wife's ante-nuptial debts, in an action on a contract made by the wife before marriage the plaintiff need not allege that the husband received any property from his wife.<sup>1</sup>

(2) *Suits to Charge Wife's Separate Property* — (a) **In General.** — As it is a general rule of the common law that a married woman cannot contract during coverture so as to render herself or her property liable, therefore it is generally held that, in an action against a married woman to charge her separate estate with a contract made by her, the plaintiff must allege the particular facts showing that she had power to make the contract,<sup>2</sup> and is

sold to defendant, and the averment should have been to that effect."

In *Schullhofer v. Metzger*, 7 Robt. (N. Y.) 576, it was held that, when a party claims to hold a husband liable for money advanced to, or for the benefit of, the wife, he should in his pleading either aver the money to have been loaned and advanced to the husband, or that it was loaned and advanced to the wife or for her benefit, at the husband's request or with his assent; or that he subsequently acquiesced; or that she was the agent of the husband in procuring the advances; or else he should allege such facts as that an implied agency from the husband to the wife may arise therefrom.

**Ratification of Wife's Contract by Husband.** — Where the contract of the wife may become obligatory by the ratification of the husband, it must be declared upon as the husband's contract without reference to the wife. *Mulford v. Young*, 6 Ohio 295.

1. *Beaumont v. Miller*, 1 Metc. (Ky.) 68; *Medley v. Tandy*, 85 Ky. 566.

**Levying Officer Must Distinguish Property.** — Under *Missouri Rev. Stat.*, § 6870, exempting the husband's property, except such as may be acquired from the wife, from all debts of the wife contracted before marriage, and section 6869 subjecting the wife's personal property to levy for such debts, the husband is properly joined with the wife in an action on a note made by her while single without an allegation in the petition that he has property subject to such debt. The levying officer must distinguish the property. *Todd v. Works*, 51 Mo. App. 267.

2. *Houston v. Williamson*, 81 Ala. 482; *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Jouch-*

*ert v. Johnson*, 108 Ind. 436; *Rodemeyer v. Rodman*, 5 Iowa 426; *Dougherty v. Sprinkle*, 88 N. Car. 300; *Morris v. Lindsley*, 45 N. J. L. 435. See also *Eckert v. Reuter*, 33 N. J. L. 266; *Vankirk v. Skillman*, 34 N. J. L. 109; *Lewis v. Perkins*, 36 N. J. L. 133.

In *Baker v. Garriss*, 108 N. Car. 218, which was an action on a promissory note executed by a married woman, the complaint alleged that the maker of the note was a married woman who died seized of certain property, but did not contain allegations showing that she was competent by statute to make the note or that her separate estate was chargeable therefor. On demurrer the complaint was held to be insufficient.

In *Strauss v. Glass*, 108 Ala. 546, it was held that, in an action against a married woman on a contract made by her during coverture, if it appears on the face of the complaint that she had no power to make the contract, she may demur to the complaint.

**Pleading Deed Executed by Married Woman.** — If in pleading a deed executed by a married woman the pleader states that it was executed by attorney, he must also state the facts which make the case one in which such mode of execution is valid, or his pleading is demurrable. *Johnston v. Taylor*, 15 Abb. Pr. (N. Y. Supreme Ct.) 339.

**Designation of Statute.** — In an action against husband and wife, seeking to charge the wife's separate estate with necessities furnished to the family, the complaint must allege under what statute the liability is claimed. *Durden v. McWilliams*, 31 Ala. 438.

**Legal Conclusions.** — An averment in a bill that a married woman executed a note and mortgage, "being at the time relieved of the disabilities of



liable thereon,<sup>1</sup> and must bring his case clearly within the terms of the statute under which the action is brought.<sup>2</sup> In some jurisdictions, however, it is held that the complaint may be framed as if against a single woman.<sup>3</sup>

coverture and made a free dealer," is not an averment of fact, but the statement of a legal conclusion. *McDonald v. Mobile L. Ins. Co.*, 56 Ala. 468.

1. *Crawford v. Feder*, 34 Fla. 397; *Black v. Rogers*, 36 Ind. 420.

**Contract Executed in Mode Prescribed.**—In a suit against husband and wife to enforce their contract to alienate their homestead, it is necessary that the petition should show that the wife executed the contract in the mode prescribed by statute. *Cross v. Everts*, 28 Tex. 523.

**Mortgage Duly Acknowledged.**—Where there was judgment, in a suit on a note and mortgage, against a husband and wife, and, on a writ of inquiry, a verdict establishing their liability, the judgment being before the court on writ of error, the allegation that the mortgage was "duly acknowledged" by the wife was held to mean that it was acknowledged in such manner as to be legally binding on her as her act and deed. *Roy v. Bremond*, 22 Tex. 626.

2. **Pennsylvania.**—In an action against a husband and wife to charge the separate estate of the wife, the plaintiff must allege and prove facts sufficient to bring the case within the act of 1848. *Mahon v. Gormley*, 24 Pa. St. 80; *Murray v. Keyes*, 35 Pa. St. 384; *Fenn v. Early*, 113 Pa. St. 264.

Where this is not done, a plea of coverture and an affidavit of defense by the wife alleging her coverture without negating all the special circumstances which, under the act, would render her liable, is sufficient to prevent judgment against her. *Mahon v. Gormley*, 24 Pa. St. 80.

**Texas.**—In order to charge the separate property of the wife, under the statute, it is necessary for the plaintiff to bring his case, by allegation and proof, clearly within the terms of the statute. *Hart. Dig.*, art. 2423. It is not sufficient to allege and prove the insolvency of the husband, and that the debt was for necessities for the family. *Brown v. Ector*, 19 Tex. 346. See also *Laird v. Thomas*, 22 Tex. 276.

**Contract by Wife for Necessaries for Support of Family.**—In an action against

husband and wife, under the *Pennsylvania* Act of 1848, to recover a debt contracted by the wife, the plaintiff must aver and prove not only that the debt was incurred for necessities for the support and maintenance of the wife's family, but that it was contracted by herself, or in her name by her authority. *Murray v. Keyes*, 35 Pa. St. 384; *Berger v. Clark*, 79 Pa. St. 340; *Gould v. McFall*, 111 Pa. St. 66; *Fell v. Brown*, 115 Pa. St. 218.

It is not sufficient that one count of the declaration charges that the article sold was "necessary," and another count that "the wife contracted the debt;" each averment is essential under the statute, and they must both appear in the same count. *Parke v. Kleeber*, 37 Pa. St. 251.

**Goods Furnished on Separate Credit.**—In an action under the Pa. Act of 1848 to recover for necessities furnished to a married woman, there need be no express averment that the goods were furnished on her separate credit, such being a reasonable inference. *Fenstermacher v. Xander*, 116 Pa. St. 41.

**In Alabama,** in an action against husband and wife seeking to charge the wife's separate estate with articles of comfort and support of the household, under Code, § 1987, the complaint must aver that the articles furnished were such as the husband would be liable for at common law, or state facts from which that inference can be drawn. *Punch v. Walke*, 34 Ala. 494. But it is not necessary to specify in the complaint the several items of which the account is composed. *Sharp v. Burns*, 35 Ala. 653.

3. **In Massachusetts,** in an action against a married woman to recover for services rendered in respect to her separate property, it is not necessary to set forth in detail the circumstances which make her liable to be sued in her own name alone. *Van Buren v. Swan*, 4 Allen (Mass.) 380. See also *Blake v. Sawin*, 10 Allen (Mass.) 340.

**In New York,** in an action upon a contract made by a married woman concerning her separate property, a complaint framed as if against a single woman is proper. If the contract sued

**Nature of Wife's Estate.** — Where it is sought to subject the property of a married woman to the payment of a debt contracted by her, the plaintiff should allege in what manner she holds the property, so that the court may judge whether the contract was one which she had power to make.<sup>1</sup> But in some cases

upon is one she is not authorized to make, the objection should be taken by answer and raised upon the trial. *Hier v. Staples*, 51 N. Y. 136; *Frecking v. Rolland*, 53 N. Y. 422; *Smith v. Dunning*, 61 N. Y. 249; *Sigel v. Johns*, 58 Barb. (N. Y.) 620; *Hanse v. Fiero*, 56 Hun (N. Y.) 463.

But in *Broome v. Taylor*, 76 N. Y. 564, reversing 9 Hun (N. Y.) 155, it was held that in an action under the N. Y. Code Civ. Pro., § 534, against husband and wife, on a bond executed by them, if the complaint shows that the female defendant is a married woman it must also contain sufficient allegations to show that the bond was against her for a purpose which would make it binding on her. See also *Baldwin v. Kimmel*, 16 Abb. Pr. (N. Y. Super. Ct.) 353.

**In South Carolina**, in an action against a married woman to recover on a note made by her, the complaint need not allege facts showing that the defendant, though a married woman, is liable on her contract. *Brice v. Miller*, 35 S. Car. 537, where the court said: "The complaint being in the ordinary form, and there being no allegation in it which would indicate that the defendant labored under any disability of any kind, it is quite clear that the facts therein stated are sufficient to constitute a cause of action. If, as a matter of fact, the defendant is a married woman, and sees fit to set up as a defense to the action her disability as such, then the burden of proof is thrown upon the plaintiff to rebut such defense by showing that the contract was of such a character as she was competent to make notwithstanding her general disability arising from coverture. But until such defense is set up, and the fact of coverture upon which it rests has been established, the plaintiff is under no obligation either to allege or prove such facts as would be necessary to meet and overcome such defense."

**1. Separate Estate — whether Statutory or Equitable.** — A bill in equity which seeks to subject property of a married woman to the payment of a debt for money loaned and goods sold her dur-

ing coverture, should disclose whether she held the property by a legal right as her separate statutory property, or by deed creating in her an equitable separate estate. If the bill fails to show by which of these tenures she holds the property, a demurrer thereto should be sustained. *Crawford v. Gamble*, 22 Fla. 487.

In *Alabama* a bill in equity to enforce a charge on a married woman's separate estate is demurrable unless it allege that the separate estate is equitable; for if it be statutory the married woman cannot bind it by contract. *Bolman v. Overall*, 80 Ala. 451.

**Character of Estate — Capacity to Charge.** — A bill which seeks to foreclose a mortgage executed by a married woman must show, with clearness and accuracy, the character of her estate, and her capacity to charge or convey the property; otherwise the complainant shows no title to relief. *Houston v. Williamson*, 81 Ala. 482.

**Condition and Amount of Estate.** — In *Texas*, if the plaintiff seeks to make a wife's property liable, upon principles of equity, he must show, by averments and proof, the condition and amount of her estate, and the value of its issues and profits, in order that the court may be informed as to the proper decree that should be made. *Haynes v. Stovall*, 23 Tex. 625.

**Instrument under Which Estate Held.** — In a suit in equity to foreclose a mortgage of lands made by a married woman, the bill should set forth the substance of the deed, or other instrument under which the estate is held, in order that the court may determine the nature of the estate, and her power over it. *Sprague v. Shields*, 61 Ala. 428.

**Property and Nature of Wife's Interest.** — A complaint seeking to charge the separate estate of a married woman with her debt is bad upon demurrer if it does not set forth the property which it is sought to reach, and the nature of her interest in it. *Sexton v. Fleet*, 6 Abb. Pr. (N. Y. C. Pl.) 8.

**Sufficient Showing of Character of Estate.** — In an action under the *Alabama*

it is held that the nature of the wife's interest need not be disclosed.<sup>1</sup>

(b) **Alleging Separate Property in Wife.**—It is generally held that, where an action is brought to charge the separate property of a married woman, the declaration or complaint should allege that she has a separate estate which is sought to be charged.<sup>2</sup> But in some states no reference need be made to such separate estate, and the wife may be declared against as if single.<sup>3</sup> And where the wife is, by statute, made personally liable for her ante-nuptial

Rev. Code, § 2376, against husband and wife on a contract for articles of comfort and support of the household, an averment in the complaint that the wife "has a separate estate, created by deed or will of H. M.," in certain lands which are particularly described, and in which it is averred that she has "an undivided interest consisting of a child's part," is sufficient to show that her estate is held under the statute, when no objection was raised to the complaint in the court below. *Starke v. Malone*, 51 Ala. 169.

1. **Real Action Against Wife.**—In *Massachusetts* it is held that the assignees of an insolvent debtor may maintain a real action against his wife without averring that she held the land to her sole and separate use. *Blake v. Sawin*, 10 Allen (Mass.) 340.

**Bill to Foreclose Trust Deed by Husband and Wife.**—A bill in chancery seeking to foreclose a trust deed made by husband and wife need not show the wife's interest in the land to be sold. The complainant is not required to set out matters of defense in his bill, or to make such a statement of facts as excludes all defenses or any particular defense, even in the case of a married woman. It is only necessary for him to show a case entitling him to relief. *Hill v. Hillman*, 6 Lea (Tenn.) 715.

2. **Alabama.**—In an action against husband and wife seeking to subject the wife's separate estate to the payment of a claim for "articles of comfort and support of the household" under the Ala. Rev. Code, § 2376, the complaint must aver the existence of a separate estate in the wife, both at the date of the contract and at the commencement of the suit, and must describe it. *Raviesies v. Stoddart*, 32 Ala. 599; *Henry v. Hickman*, 22 Ala. 685; *Childress v. Mann*, 33 Ala. 206.

**District of Columbia.**—In a suit instituted under the Married Woman's Act of the District of Columbia, against a

married woman, the declaration or complaint should show that she is a married woman having a separate estate, and that she has, by reason of some contract having relation to it, become liable to satisfy a judgment against her out of that estate. The judgment against her is not a personal one purely, but one to be satisfied out of her separate estate, and the record should show this; otherwise the judgment is void. *Offutt v. Dangler*, 5 Mackey (D. C.) 313.

**Indiana.**—In a suit to charge the separate estate of a married woman with a contract by her on a promise to pay the same out of her separate estate, the complaint should allege that she was, at the day of the alleged promise or contract, the owner of a separate estate. *Thomas v. Passage*, 54 Ind. 106.

**Louisiana.**—To enable one to sue a married woman personally or charge her separate estate, he must allege and show that she is separate in property by marriage contract or judgment. *Dubose v. Hall*, 7 La. Ann. 568; *Robson v. Shelton*, 14 La. Ann. 723; *Surls v. Hienn*, 20 La. Ann. 229.

**Missouri.**—In an action to charge the separate property of a married woman, the petition should allege that the wife had a separate estate at the time she contracted the debt, and should describe such estate. *Kern v. Pfaff*, 44 Mo. App. 29; *Gabriel v. Mulen*, 30 Mo. App. 464.

**North Carolina.**—The complaint in an action upon the contract of a married woman must allege that she is possessed of a separate estate. *Dougherty v. Sprinkle*, 88 N. Car. 300.

3. **New York.**—In an action against a married woman on a contract made by her, the complaint need not state that she has separate property. It is sufficient if framed as though the defendant were a single woman, and if her coverture is available in defense she may set it up in her answer. *Smith*

debts, she may be declared against on such debts without any averment that she has a separate estate.<sup>1</sup>

**Time of Holding Separate Property.**—In cases where an averment of separate property is necessary, the declaration or complaint must allege that the wife held such property at the time the contract was made.<sup>2</sup> And it seems there should also be an averment that she was still in possession of such property at the time of bringing the suit.<sup>3</sup>

*v. Dunning*, 61 N. Y. 249; *Hier v. Staples*, 51 N. Y. 136; *Frecking v. Roland*, 53 N. Y. 422.

In *Sigel v. Johns*, 58 Barb. (N. Y.) 620, the court said: "This statute, neither by its language nor its fair import, requires the complaint to show that the defendant has separate property; for no such fact could be required to be alleged in an action upon a similar covenant against a single woman. And in the cases provided for, the action may be brought in the same manner as though it was against a sole and unmarried female; and that would not be done if the allegation were required that the defendant had separate property. The effect of the statute is, that in the actions provided for the defendant may, though married, be sued and prosecuted precisely as if she were a single female."

In *Hanse v. Fiero*, 56 Hun (N. Y.) 463, Mayham, J., said: "It was never necessary, in order to recover against a married woman, to allege in the complaint the facts which, if controverted, would have to be proved to charge her. It is enough to complain generally upon the contract or obligation. She may be sued and declared against as a *feme sole*, and her coverture is a matter of defense only. \* \* \* It was wholly unnecessary to allude in the complaint in any way to her coverture or her separate estate."

**Ohio.**—Under the present statute, a petition on a note made by a married woman and her husband need not aver the coverture of the wife, or that she has a separate estate, or made the contract with reference thereto; but the note may be declared on precisely as if she were unmarried, and a personal judgment may be rendered against her. *City Nat. Bank v. Holden*, 14 Cinc. Wkly. L. Bul. 399.

It was formerly held in Ohio that, in order to obtain a judgment against a married woman, the petition must aver that she had separate property and in-

tended to charge it. *Roskoph v. Coates*, 1 Clev. (Ohio) 60; *Wilcox v. Zimmerman*, 1 Clev. (Ohio) 75; *Kurtz v. Murray*, 2 Cinc. Wkly. L. Bul. 122.

**1. Alabama.**—Under the provisions of the Ala. Code, § 1981, the wife is liable for a debt contracted by her before marriage, as if she were still unmarried; and in declaring against her on such debt it is not necessary to aver that she has a separate estate. *Zachary v. Cadenhead*, 40 Ala. 236, where the court said: "The case of *Ravisies v. Stoddart*, 32 Ala. 599, and other cases in harmony with it, are not in conflict with the doctrines of this opinion. Those cases are founded on section 1987 of the code, and are expressly put upon the ground that, for the contracts specified in that section, 'the separate estate of the wife is liable, to be enforced by action at law' against the husband and wife jointly, or against him alone. The rules, therefore, laid down in those cases, are not applicable to this."

**California.**—A judgment was rendered against a married woman for a debt contracted by her while single, which judgment was affirmed on appeal. In a suit against her by a surety on her appeal bond, it was held that the complaint need not set out any separate property of the defendant, because the wife was liable *in personam* before coverture, and by the California statute continued so after marriage. *Bostic v. Love*, 16 Cal. 70.

**2. Ravisies v. Stoddart**, 32 Ala. 599; *Thomas v. Passage*, 54 Ind. 106; *Gabriel v. Mullen*, 30 Mo. App. 464; *Kern v. Pfaff*, 44 Mo. App. 29.

**3. Wilcox v. Zimmerman**, 1 Clev. (Ohio) 75; *Smith v. Frame*, 3 Ohio Cir. Ct. Rep. 587.

In *Ravisies v. Stoddart*, 32 Ala. 599, it is held that in an action against husband and wife seeking to subject the wife's separate estate to the payment of a claim for "articles of comfort and support of the household," under

(c) **Describing Separate Property.**—Where suit is brought to charge the separate estate of a married woman it is generally held that the declaration or complaint must describe such property.<sup>1</sup>

(d) **Alleging Intent to Charge.**—In an action to reach a married woman's separate estate on a contract made by her, the plaintiff should allege that she intended to charge her separate estate.<sup>2</sup>

Ala. Code, § 1987, the complaint must aver the existence of a separate estate in the wife, both at the date of the contract and at the commencement of the suit. But see *Duncan v. Robertson*, 58 Miss. 390, wherein it is held that if the declaration aver the existence of conditions enabling the wife validly to make the contract sued upon, as a *feme covert*, it is not necessary that it should also aver that at the time of the institution of the action she continued to be the owner of separate property liable to the satisfaction of the demand.

**Not Ground for Reversal.**—Under *Ohio* Rev. Stat., § 5115, there will be no reversal for failure to allege that the wife possessed separate property at the time of bringing the action. *Smith v. Frame*, 3 Ohio Cir. Ct. Rep. 587.

1. *Ravisies v. Stoddart*, 32 Ala. 599; *Thomas v. Passage*, 54 Ind. 106; *Gabriel v. Mullen*, 30 Mo. App. 464; *Kern v. Pfaff*, 44 Mo. App. 29. See also *Sexton v. Fleet*, 6 Abb. Pr. (N. Y. C. Pl.) 8.

In *Ohio*, however, it is sufficient in such action if the petition aver that the wife has separate property, without specifically describing it. *Hinman v. Williams*, 4 Cinc. Wkly. L. Bul. 1079; *Kurtz v. Murray*, 2 Cinc. Wkly. Bul. 122.

2. *Roskoph v. Coates*, 1 Clev. (Ohio) 60; *Arnold v. Ringold*, 16 How. Pr. (N. Y. Supreme Ct.) 158; *Palen v. Lent*, 5 Bosw. (N. Y.) 713.

In *Shannon v. Bartholomew*, 53 Ind. 54, it was held that in an action to subject the separate real estate of a married woman for a debt contracted for improvements thereon, the complaint must allege that the defendant intended to or did charge, or agree to charge, the indebtedness against her separate estate. The fact that she caused necessary and proper improvements to be made on her real estate does not raise the inference that she intended to create a charge upon it.

**Sufficient Averment of Intent.**—In an action against husband and wife to subject the separate property of the wife to the payment of a note made by her, the

complaint alleged that the note was given by the wife for the express purpose of charging, and with the intent to charge, her separate estate with its payment. The court held that on a demurrer to the complaint this averment must be deemed equivalent to an averment that the debt was contracted upon the credit of her separate estate, and with the express intent of charging that estate with its payment. *Francis v. Ross*, 17 How. Pr. (N. Y. C. Pl.) 561.

**Insufficient Averment of Intent.**—In an action to charge the separate real estate of a married woman for materials furnished and work done in the erection of a dwelling house thereon, the complaint alleged, as to the making of the contract, that the wife had constituted her husband her agent to purchase materials and employ workmen to build said house; that the contract was made with the plaintiff by the husband as such agent; and that when the plaintiff furnished said materials and performed said work he did not know that said real estate was the property of the wife and that the husband was acting as her agent, but he furnished said materials and did said work at the request of the husband, and charged the same to him, and afterwards learned that she was the owner and that he was acting as her agent. It was held that the complaint did not show that the wife, either in person or by agent, so contracted with reference to her separate estate as to make the same liable for the alleged indebtedness. *Crickmore v. Breckenridge*, 51 Ind. 294.

**Agreement in Writing to Charge Separate Estate.**—Where the wife agrees in writing to charge her separate property for goods sold to her and her husband, such written agreement need not be attached to the petition. *Fisher v. McMahon*, 3 Cinc. Wkly. L. Bul. 52.

**Denial of Intent to Charge.**—In an action to charge the separate estate of a married woman with a promissory note signed by her, the petition alleged that she intended and agreed to charge

(6) **Alleging Benefit to Separate Property.**—Where the statute provides that a married woman may contract for the betterment of her separate property, the declaration or complaint in an action on such contract should follow the terms of the statute and aver that it was made for the benefit of her separate estate.<sup>1</sup>

(3) **Suits Against Wife as Sole Trader.**—In suing a married woman on a contract made by her as a sole trader the declaration or complaint should allege the facts necessary to show that she is a sole trader under the statute,<sup>2</sup> and to establish her

her separate estate with the payment of the said note. In her answer she denied this allegation without setting forth the facts surrounding the transaction showing that she did not intend to charge her separate estate. On demurrer the answer was held sufficient. *Harris v. Wilson*, 40 Ohio St. 300.

1. **Indiana.**—In an action to enforce a mechanic's lien for improvements put upon the wife's separate realty, the complaint must aver that the improvements were necessary and proper for a full and complete enjoyment by the wife of the real estate in question. *Lindley v. Cross*, 31 Ind. 106; *Johnson v. Tutewiler*, 35 Ind. 353.

**Sufficiency of Complaint.**—In an action against husband and wife to enforce a mechanic's lien for improvements upon the wife's realty, the complaint alleged that the woman was the wife of the other defendant; that she owned the land; that the materials were furnished and the work done at her special request; and that the same were necessary for the full enjoyment of the property by her. It was held that after verdict for the plaintiff the court would infer that it was proved on the trial that her contract was conscionable, that it related to the betterment of the land, and that it was reasonably calculated to promote that end. *Sharpe v. Clifford*, 44 Ind. 346.

**Ohio.**—In order to obtain judgment against the wife on a note made by the husband and wife, the petition must aver that the note was given to benefit her separate estate; and a judgment against her, in the absence of such averment, will be reversed, it being presumed in the absence of a bill of exceptions that the evidence did not extend beyond the allegations of the petition. *Becroft v. Dossman*, 2 Cinc. Wkly. L. Bul. 110.

**Oregon.**—To bind the separate estate of a married woman for the payment

of a judgment on a contract made by her, the record should show that the debt was contracted either for the benefit of her separate estate or for her own benefit on the credit of her separate estate. *Kennard v. Sax*, 3 Oregon 263.

**Pennsylvania.**—In an action against husband and wife to charge the separate estate of the wife with commissions for selling real estate belonging to her, the necessity for the sale must be averred. It is not sufficient to allege that it was for her use and at her instance and request; for it should appear that the debt was contracted for some act necessary for the use, enjoyment, or preservation of her property, or that its condition or value was such as to make a sale thereof necessary or even advisable for her advantage or profit. *Fenn v. Early*, 113 Pa. St. 264.

**Texas.**—A petition on a joint note against a husband and wife, which does not aver that the debt was contracted for the benefit of the wife's separate property, or any other fact that would authorize a judgment against her, presents no cause of action against the wife, and a judgment by default against her will be reversed. *Trimble v. Miller*, 24 Tex. 214.

2. **Insufficient Averment.**—A declaration that the plaintiffs sue the defendant, "a married woman conducting a mercantile business as a free dealer," and not alleging the essential facts to show that she is such a free dealer, is not a sufficient basis for a judgment at law against a married woman. *Crawford v. Tiedeman*, 35 Fla. 27.

In *Crawford v. Feder*, 34 Fla. 397, a declaration alleged that the plaintiffs sued the defendant, a married woman conducting a mercantile business as a free dealer under the statutes of Florida, using a firm name, for that she accepted a draft drawn on her at a date prior to the filing of the declaration;

liability in that capacity.<sup>1</sup>

(4) *Joinder of Causes*. — A cause of action against the husband alone cannot be joined with a cause of action against the husband and wife jointly.<sup>2</sup> But when causes of action accrue in the same right, and the same judgment may be given on both, they may be joined.<sup>3</sup>

but failed to aver that she had been made a free dealer under the statute, or that she in fact was a free dealer thereunder when the contract of acceptance was made by her. It was held that the declaration was so fatally defective as not to be cured by verdict or judgment.

**1. Insufficient Showing of Liability.** — Where husband and wife were sued for rent claimed on a lease made by the plaintiff to the wife — the plaintiff and the wife being tenants in common of the property — it was held that the wife could be liable only as a sole trader under the statute, and that the complaint must aver facts requisite to establish her liability in that character, and the allegation that she "was doing business as a *feme sole*, with the consent of her husband," was insufficient. *Aiken v. Davis*, 17 Cal. 119.

**Sufficient Averment.** — An averment in the complaint that the defendant, a married woman who carried on a separate business, represented at the time of making the contract that it was for the uses of such business, is sufficient upon demurrer. If the contract was not in fact for the use of such business, it must be alleged by way of defense. *Coster v. Isaacs*, 16 Abb. Pr. (N. Y. Super. Ct.) 328.

**Presumption of Liability.** — Since the *New York Acts of 1860 and 1862*, where a married woman is sued upon a business transaction the presumption is that she contracted on her own account with reference to her own business, and if such be not the fact she must make it apparent if she desires to avoid the liability. *Hudson v. Huyler*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 288.

In *Melcher v. Kuhland*, 22 Cal. 522, the court said: "The fact that she is a sole trader, and that she executed the note, is sufficient to raise the presumption, if any presumption is necessary, that the debt was contracted on account of her business as a sole trader."

**Admission by Pleading to Merits.** — Where a married woman is sued as a sole trader, by pleading to the merits

she admits her liability to be sued in that character. *Blythwood v. Everingham*, 3 Rich. L. (S. Car.) 285.

**2.** *May v. Smith*, 48 Ala. 483; *May v. House*, 2 Chit. Rep. 697, 18 E. C. L. 461; *Edwards v. Davis*, 16 Johns. (N. Y.) 281.

In *Palen v. Lent*, 5 Bosw. (N. Y.) 713, it was held that a cause of action against a husband, entitling the plaintiff to recover money from him, cannot be joined with a claim to charge the separate estate of the wife with the payment of the amount sought to be recovered.

In *Tobin v. Connery*, 13 Ind. 65, which was an action against husband and wife to recover rent for premises occupied a part of the time by the woman while single, and after marriage by husband and wife jointly, it was held that there was a misjoinder of causes; for the period when the wife occupied alone the action should have been against the husband and wife, and for the period when they occupied jointly the action should have been against the husband alone.

**General Demurrer for Misjoinder.** — Where a plaintiff in a single suit joined counts for ante-nuptial contracts of the wife, and for promises by the husband during marriage, it was held that advantage might be taken of the misjoinder of causes on general demurrer. *May v. House*, 2 Chit. Rep. 697, 18 E. C. L. 461.

**General Judgment for Plaintiff Erroneous.** — If a count on a promise by husband and wife be joined with a count on a promise by the wife *dum sola*, and judgment is rendered generally for the plaintiff, it is error. *Edwards v. Davis*, 16 Johns. (N. Y.) 281.

**3.** In *Eskridge v. Ditmars*, 51 Ala. 245, it was held that, in an action against husband and wife, the complaint is not demurrable for a misjoinder of counts because it unites a count on a bill of exchange drawn by the defendants, not describing them as husband and wife, with a count for articles of comfort and support of the

c. IN SUITS FOR WIFE'S TORTS. — For a tort committed by the wife in the husband's presence, or at his instigation, the husband only is liable,<sup>1</sup> and the tort should be so declared on.<sup>2</sup> If the tort was committed by the wife alone, that fact should be stated.<sup>3</sup>

8. **Plea or Answer** — a. HOW WIFE DEFENDS — 1) *At Common Law*. — It is a rule of the common law that in an action against husband and wife they must plead jointly to the declaration.<sup>4</sup>

household, for which it seeks to charge the wife's statutory separate estate.

**Joinder of Common and Special Counts.**

— Where, in an action against husband and wife, two common counts were joined with a special count, to charge the wife's separate property, it was held that the joinder was proper. The wife might raise any question as to her personal liability on the first two counts by pleading her coverture, or, if the fact of coverture appeared on the face of the complaint, by demurrer. *Jordan v. Smith*, 83 Ala. 299.

**Action Against Wife Alone.** — A count against a married woman on a contract for necessary repairs to her separate estate, averring that she was authorized to contract therefor by her husband, may be joined with a count averring that she requested the work to be done. *Lippincott v. Hopkins*, 57 Pa. St. 328.

1. As to the husband's liability for the wife's torts, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

2. **Conversion by Husband and Wife.** — In an action against husband and wife for a joint conversion, the declaration must aver that the conversion was to the husband's use. An averment that the conversion was to "their" own use is bad on demurrer. *Tobey v. Smith*, 15 Gray (Mass.) 535; *Estill v. Fort*, 2 Dana (Ky.) 238. But it is sufficient after verdict. *Keyworth v. Hill*, 3 B. & Ald. 685, 5 E. C. L. 422.

**Joinder of Counts.** — A count in trover charging a conversion by husband and wife jointly to the use of the husband may be joined with one charging a conversion by the wife alone. *Estill v. Fort*, 2 Dana (Ky.) 238.

**In Replevin Against Husband and Wife,** if the declaration avers that both defendants took and detained the property it will be supported by proof that the wife took and detained it; and so, if the declaration alleges that the wife

took and detained the property, a judgment may be rendered thereon against both the wife and husband, both being sued. *Corn v. Brazelton*, 2 Swan (Tenn.) 273.

**Averment of Tort Committed in Husband's Presence.** — Where the husband is sued alone for a tort committed by the wife, the complaint states a *prima facie* cause of action against him alone if it alleges that the tort was committed in his presence, without stating that it was done at his instigation; but this presumption may be rebutted by proof. *Kosminsky v. Goldberg*, 44 Ark. 401.

**Defense of Marital Coercion.** — If, in the commission of the tort, the wife acted under marital coercion, and such fact does not appear on the face of the petition, her defense in that respect must be made by answer. *Clark v. Bayer*, 32 Ohio St. 299.

**Joint Action for Slander.** — Since the Vermont Acts of 1884, No. 140, where an action is brought against husband and wife for slanderous words spoken by the wife, the declaration must allege that the words were spoken by the authority and direction of the husband, else it is demurrable for not showing a reason for joining the husband. *Story v. Downey*, 62 Vt. 243.

3. *McKeowen v. Johnson*, 1 McCord L. (S. Car.) 578.

4. 1 Chit. Plead. (16th Am. ed.) 592. In *Templeton v. Clary*, 1 Blackf. (Ind.) 486, which was a suit against husband and wife for slanderous words charged in the declaration to have been spoken by the wife, the husband alone filed a plea, and issue being joined thereon a verdict and judgment were rendered against husband and wife. It was held that they could not sever in pleading, and that the plea by the husband alone was bad.

**In Illinois**, under the Act of 1861, for the protection of married women in their separate property, the wife has



(2) *In Equity*.—In an equity suit against husband and wife they must generally answer jointly,<sup>1</sup> and the wife cannot put in a separate answer without leave of the court. See article ANSWERS IN EQUITY PLEADING, vol. 1, p. 885.

(3) *Under the Code*.—In a suit under the code against the husband and wife jointly, the husband should ordinarily appear and answer for both.<sup>2</sup> But where the wife has an interest separate from that of the husband she may put in a separate answer<sup>3</sup> or demurrer.<sup>4</sup>

the right to plead separately from her husband when sued with him. *Schmidt v. Postel*, 63 Ill. 58.

1. *Pidcock v. Mellick*, (N. J. 1887) 7 Atl. Rep. 880; *Comley v. Hendricks*, 8 Blackf. (Ind.) 189.

**Binding Effect on Wife.**—Where the husband and wife join in an answer as co-defendants it is considered as the defense of the husband alone, and will not affect a future claim by the wife in respect of any separate interest she may have in the suit. *Bird v. Davis*, 14 N. J. Eq. 469. But where the suit against them respects the separate estate of the wife, and she unites with the husband in signing the answer which contains admissions of the causes of action, on appeal the wife will be held bound by such admissions, although the husband alone swore to the answer. *Dyett v. North American Coal Co.*, 20 Wend. (N. Y.) 570.

**Verification by Both.**—A joint answer of the husband and wife must be sworn to by both, unless the complainant consents to receive such answer upon the oath of the husband only. *New York Chemical Co. v. Flowers*, 6 Paige (N. Y.) 654. But on appeal it is too late for the wife to object that she did not swear to the answer. *Dyett v. North American Coal Co.*, 20 Wend. (N. Y.) 570.

**Where Wife Is an Infant.**—Where a suit in equity is brought against husband and wife to charge the separate property of the wife with a debt contracted by her before marriage, if there are no special circumstances requiring the wife to be separately defended it is not necessary to appoint a guardian *ad litem* to defend her; but the husband being in equity the trustee of her property can properly make defense for both. *Coles v. Hurt*, 75 Va. 380.

**2. Duty of Husband to Put in Joint Answer.**—In an action relating to real estate, against husband and wife, where process is served only on the husband, he is bound, except where the estate is

the separate property of the wife, to enter a joint appearance and put in a joint answer for himself and wife. *Eckerson v. Vollmer*, 11 How. Pr. (N. Y. Supreme Ct.) 42.

Where husband and wife are sued together on their joint obligation, it is the duty of the husband to defend for both, and to set up the wife's disability in a proper case; and if he fails to do so the wife cannot have the judgment against her set aside on the ground of her incompetency to contract. *Vick v. Pope*, 81 N. Car. 22.

**Separate Answer Only by Leave of Court.**

—In an action to foreclose a mortgage executed by husband and wife upon the wife's separate estate, it is irregular for the wife to answer alone without the leave of the court, as the husband, until the contrary appears, is presumed to be the proper person to guard the interests of the wife in all cases; and such separate answer will be stricken out on motion of the plaintiff. *Wolf v. Banning*, 3 Minn. 202.

**Verification of Joint Answer.**—In an action against husband and wife where the wife's interest is separate and distinct from the husband's, a joint answer must be verified by both. *Reed v. Butler*, 2 Hilt. (N. Y.) 589; *Young v. Seely*, 12 How. Pr. (N. Y. Supreme Ct.) 395.

**3. Respecting Wife's Separate Estate.**—A married woman may put in a separate answer, without leave of court, in an action respecting property which she claims as her separate estate. *Harley v. Ritter*, 9 Abb. Pr. (N. Y. C. Pl.) 400.

**In California**, where the husband and wife are sued together, the wife may "defend for her own right." This can be done as well when she is sued jointly with her husband as when the trial is separate; her defense, if a special one, can come in in either case. *Deuprez v. Deuprez*, 5 Cal. 387.

**4. Respecting Wife's Separate Estate.**—Where suit is brought against hus-

*b. COVERTURE AS A DEFENSE* — (1) *Who May Set Up*. — Coverture as a personal defense to an action against a married woman is available only to her and to such others as may have derived from her some claim or right to the property in question.<sup>1</sup>

(2) *When Set Up*. — In those states where the doctrine prevails that an unauthorized judgment against a married woman is not void, but only voidable,<sup>2</sup> if she wishes to avail herself of her coverture as a defense she must set it up at the trial,<sup>3</sup> and, failing to do so, she cannot afterwards take advantage of it.<sup>4</sup>

band and wife in respect to the wife's separate estate, she may demur separately. *Arnold v. Ringold*, 16 How. Pr. (N. Y. Supreme Ct.) 159.

**Waiver of Irregularity.** — In *Francis v. Ross*, 17 How. Pr. (N. Y. C. Pl.) 561, husband and wife demurred separately to the complaint. The court said: "Under ordinary circumstances it would not be allowed, as it is a general rule, only to be departed from in special cases and upon good cause shown, that in an action against husband and wife the husband must procure the joint answer of himself and wife to be put in. But as their separate answers cannot be disregarded, and can only be stricken out upon motion to the court for the purpose, the plaintiffs here, I suppose, must be considered as waiving the irregularity by noticing the demurrer for argument, and they are therefore to be viewed in the same aspect as if an order allowing the defendants to answer or demur separately had been regularly obtained."

1. *Newhart v. Peters*, 80 N. Car. 166.

In *Johnson v. Jouchert*, 124 Ind. 105, the court said: "The plea of coverture is so far the personal privilege of a married woman, or of those who are privies in blood, or in representation with her, that before any third person can plead it in her behalf it must affirmatively appear that it is made for her benefit and with her consent, or that in equity and good conscience the person setting up the defense should be permitted to do so in order to protect a consideration actually paid her without notice of the invalid incumbrance, or with the mutual intention and agreement that he should be permitted to set up its invalidity."

**In Collateral Proceedings.** — Coverture is a personal defense, and is not available to third persons in a collateral proceeding. *Bennett v. Mattingly*, 110 Ind. 197.

**Parties in Privy of Estate.** — The defense of coverture is available to those in privy with the wife. Therefore, heirs may plead the coverture of their mother. *Ellis v. Baker*, 116 Ind. 408.

The executor of a married woman may plead the coverture of the testatrix in actions brought to charge her separate estate. *Baker v. Garriss*, 108 N. Car. 218.

**To Be Pleaded in Proper Person.** — At common law a married woman can only plead her coverture in proper person. She is incompetent to appoint an attorney. *Phillips v. Burr*, 4 Duer (N. Y.) 113.

2. There is an irreconcilable conflict in the decisions regarding the effect of an unauthorized personal judgment against a married woman. Of course, where it is held that such a judgment is absolutely void, coverture is always available as a defense, and the cases cited in this section do not apply. See *infra*, IV. 9. *b. Effect of Judgment Against Wife*.

3. *Work v. Cowhick*, 81 Ill. 317; *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300; *Wagner v. Ewing*, 44 Ind. 441; *Landers v. Douglas*, 46 Ind. 522; *Long v. Dixon*, 55 Ind. 352; *Von Schrader v. Taylor*, 7 Mo. App. 361; *Westervelt v. Ackley*, 62 N. Y. 505; *Burnett v. Nicholson*, 86 N. Car. 99; *Vick v. Pope*, 81 N. Car. 22; *Neville v. Pope*, 95 N. Car. 346; *Phelps v. Brackett*, 24 Tex. 236; *Caldwell v. Brown*, 43 Tex. 216.

4. **On Appeal.** — If a married woman wishes to rely upon her coverture as a defense she must set it up in her answer at the trial; it is not available on appeal. *Westervelt v. Ackley*, 62 N. Y. 505.

**On Petition for Writ of Error.** — Where suit is brought against a married woman who appears and answers without pleading her coverture, and her coverture neither appears in the

(3) *How Set Up* — Where Wife Is Not Liable. — Where the wife is sued upon an obligation which cannot be enforced against her, if the defect appear upon the face of the pleadings she may demur,<sup>1</sup> or she may plead her coverture in bar<sup>2</sup> or give it in evidence under the general issue.<sup>3</sup>

When Wife Is Liable. — When the wife is really liable, but the suit is improperly brought against her, she should plead her coverture in abatement.<sup>4</sup>

In Equity the wife cannot take advantage of her coverture by a plea in abatement.<sup>5</sup>

(4) *Necessary Allegations* — (a) In Suits on Contracts. — As stated heretofore, it is the general doctrine that in declaring against a married woman on a contract the plaintiff must allege all the facts necessary to show her liability as such.<sup>6</sup> Where this rule prevails, if the wife's liability is not disclosed by the declaration or complaint, a mere plea of coverture *prima facie* sets up a defense,<sup>7</sup> and the plaintiff must reply the facts necessary to

pleadings nor proof, she cannot take advantage of the objection for the first time on a petition for a writ of error. *Caldwell v. Brown*, 43 Tex. 216.

Motion for New Trial. — The objection that the defendant, at the time of making the contract sued on, was a married woman, comes too late on a motion for a new trial. *Work v. Cowhick*, 81 Ill. 317.

Collateral Attack. — If the fact of the wife's coverture does not appear on the record, and she fails to set up the defense at the trial, it is generally held that the judgment is binding on her and cannot be collaterally attacked. See *infra*, IV. 9. *b. Effect of Judgment Against Wife.*

Where the Coverture Appears on the Face of the Complaint a personal judgment rendered against a married woman is open to review. *Emmett v. Yandes*, 60 Ind. 548; *Green v. Ballard*, 116 N. Car. 144; *Rubel v. Bushnell*, 91 Ky. 251. See also *Hinsey v. Feeley*, 62 Ind. 85.

1. *Leslie v. Harlow*, 18 N. H. 518.

2. *Streeter v. Streeter*, 43 Ill. 155; *Kennard v. Sax*, 3 Oregon 263; 1 Chit. Plead. (16th Am. ed.) 68.

In Bar, Not in Abatement. — In an action against a married woman under the *New Jersey* Act of March 24, 1862, which allows a married woman to contract for the benefit of her separate estate, if the declaration fails to aver the existence of the particular facts which by the statute removed the disability of the wife to contract, the defendant must plead her coverture in bar and not

in abatement. *Morris v. Lindsley*, 45 N. J. L. 435.

Signature in Person. — A plea of coverture by a female defendant, whether in bar or in abatement, should be signed by her in person and not by attorney. *Keddeslin v. Meyer*, 2 Miles (Pa.) 295.

3. *Streeter v. Streeter*, 43 Ill. 155; *Painter v. Weatherford*, 1 Greene (Iowa) 97; 1 Chit. Plead. (16th Am. ed.) 68.

4. *Ante-nuptial Contract*. — Where a married woman is sued alone upon a contract made by her before marriage, she should plead her coverture in abatement. *Kennard v. Sax*, 3 Oregon 263; *Sheppard v. Kindle*, 3 Humph. (Tenn.) 80. See also *Powers v. Totten*, 42 N. J. L. 442.

Too Late After Plea in Bar. — Where the wife was improperly joined as a defendant the defendants pleaded the general issue, and, after a demurrer thereto had been sustained, the wife pleaded her coverture in abatement. It was held that the plea in abatement came too late after the defendants had pleaded in bar, and must be stricken out. *Thomas v. Lowy*, 60 Ill. 512.

5. *Gardner v. Moore*, 2 Edw. Ch. (N. Y.) 313, in which case, a judgment having been obtained against the wife as a *feme sole*, and a judgment creditor's bill filed against her alone, a plea in abatement alleging her coverture was overruled with costs.

6. See *supra*, IV. 7. *b. In Suits on Wife's Contracts.*

7. *Cupp v. Campbell*, 103 Ind. 213; *Arnold v. Engleman*, 103 Ind. 512;

show her liability notwithstanding her coverture.<sup>1</sup> But it is the tendency in modern practice to declare against a married woman as if single,<sup>2</sup> and where the declaration or complaint is so framed, if the wife relies upon her coverture as a defense she must show that the case is one in which a married woman is not liable to be sued.<sup>3</sup>

*Murray v. Keyes*, 35 Pa. St. 384; *Scudder v. Gori*, 3 Robt. (N. Y.) 661, 18 Abb. Pr. (N. Y.) 223.

In *Tracy v. Keith*, 11 Allen (Mass.) 214, Hoar, J., said: "By the common law a married woman is generally incapable of making a valid contract. The recent statutes of the commonwealth have given her a special, limited power of binding herself by her contracts, under certain circumstances. Unless these circumstances are shown to exist she has no contracting power. The plea of coverture, generally, is therefore a sufficient defense to an action of contract against her, and it is not necessary for her to negative in pleading or proof all possible exceptions."

**Affidavit of Defense.**—In an action against a married woman on a promissory note it is sufficient, in an affidavit of defense, to allege the coverture, and that the note was not given for necessities. *Imhoff v. Brown*, 30 Pa. St. 504.

**In Equity.**—Where a married woman was made a defendant in equity without the husband being joined, it was held that a plea setting up her coverture need not show that this was not a case in which a married woman could be sued alone. *Parker v. Parker*, Walk. (Mich.) 457.

1. *Murray v. Keyes*, 35 Pa. St. 384, wherein it is held that, in an action to charge the separate estate of the wife, if the declaration does not show by averment that the debt is one for which the wife is liable by statute, the plea of coverture is a good defense for the wife. If the plaintiff wishes to avoid its effect he must set forth in a replication the special circumstances which make the wife liable, notwithstanding her coverture; or amend his declaration so as to set forth these circumstances. See also *Tracy v. Keith*, 11 Allen (Mass.) 214.

**Power to Make Contract.**—In an action against a married woman on a contract made by her after marriage, if she pleads her coverture thereto the plaintiff must reply the facts which show that the contract declared on is

one which the married woman had power to execute. *Cupp v. Campbell*, 103 Ind. 213; *Arnold v. Engleman*, 103 Ind. 512.

**Benefit of Separate Estate.**—An answer to a complaint upon a promissory note, that the maker is a married woman, is sufficient as a confession and avoidance, and the plaintiff may be compelled to reply to such answer, showing the consideration, and that the note was for the benefit of her estate. *Scudder v. Gori*, 18 Abb. Pr. (N. Y. Super. Ct.) 223.

It is the present doctrine in *New York*, however, that a married woman may be declared against as if single. See *supra*, IV. 7. b. (1) *In General*. And therefore she should, in such case, show in her plea of coverture that she is not liable to be sued. *Brand v. Hammond*, 65 How. Pr. (N. Y. Supreme Ct.) 264; *Ferris v. Holmes*, 8 Daly (N. Y.) 217. See also *Frecking v. Rolland*, 53 N. Y. 422.

**Sufficient Reply.**—In an action against husband and wife to recover the amount due on three promissory notes alleged to have been executed by the defendants, the complaint alleged the necessary assignment for a valuable consideration before their maturity. The wife answered that she was a married woman at the time she executed the notes, and that she received no part of the consideration upon which the notes were given, but signed them merely as surety for her husband. The plaintiff replied that the consideration of the notes was certain personal property purchased by the wife for use in her own separate business. This reply was held sufficient on demurrer, although it was not averred therein that the personal property alleged to have been purchased by her was delivered to or received by her. *Chandler v. Spencer*, 109 Ind. 553.

2. See *supra*, IV. 7. b. *In Suits on Wife's Contracts*.

3. **Mere Plea of Coverture Insufficient.**—In an action against a married woman on a promissory note, executed during coverture, an answer merely setting

(b) **In Actions for Torts.**—In pleading coverture as a defense to an action of tort against husband and wife, the wife must also allege that she acted under the husband's coercion.<sup>1</sup>

**9. Judgment**—*a. KIND OF JUDGMENT*—(1) *At Common Law*—**General Rule.**—By the rules of the common law a married woman is incapable of making a contract that will bind her personally; therefore, in the absence of a statute authorizing it, no personal judgment or decree can be rendered against her in an action founded on such contract.<sup>2</sup>

up her coverture is not sufficient; she must not only aver in her answer that she was a married woman, but that the note was not made in or about the carrying on of any trade or business by her. *Ferris v. Holmes*, 8 Daly (N. Y.) 217. See also *Frecking v. Roland*, 53 N. Y. 422.

**Contract Not Enforceable.**—Coverture as an affirmative defense, and all matters necessary to sustain it, must be pleaded. Where the wife interposes coverture as a defense, in an action on a contract made by her, she must show that the case is one in which a married woman's contract cannot be enforced. *Brand v. Hammond*, 65 How. Pr. (N. Y. Supreme Ct.) 264; *Vansyckel v. Woolverton*, 56 N. J. L. 8. See also *Hinkson v. Williams*, 41 N. J. L. 35.

In *Vansyckel v. Woolverton*, 56 N. J. L. 8, the court said: "Most of the contracts made by a married woman can be legally enforced, and consequently there can be no inference that the particular contract in suit is beyond her competency." See also *Hinkson v. Williams*, 41 N. J. L. 35.

**Presumption of Power to Contract.**—Where, by statute, all of the property of a married woman is made her separate property and the husband is absolved from liability on her contracts, she being required to sue and be sued thereon alone, it will be presumed that she had power to make the contract on which suit is brought against her; and a plea of coverture, therefore, without additional averments, is insufficient. *Strauss v. Glass*, 108 Ala. 546.

**On Scire Facias to Revive a Judgment** against a married woman, a mere plea of her coverture at the time of rendering the judgment, and that her husband did not consent to the arbitration upon the award on which the judgment was founded, is insufficient. She should state, in the shape of a cross-

action, all such facts as are necessary to show affirmatively that the judgment should not have been rendered against her. *Taylor v. Harris*, 21 Tex. 438.

1. *Clark v. Bayer*, 32 Ohio St. 299; *Burnett v. Nicholson*, 86 N. Car. 99.

In *Stockwell v. Thomas*, 76 Ind. 506, it was held that in an action against husband and wife for the wrongful taking and conversion of the plaintiff's property, a plea of coverture by the wife which does not allege that she committed the tort in company with or by order of her husband is insufficient; for if the torts were committed by the wife alone during the coverture, and not in company with nor by the order of her husband, they were jointly liable and were properly joined as defendants in the action.

**Failure to Demur to Plea.**—In *Alabama* a wife may be sued alone for her torts, and therefore a plea of coverture is no defense. But if the defendant fails to demur to the plea, in such case it must stand as a good plea of coverture. *Britt v. Pitts*, 111 Ala. 401.

2. *Agnew v. Williams*, 1 Bush (Ky.) 4; *Randall v. Bourguardez*, 23 Fla. 264; *Prentiss v. Paisley*, 25 Fla. 927; *Morse v. Toppan*, 3 Gray (Mass.) 411; *Hunt v. Thompson*, 61 Mo. 148. See also *Kirk v. Fort Wayne Gaslight Co.*, 13 Ind. 56, and cases cited *infra*, IV. 9. a. (2) *Under Married Woman's Acts*.

For a full discussion of judgments against married women, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

**Marriage Pending Suit.**—In an action commenced against the wife before marriage the plaintiff may proceed and have personal judgment against her without noticing the husband. See *supra*, IV. 4. *Effect of Marriage Pending Suit*.

**Warrant of Attorney to Confess Judgment.**—It has been held that a judg-

**Ante-nuptial Contracts of Wife.**—In an action commenced after marriage, upon a contract made by the wife while single, the judgment should be against both husband and wife,<sup>1</sup> unless otherwise provided by statute.<sup>2</sup>

(2) *Under Married Woman's Acts*—**Judgment in Rem.**—Some of the statutes extending the rights and liabilities of the wife and allowing her to bind her separate property by contract do not admit of a personal judgment against her, but only against the property.<sup>3</sup>

ment entered by confession by an attorney under a bond and warrant of attorney, which the wife was incompetent to give, is void as to her. *Dorrance v. Scott*, 3 Whart. (Pa.) 309; *Caldwell v. Walters*, 18 Pa. St. 79; *Mendenhall v. Springer*, 3 Harr. (Del.) 87; *Ex p. Wright*, 2 Harr. (Del.) 49.

1. *Gray v. Thacker*, 4 Ala. 136; *Fultz v. Fox*, 9 B. Mon. (Ky.) 499; *McDermott v. French*, 15 N. J. Eq. 78; *Mallory v. Vanderheyden*, 3 Barb. Ch. (N. Y.) 9; *Babb v. Bruere*, 23 Mo. App. 604; *Wisdom v. Newberry*, 30 Mo. App. 241; *Todd v. Works*, 51 Mo. App. 267; *Walker v. Deaver*, 79 Mo. 664; *Nash v. George*, 6 Tex. 234; *Cole v. Seeley*, 25 Vt. 220; *Platner v. Patchin*, 19 Wis. 333.

**A Judgment Against the Husband Alone** will be reversed on error. *Gray v. Thacker*, 4 Ala. 136. See also *Gruen v. Bamberger*, 11 Mo. App. 261.

**Husband's Property Not Liable.**—Under some statutes, although the husband is joined as a defendant in an action to recover a debt contracted by the wife before marriage, the judgment binds the separate property of the wife only, and not that of the husband. *Lennox v. Eldred*, 65 Barb. (N. Y.) 410; *Nash v. George*, 6 Tex. 234.

In *Missouri* the judgment against the husband should not be general, but should be so framed as to allow the plaintiff to have execution thereon against such property only of the husband as he may have acquired from the wife. *Wisdom v. Newberry*, 30 Mo. App. 241; *Babb v. Bruere*, 23 Mo. App. 604.

The judgment, when rendered, should show that it is founded on a liability of the wife incurred prior to the marriage, and that her estate, and not the estate of the husband, is subject to its payment. *Fultz v. Fox*, 9 B. Mon. (Ky.) 499.

2. Under the statutes of most of the states the wife may now be sued alone

in many cases, and judgment rendered against her without noticing the husband. See *supra*, IV. 1. *Parties to Suits*; and *infra*, IV. 9. a. (2) *Under Married Woman's Acts*.

3. *Alabama*.—*Raviesies v. Stoddard*, 32 Ala. 599; *Lee v. Ryall*, 68 Ala. 354. See also *Starke v. Malone*, 51 Ala. 169; *Nelms v. Armstrong*, 63 Ala. 330.

*California*.—*Bogart v. Woodruff*, 96 Cal. 609.

*Iowa*.—*McGlaughlin v. O'Rourke*, 12 Iowa 459; *Reed v. King*, 23 Iowa 500.

*Mississippi*.—*Mallett v. Parham*, 52 Miss. 921.

*Missouri*.—*Hemelreich v. Carlos*, 24 Mo. App. 264; *Bruns v. Capstick*, 46 Mo. App. 397.

*New York*.—*Baldwin v. Kimmel*, 1 Robt. (N. Y.) 109.

*Texas*.—*Menard v. Sydnor*, 29 Tex. 257; *Sigal v. Miller*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1012.

*Virginia*.—*Crockett v. Doriot*, 85 Va. 240.

*West Virginia*.—*Turk v. Skiles*, 38 W. Va. 404.

*Wisconsin*.—*Rogers v. Weil*, 12 Wis. 664.

**Direction in Judgment.**—In an action against a married woman under a statute which does not allow a personal judgment against her, the judgment should direct that it be enforced only on the property liable thereto. *Bogart v. Woodruff*, 96 Cal. 609; *Reed v. King*, 23 Iowa 500; *Baldwin v. Kimmel*, 1 Robt. (N. Y.) 109; *Crockett v. Doriot*, 85 Va. 240; *Sigal v. Miller* (Tex. Civ. App. 1894) 25 S. W. Rep. 1012. See also *Starke v. Malone*, 51 Ala. 169.

**Specification of Property.**—In an action against husband and wife seeking to subject the wife's separate estate to the payment of "articles of comfort and support of the household," as allowed by the *Alabama Code*, § 1987, the judgment against the husband should be personal, to be enforced by execution;

**Judgment in Personam.**—But it is the tendency of modern legislation to make a married woman personally liable on her contracts, and under many of the statutes at present a personal judgment may be rendered against her.<sup>1</sup>

**Where the Husband Is Joined for Conformity,** in an action to charge the

but, as against the wife, the judgment must specify the property found subject to the plaintiff's demand, and order its sale by the sheriff. *Ravies v. Stoddart*, 32 Ala. 599; *Lee v. Ryall*, 68 Ala. 354.

**Judgment of Justice of the Peace.**—In *Pennsylvania* a judgment against a married woman before a justice of the peace must affirmatively show her liability on a contract within the statute. *Hecker v. Haak*, 88 Pa. St. 238. But see *Jester v. Hunter*, 2 Pa. Dist. Rep. 690.

**Judgment for Community Debt.**—Where suit is brought to recover a community debt a judgment for the plaintiff should show upon its face the fact that it is for a community debt. *McDonough v. Craig*, 10 Wash. 239.

1. Wherever a married woman may be sued as a *feme sole* a personal judgment may be rendered against her. *Alexander v. Bouton*, 55 Cal. 15; *Marlow v. Barlew*, 53 Cal. 456; *Fawkner v. Scottish-American Mortg. Co.*, 107 Ind. 555; *Van Metre v. Wolf*, 27 Iowa 341; *Jones v. Glass*, 48 Iowa 345; *Hart v. Grigsby*, 14 Bush (Ky.) 542; *Bearden v. Miller*, 54 Mo. App. 199; *Walker v. Swayzee*, 3 Abb. Pr. (N. Y. C. Pl.) 136; *Cashman v. Henry*, 75 N. Y. 103; *Williamson v. Cline*, 40 W. Va. 194; *Wadsworth v. Henderson*, 16 Fed. Rep. 447.

In *Leonard v. Townsend*, 26 Cal. 435, it was held that a judgment may be rendered against a married woman for costs in an action brought by her as sole plaintiff, concerning her separate property, and when so rendered an execution in the usual form may be issued on the same, and her separate property sold by the sheriff, and the purchaser at the sheriff's sale, upon receipt of the sheriff's deed, will acquire a valid title thereto.

**Ordinary Money Judgment.**—In an action to subject the separate estate of a married woman to the payment of a debt contracted by her in relation to her separate estate, the judgment may be in the form of an ordinary money judgment. *Corn Exch. Ins. Co. v.*

*Babcock*, 9 Abb. Pr. N. S. (N. Y. Comm. App.) 156, [*reversing* *Corn Exch. Ins. Co. v. Babcock*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 246]; *Vosburgh v. Brown*, 66 Barb. (N. Y.) 421.

**Ante-nuptial Contracts.**—Where a married woman is made personally liable for an ante-nuptial debt personal judgment may be rendered against her. *Smith v. Beard*, 73 Ind. 159; *Travis v. Willis*, 55 Miss. 557.

**For Torts of Wife.**—In an action against husband and wife for slanderous words spoken by the wife, a general judgment may be rendered against both, but requiring that her separate estate be first exhausted, before selling the husband's, to satisfy judgment. *Zeliff v. Jennings*, 61 Tex. 458.

**Judgment by Confession.**—A married woman may confess a judgment for a valid ante-nuptial debt, and such judgment will be conclusive and enforceable against her, as if rendered by default or upon a verdict. *Travis v. Willis*, 55 Miss. 557.

A married woman may confess a judgment to secure a debt contracted by her and for her use and benefit in carrying on her separate business. *Canandaigua First Nat. Bank v. Garlinghouse*, 53 Barb. (N. Y.) 615.

**Liability Must Appear of Record.**—It is error to render a personal judgment against a married woman unless it appears upon the record that the contract is one upon which she is liable to a personal judgment. *Rogers v. Weil*, 12 Wis. 664; *McGlaughlin v. O'Rourke*, 12 Iowa 459; *Menard v. Sydnor*, 29 Tex. 257. But see *Robinson v. Staderker*, 59 Miss. 3.

**Judgment Against Wife by Maiden Name.**—A judgment against a wife, in an action against her alone, in her maiden name, upon a note so executed by her before marriage, is not void because of misnomer in describing her by her maiden name instead of by the name of her husband, she being sufficiently identified by the name under which she was sued. *Bogart v. Woodruff*, 96 Cal. 609.

separate property of the wife, it is improper to render a personal judgment against him.<sup>1</sup>

*b. EFFECT OF JUDGMENT AGAINST WIFE.*—The decisions regarding the effect of a personal judgment against the wife, in a case where a personal judgment is not authorized by law, are in irreconcilable conflict.<sup>2</sup> In some states it is held that if the court awards a personal judgment against her in such a case it is absolutely void, and therefore may be attacked collaterally.<sup>3</sup> But there are numerous cases holding that such a judgment against the wife is voidable only and not void, and is binding on her until set aside in direct proceedings.<sup>4</sup>

1. *Walker v. Swayzee*, 3 Abb. Pr. (N. Y. C. Pl.) 136; *Bacon v. Bevan*, 44 Miss. 294.

**Against Wife and Trustee.**—In an action against a married woman to subject her separate estate to the payment of certain promissory notes given by her, no relief being asked against the husband, who was made a co-defendant merely for conformity with the statutes, it was held that the decree should be entered against the wife and her trustee alone, subjecting the land of the wife to the payment of the notes. *Staley v. Ivory*, 65 Mo. 74.

2. For a full discussion of the effect of a personal judgment against a married woman, see Am. and Eng. Encyc. of Law (2d ed.), tit. *Husband and Wife*.

3. *Kentucky*.—*Parsons v. Spencer*, 83 Ky. 305; *Stevens v. Deering*, (Ky. 1888) 9 S. W. Rep. 292.

*Louisiana*.—*Bowman v. Sheriff*, 30 La. Ann. 1021.

*Maryland*.—*Griffith v. Clarke*, 18 Md. 457.

*Massachusetts*.—*Morse v. Toppan*, 3 Gray (Mass.) 411.

*Mississippi*.—*Cary v. Dixon*, 51 Miss. 593; *Griffin v. Ragan*, 52 Miss. 78; *Magruder v. Buck*, 56 Miss. 314.

*Missouri*.—*Higgins v. Peltzer*, 49 Mo. 152; *Wernecke v. Wood*, 58 Mo. 352; *Lincoln v. Rowe*, 64 Mo. 138; *Weil v. Simmons*, 66 Mo. 617; *Corrigan v. Bell*, 73 Mo. 53; *Asbury v. Odell*, 83 Mo. 264. But see *Von Schrader v. Taylor*, 7 Mo. App. 361.

*Pennsylvania*.—*Dorrance v. Scott*, 3 Whart. (Pa.) 309; *Caldwell v. Walters*, 18 Pa. St. 79; *Graham v. Long*, 65 Pa. St. 383; *Swayne v. Lyon*, 67 Pa. St. 436; *Hecker v. Haak*, 88 Pa. St. 238; *Vandyke v. Wells*, 103 Pa. St. 49.

*South Carolina*.—*Wallace v. Rippon*, 2 Bay (S. Car.) 112.

*West Virginia*.—*White v. Foote Lumber, etc., Co.*, 29 W. Va. 385.

*United States*.—*Norton v. Meader*, 4 Sawy. (U. S.) 603.

In *Morse v. Toppan*, 3 Gray (Mass.) 411, Shaw, C. J., said: "The fact that the defendant was a married woman when the judgment was rendered against her would alone be a good bar to this action. It would be the same as if she had entered into an obligation by bond at the same time to which she might have pleaded *non est factum*. A judgment is in the nature of a contract; it is a specialty and creates a debt; and to have that effect it must be taken against one capable of contracting a debt."

In *Griffith v. Clarke*, 18 Md. 457, Bartol, J. said: "The principle that a party cannot impeach a judgment on any ground which might have been pleaded or relied upon as a defense to the suit does not apply to a case like this, where the defendant is a *feme covert* and not *sui juris*." To the same effect see *Parsons v. Spencer*, 83 Ky. 305.

**Enjoining Judgment.**—A married woman may enjoin the execution of a judgment against her where the court was not authorized by law to render such judgment. *Bowman v. Sheriff*, 30 La. Ann. 1021; *Griffith v. Clarke*, 18 Md. 457; *Griffin v. Ragan*, 52 Miss. 78.

4. *California*.—*Gambette v. Brock*, 41 Cal. 78.

*Georgia*.—*Glover v. Moore*, 60 Ga. 189; *Mashburn v. Gouge*, 61 Ga. 512; *Wingfield v. Rhea*, 73 Ga. 477.

*Indiana*.—*McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300; *Wagner v. Ewing*, 44 Ind. 441; *Landers v. Douglas*, 46 Ind. 522; *Burk v. Hill*, 55 Ind. 419; *Long v. Dixon*, 55 Ind. 352.



**Equitable Relief.** — Ordinarily a married woman can obtain relief in equity against a judgment only by establishing facts that would entitle her to relief independent of the fact of coverture.<sup>1</sup>

*Iowa.* — Wolff *v.* Van Metre, 19 Iowa 134; Guthrie *v.* Howard, 32 Iowa 54.

*Kansas.* — Keith *v.* Keith, 26 Kan. 26.

*Michigan.* — Wilson *v.* Coolidge, 42 Mich. 112.

*Montana.* — Vantilburg *v.* Black, 3 Mont. 459.

*North Carolina.* — Green *v.* Branton, 1 Dev. Eq. (N. Car.) 504; Vick *v.* Pope, 81 N. Car. 22; Grantham *v.* Kennedy, 91 N. Car. 148.

*Ohio.* — Callen *v.* Ellison, 13 Ohio St. 446; McCurdy *v.* Baughman, 43 Ohio St. 78.

*Rhode Island.* — Smith *v.* Borden, 17 R. I. 220.

*Tennessee.* — Howell *v.* Hale, 5 Lea (Tenn.) 405; Chatterton *v.* Young, 2 Tenn. Ch. 768.

*Texas.* — Howard *v.* North, 5 Tex. 290; Taylor *v.* Harris, 21 Tex. 438; Baxter *v.* Dear, 24 Tex. 17; Phelps *v.* Brackett, 24 Tex. 236.

*England.* — Moses *v.* Richardson, 8 B. & C. 421, 15 E. C. L. 254; Dick *v.* Tolhausen, 4 H. & N. 695.

As to the appropriate time for setting up coverture as a defense, see *supra*, IV. 8. *b.* (2) *When Set Up*.

In Howard *v.* North, 5 Tex. 290, Hemphill, C. J., said: "The acts of *femes covert in pais* may be and frequently are void; yet this does not impair the conclusive force of judgments to which they are parties; and, if they be not reversed on error or appeal, their effects cannot be gainsaid when they are enforced by ultimate process or where they are brought to bear on

their rights in any future controversy."

In Wilson *v.* Coolidge, 42 Mich. 112, Graves, J., said: "If she refrains and suffers the case to go on to judgment against her, and still more, suffers the judgment to stand, the circumstance that she was not originally bound will not suffice to render the judgment void. In case it has not been impeached on error or appeal it cannot be repudiated; and when recourse is had to legal process to enforce it, its conclusiveness cannot be brought into question on account of the invalidity of the cause of action or the right which she held to successfully resist it."

**Where the Coverture Appears on the Face of the Record**, if a personal judgment be rendered against a married woman in a case where a personal judgment is not authorized by statute it may be set aside on motion. Rubel *v.* Bushnell, 91 Ky. 251; Green *v.* Ballard, 116 N. Car. 144; Emmett *v.* Yandes, 60 Ind. 548. And see Hinsey *v.* Feeley, 62 Ind. 85.

**When Set Aside.** — A judgment against a married woman on a contract which she is not empowered to make may be set aside on motion and affidavit, or on writ of error *coram nobis*, at any time during the coverture and before the satisfaction of the judgment. Albree *v.* Johnson, 1 Flipp. (U. S.) 341.

1. Green *v.* Branton, 1 Dev. Eq. (N. Car.) 504; Wolff *v.* Van Metre, 19 Iowa 134; Van Metre *v.* Wolf, 27 Iowa 342; McCurdy *v.* Baughman, 43 Ohio St. 78.

## IMMIGRATION.

**Contract Labor Law.** — An action brought in a United States Circuit Court to recover a penalty for violation of the laws against importing foreign labor may begin with a *capias*, if such is the practice of the state in which the action is brought.<sup>1</sup> In such an action the declaration, or complaint, should allege everything necessary to show the violation of the statute.<sup>2</sup>

**Importation for Purposes of Prostitution.** — In criminal prosecutions for the violation of the laws forbidding the importation of women for purposes of prostitution, the indictment need only allege a substantial infraction of the statute, without stating the details incidental to the importation.<sup>3</sup>

1. A suit brought in Vermont to recover a penalty under Act U. S. 1885, c. 164, § 3, which relates to alien contracts for labor, may be begun by a *capias* in accordance with the Vermont law. U. S. v. Bannister, 70 Fed. Rep. 44.

**2. Defective Declaration — Necessary Allegations.** — In an action to recover a penalty for violation of 23 U. S. Stat. at L. 332, c. 164, § 1, as amended by 26 U. S. Stat. at L. 1084, c. 551, the court held the declaration defective in the following particulars: (1) For lack of a particular allegation of a contract between the defendant and the imported laborer, setting forth categorically in what such contract consisted; (2) for lack of a distinct statement that labor was performed under the contract; (3) for lack of a distinct statement of the acts by which the defendant assisted and encouraged the laborer to immigrate. U. S. v. River Spinning Co., 70 Fed. Rep. 978.

In an action of debt to recover a penalty for importing a foreign laborer in violation of Acts U. S., February 26, 1885, the declaration was held to be defective for failing to aver either that the foreign laborer ever immigrated into the United States, or that the defendant knew, when he assisted or encouraged the laborer to migrate, that he was under a contract to perform labor in the United States. U. S. v. Borneman, 41 Fed. Rep. 751.

**Construction.** — In an action by the United States to recover a penalty for importing a foreign laborer, the com-

plaint alleged that the defendant company entered into a contract with one J. L. to immigrate into the United States and work for it; and further alleged that the said J. L., in pursuance of the said agreement, did immigrate and come into the United States, etc., and that the defendant prepaid the transportation of the said J. L. It was held that this complaint sufficiently showed the acceptance of the offer in Canada, and was good under the Montana rule that pleadings should be liberally construed with a view to substantial justice between the parties. U. S. v. Great Falls, etc., R. Co., 53 Fed. Rep. 77.

**3. Unnecessary Allegations.** — An indictment under Act U. S., March 3, 1875, forbidding the importation of women for purposes of prostitution, need not state the facts constituting the ultimate fact of importation, nor specify the kind of prostitution, nor state the place at which the women are to be used, nor allege that the importation was made in pursuance of an agreement made prior to the importation. U. S. v. Pagliano, 53 Fed. Rep. 1001.

**"Import and Bring" the Same as "Import."** — Under Act U. S., March 3, 1875, forbidding the importation of women for purposes of prostitution, an indictment is not defective because it alleges that the defendant "did import and bring," while the statute uses the word "import" only. U. S. v. Pagliano, 53 Fed. Rep. 1001.

## IMPARLANCE.

See generally articles *CONTINUANCES*, vol. 4, p. 822; *TIME TO PLEAD*.

*In proceedings relating to Dower*, see article *DOWER*, vol. 7, p. 162.

## IMPEACHMENT AND CORROBORATION OF WITNESSES.

BY W. H. MICHAEL.

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### CROSS-REFERENCES.

As to *Corroboration to Overcome Answer in Equity*, see article *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 932.  
*Necessity of Corroboration in cases where accomplices testify, and in cases of Treason, Perjury, Bastardy, and Breach of Promise of Marriage*, see AM. AND ENG. ENCYC. OF LAW, titles *ACCOMPLICES*; *TREASON*; *PERJURY*; *BASTARDY*; *BREACH OF PROMISE OF MARRIAGE*.

**I. IMPEACHMENT — 1. Direct Contradiction.** — It is an elementary rule of universal application, that a party has the right to call witnesses for the purpose of contradicting material evidence given by a witness for his opponent.<sup>1</sup> In fact, as has been stated by a learned judge, where a witness has fabricated a story with circumstances, the disproof of the circumstances is generally the only possible way of disproving the material facts.<sup>2</sup> Consequently, where a witness has given testimony which is material to the issue on trial, such witness is subject to direct contradiction upon any fact or circumstance tending to corroborate and strengthen his testimony.<sup>3</sup>

1. *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179; *Frank v. Manny*, 2 Daly (N. Y.) 92; *People v. De France*, 104 Mich. 563.

**The Mere Contradiction** of a witness does not warrant the disregarding of his whole testimony for want of corroboration. *Louisville, etc., R. Co. v. Kelly*, 63 Fed. Rep. 407.

2. *Thompson, C. J.*, in *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 184.

3. *Alabama*. — *Evans v. State*, 109 Ala. 11.

*California*. — *Davis v. California Powder Works*, 84 Cal. 617.

*Colorado*. — *Grimes v. Hill*, 15 Colo. 365.

*Georgia*. — *East Tennessee, etc., R. Co. v. Daniel*, 91 Ga. 768.

*Illinois*. — *Butler v. Cornell*, 148 Ill. 276.

*Massachusetts*. — *Lewis v. Boston*

The Credit of the Witness may also be attacked by proof of independent facts and circumstances inconsistent with his testimony.<sup>1</sup>

**2. Conduct Inconsistent with Testimony.** — The acts and conduct of a witness, relative to the matter in controversy, which are inconsistent with his testimony, may always be proved for the purpose of weakening the force of his evidence.<sup>2</sup>

**3. Previous Contradictory Statements Out of Court** — *a. LAYING FOUNDATION* — (1) *Generally.* — A witness may be impeached by proof of verbal statements made by him out of court upon a material point, which are contradictory of his testimony on the trial, though such statements are not admissible as independent evidence upon the merits of the case. As a preliminary, however, to the reception of evidence of such contradictory statements, it is necessary to prepare the way by a cross-examination of the witness concerning the supposed contradictory statements which are to be brought forward against him.<sup>3</sup>

Gas Light Co., 165 Mass. 411; Riddell v. Thayer, 127 Mass. 489; Com. v. Goodnow, 154 Mass. 487; Whitney v. Boston, 98 Mass. 312; Com. v. Smith, 163 Mass. 411.

*United States.* — Southern Bell Telephone, etc., Co. v. Watts, 66 Fed. Rep. 460.

In Riddell v. Thayer, 127 Mass. 489, the court said: "The only question is whether the testimony of the defendant was material to the issue; for, if material to the issue, there can be no doubt of the right of the plaintiff to contradict it."

1. People v. Freeman, 92 Cal. 359; Pharo v. Beadleston, 2 Misc. Rep. (N. Y. C. Pl.) 424; Little v. Lichkoff, 98 Ala. 321.

A witness for the plaintiff having testified that the plaintiff's credit at a bank of which the witness was a member was good before the judgment and after the judgment was destroyed, it was competent for the defendant to ask, upon a cross-examination, whether the plaintiff had not been refused credit at the bank just prior to the judgment. Little v. Lichkoff, 98 Ala. 321.

2. Whitney v. Butts, 91 Ga. 124; Handy v. Canning, 166 Mass. 107; Hyland v. Milner, 99 Ind. 308; Yeaw v. Williams, 15 R. I. 20; Miller v. Baker, 160 Pa. St. 172; Stillwell v. Farewell, 64 Vt. 286.

In Yeaw v. Williams, 15 R. I. 20, which was a suit against a town for damages for injuries to the plaintiff, caused by a collision with a post in the highway, it was held admissible to

ask the surveyor of highways, who had testified for the defense that he did not think the position of the post dangerous, whether he had not, after the accident, removed the post.

3. *Alabama.* — Holley v. State, 105 Ala. 100; Payne v. State, 60 Ala. 80; Cooper v. State, 90 Ala. 641; Gilyard v. State, 98 Ala. 59; Hester v. State, 103 Ala. 83.

*Arkansas.* — Jones v. State, 58 Ark. 390.

*California.* — Birch v. Hale, 99 Cal. 299; People v. Nonella, 99 Cal. 333; Young v. Brady, 94 Cal. 128; Mutter v. I. X. L. Lime Co., (Cal. 1895) 42 Pac. Rep. 1068; People v. Bosquet, 116 Cal. 75; Salle v. Mayer, 91 Cal. 165.

*Colorado.* — Michigan F. & M. Ins. Co. v. Wich, 8 Colo. App. 409; Mullen v. McKim, 22 Colo. 468.

*Georgia.* — Georgia R., etc., Co. v. Smith, 85 Ga. 530; Gardner v. State, 81 Ga. 144.

*Illinois.* — Richardson v. Kelly, 85 Ill. 491; Phillips v. Kesterson, 154 Ill. 572; Miner v. Phillips, 42 Ill. 130; Root v. Wood, 34 Ill. 286; Quincy Horse R., etc., Co. v. Gnuse, 137 Ill. 264, reversing 38 Ill. App. 212; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 23 Am. St. Rep. 688; Aneals v. People, 134 Ill. 401; Boeker v. Hess, 34 Ill. App. 332.

*Indiana.* — Blough v. Parry, (Ind. 1895) 40 N. E. Rep. 70; Diffenderfer v. Scott, 5 Ind. App. 243.

*Iowa.* — Kreuger v. Sylvester, (Iowa. 1897) 69 N. W. Rep. 1059; Browning v. Gosnell, 91 Iowa 448; Richmond v.

Such Cross-examination must embrace not only the particulars of the conversation upon which it is intended to contradict the witness, but also the time when, the place where, and the person or persons to whom he is supposed to have made the contradictory statement.<sup>1</sup>

Sundburg, 77 Iowa 255; Neeb v. McMillan, 92 Iowa 200.

*Kansas*. — State v. Cleary, 40 Kan. 287; Howe Mach. Co. v. Clark, 15 Kan. 492.

*Kentucky*. — Robinson v. Com., (Ky. 1889) 11 S. W. Rep. 81.

*Louisiana*. — State v. Jones, 44 La. Ann. 961; State v. Johnson, 35 La. Ann. 871; State v. Nixon, 47 La. Ann. 836; State v. Conerly, 48 La. Ann. 1561; State v. O'Kean, 35 La. Ann. 901; State v. Callegari, 41 La. Ann. 578; State v. Johnson, 41 La. Ann. 574.

*Maryland*. — Brown v. State, 72 Md. 468; Caledonian Ins. Co. v. Traub, 83 Md. 524; Waters v. Waters, 35 Md. 532.

*Massachusetts*. — Cogswell v. Newburyport Sav. Inst., 165 Mass. 524; Com. v. Smith, 163 Mass. 411.

*Michigan*. — McClellan v. Fort Wayne, etc., R. Co., 105 Mich. 101; Jensen v. Michigan Cent. R. Co., 102 Mich. 176; Connell v. McNett, (Mich. 1896) 67 N. W. Rep. 344; Strudgeon v. Sand Beach, (Mich. 1895) 65 N. W. Rep. 616; Skelton v. Fenton Electric Light, etc., Co., 100 Mich. 87.

*Minnesota*. — Horton v. Chadbourn, 31 Minn. 322; Watson v. St. Paul City R. Co., 42 Minn. 46; Granning v. Swenson, 49 Minn. 381.

*Missouri*. — Rechow v. American Cent. Ins. Co., 65 Mo. App. 52; State v. Baldwin, 56 Mo. App. 423; State v. Ragsdale, 59 Mo. App. 590; Carder v. Primm, 52 Mo. App. 102; Spohn v. Missouri Pac. R. Co., 116 Mo. 617, 122 Mo. 1; State v. Parker, 96 Mo. 382; State v. Taylor, 134 Mo. 109.

*Montana*. — State v. O'Brien, 18 Mont. 1.

*Nebraska*. — Wood River Bank v. Kelley, 29 Neb. 590; Fremont Butter, etc., Co. v. Peters, 45 Neb. 356; Davison v. Cruse, 47 Neb. 829.

*New Mexico*. — Kirchner v. Laughlin, 6 N. Mex. 300; U. S. v. Fuller, 4 N. Mex. 358.

*New York*. — Lee v. Chadsey, 3 Keyes (N. Y.) 225; Sprague v. Cadwell, 12 Barb. (N. Y.) 518; Morris v. New York, etc., R. Co., 25 Civ. Pro. Rep. (N. Y. Ct. App.) 168; Hart v. Hudson

River Bridge Co., 84 N. Y. 56; Budlong v. Van Nostrand, 24 Barb. (N. Y.) 25; Briggs v. Wheeler, 16 Hun (N. Y.) 583; Gorgen v. Balzhouser, 2 N. Y. Wkly. Dig. 529; Boyd v. Boyd, 7 Misc. Rep. (N. Y. City Ct.) 428; Weymouth v. Broadway, etc., R. Co., 2 Misc. Rep. (N. Y. Super. Ct.) 506; McCulloch v. Dobson, 133 N. Y. 114; Provost v. New York, 15 Daly (N. Y.) 87; Sandford v. Shafer, (Supreme Ct.) 2 N. Y. Supp. 357.

*North Carolina*. — State v. Wright, 75 N. Car. 439; Hooper v. Moore, 3 Jones L. (N. Car.) 428; State v. Patterson, 2 Ired. L. (N. Car.) 352, 38 Am. Dec. 699.

*Pennsylvania*. — Frack v. Gerber, 167 Pa. St. 316.

*South Dakota*. — State v. Hughes, (S. Dak. 1896) 66 N. W. Rep. 1076.

*Texas*. — International, etc., R. Co. v. Dyer, 76 Tex. 156; Missouri, etc., R. Co. v. Sanders, (Tex. Civ. App. 1895) 33 S. W. Rep. 245; Ledbetter v. State, (Tex. Crim. App. 1895) 29 S. W. Rep. 1084; Clapp v. Engledow, 72 Tex. 252; Smith v. Jones, 11 Tex. Civ. App. 18.

*Vermont*. — Holbrook v. Holbrook, 30 Vt. 433.

*Virginia*. — Unis v. Charlton, 12 Gratt. (Va.) 494.

*West Virginia*. — State v. Goodwin, 32 W. Va. 177.

*Wisconsin*. — Cohn v. Heimbauch, 86 Wis. 176; Sieber v. Amunson, 78 Wis. 679; Baker v. State, 69 Wis. 40; Welch v. Abbott, 72 Wis. 512; Hunter v. Gibbs, 79 Wis. 70.

*Wyoming*. — Toms v. Whitmore, (Wyoming 1896) 44 Pac. Rep. 56.

*United States*. — Conrad v. Griffey, 16 How. (U. S.) 38; Ludtke v. Hertzog, 72 Fed. Rep. 142.

*England*. — Crowley v. Page, 7 C. & P. 789, 32 E. C. L. 737; Angus v. Smith, M. & M. 473, 22 E. C. L. 360; Carpenter v. Wall, 11 Ad. & El. 803, 39 E. C. L. 234.

1. *Alabama*. — Floyd v. State, 82 Ala. 16.

*California*. — Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413.

*Florida*. — Montgomery v. Knox, 23 Fla. 595.

**Reason for Requiring Foundation.** — The direct tendency of the evidence being to impeach the veracity of the witness by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires that he be given an opportunity of declaring whether he ever made such a statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances the statement was made, from what motives, and with what design.<sup>1</sup>

*Georgia.* — Whitaker v. State, 79 Ga. 87.

*Illinois.* — Quincy Horse R., etc., Co. v. Gnuse, 137 Ill. 264.

*Indiana.* — Hill v. Gust, 55 Ind. 45; Jackson v. Swope, 134 Ind. 111; Pence v. Waugh, 135 Ind. 143.

*Iowa.* — Esterly v. Eppelsheimer, 73 Iowa 260; Neeb v. McMillan, 92 Iowa 200.

*Kansas.* — Da Lee v. Blackburn, 11 Kan. 190.

*Michigan.* — Koehler v. Buhl, 94 Mich. 496.

*Mississippi.* — Bonelli v. Bowen, 70 Miss. 142; Jones v. State, 65 Miss. 179; Fulton v. Hughes, 63 Miss. 61; Clark v. State, (Miss. 1891) 9 So. Rep. 820.

*Missouri.* — Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364; Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191.

*Nebraska.* — Hanscom v. Burmood, 35 Neb. 504; Bartlett v. Cheesebrough, 32 Neb. 339.

*North Carolina.* — State v. Dickerson, 98 N. Car. 708.

*Oregon.* — State v. Hunsaker, 16 Oregon 497.

*Pennsylvania.* — Zebley v. Storey, 117 Pa. St. 478.

*South Carolina.* — Stepp v. National L., etc., Assoc., 37 S. Car. 417.

*Texas.* — Donahoo v. Scott, (Tex. Civ. App. 1895) 30 S. W. Rep. 385; Ledbetter v. State, (Tex. Crim. App. 1895) 29 S. W. Rep. 1084; Henderson v. State, 1 Tex. App. 432.

*United States.* — Standard Oil Co. v. Van Etten, 107 U. S. 325.

See also cases cited in preceding note.

In Peterson v. State, 83 Md. 194, the question whether the prosecuting witness had, previous to the day of buying liquor, repeatedly said that he was twenty-one years old, was held to have been properly excluded, because it did not specify the time and place of the alleged statement, nor the person to whom it was made.

This rule is enforced whether the alleged contradictions are intended to impeach the witness's credit or to show malice on his part. State v. Goodbier, 48 La. Ann. 770.

**Not Necessary to Use Exact Words.** — It is not necessary, in laying the foundation for the impeachment of the witness, to use the exact words alleged. Donahoo v. Scott, (Tex. Civ. App. 1895) 30 S. W. Rep. 385.

**In Massachusetts.** — Declarations made out of court contrary to, or inconsistent with, the testimony of a witness in any material matter, may be proved by other testimony, either with or without a previous inquiry to the witness thus contradicted. Tucker v. Welsh, 17 Mass. 160; Com. v. Hawkins, 3 Gray (Mass.) 463; Harrington v. Lincoln, 2 Gray (Mass.) 133; Hathaway v. Crocker, 7 Met. (Mass.) 266; Day v. Stickney, 14 Allen (Mass.) 260; Weeks v. Needham, 156 Mass. 289; Carville v. Westford, 163 Mass. 544; Day v. Cooley, 118 Mass. 524; Brooks v. Weeks, 121 Mass. 433; Com. v. Moinehan, 140 Mass. 463; Hosmer v. Groat, 143 Mass. 16; Tobin v. Jones, 143 Mass. 448; Hastings v. Livermore, 15 Gray (Mass.) 10; Com. v. Smith, 163 Mass. 411.

A matter, however, upon which the witness is thus impeached must be material to the issue on trial. Com. v. Buzzell, 16 Pick. (Mass.) 153; Com. v. Sackett, 22 Pick. (Mass.) 394; Tucker v. Welsh, 17 Mass. 160; Brockett v. Bartholomew, 6 Met. (Mass.) 399; Hathaway v. Crocker, 7 Met. (Mass.) 266.

1. *Colorado.* — Ryan v. People, 21 Colo. 119.

*Illinois.* — Travelers' Preferred Accident Assoc. v. McKinney, 57 Ill. App. 141.

*Indiana.* — Pape v. Lathrop, (Ind. App. 1897) 46 N. E. Rep. 154.

*Louisiana.* — State v. Delaneville, 48 La. Ann. 502; State v. Goodbier, 48 La. Ann. 770.

**Where Contradictory Statements Are in Writing.**—Where the contradictory statements were reduced to writing by the witness, or by another and signed by him, the necessity of laying a foundation for the reception of impeaching evidence still remains, but for obvious reasons the limitation as to the time and place of making

*Missouri.*—*Spohn v. Missouri Pac. R. Co.*, 116 Mo. 617; *Carder v. Primm*, 52 Mo. App. 108.

*Montana.*—*State v. O'Brien*, 18 Mont. 1.

*New York.*—*Ankersmit v. Tuch*, 114 N. Y. 51.

*North Carolina.*—*State v. Goff*, 117 N. Car. 755.

*Oregon.*—*Joseph v. Furnish*, 27 Oregon 260.

*Texas.*—*Barry v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 692.

*United States.*—*The Charles Morgan*, 115 U. S. 69.

*England.*—*Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737; *Angus v. Smith, M. & M.* 473, 22 E. C. L. 360.

In *The Queen's Case*, 2 Brod. & B. 299, 6 E. C. L. 154, the House of Lords put the following question to the judges: "If, in the courts below, a witness examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A and B, answered that he did not remember it; and such witness was not asked on his cross-examination whether he had or had not made a declaration stated in the question respecting such quarrel; and, in the progress of the defense, the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration, in order to prove that he must remember it; according to the practice of the courts below, would such proof be received?"

In answer to this question Abbott, C. J., delivering the opinion of all the judges, said: "It must be in the knowledge and experience of every man that a slight hint or suggestion of some particular matter connected with a subject puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with the subject, which, until that hint or suggestion was given, were wholly absent from it. For this reason the proof that, at a time past, a witness has spoken on any subject does not, in our opinion, lead to a legitimate conclusion that such witness, at the time

of his examination, had that subject present in his memory; and to allow the proof of his former conversation to be adduced without first interrogating him to that conversation, and reminding him of it, would, in many cases, have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection which it is, in my opinion, the duty of every court to afford to every person who appears as a witness on the one side and on the other. According, therefore, to the practice of the courts below, a witness is asked, on cross-examination, whether he has made a declaration or held a conversation; and such previous question is considered as a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side. I must, however, my lords, take the liberty to add that in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation in the way in which I have mentioned, the court would, of its own authority, call back the witness in order to give the counsel an opportunity of laying the required foundation by putting his questions to the witness, although the counsel had not before asked them; it being much better to permit the order and regularity of the proceedings as to time and season to be broken in upon, than to allow irrelevant or incompetent evidence to be received."

**Sufficient Identification.**—In *People v. Bosquet*, 116 Cal. 75, it was held that to ask a witness if he remembers "telling A., at one time, in a conversation on L. street, in this city, about three months ago—within the last five months—that," etc., sufficiently identifies time, place, and person, as required, to lay a foundation for the impeachment of the witness.

**Time Fixed as "About One Year Ago."**—In *Kirshbaum v. Hanover F. Ins. Co.*, (Ind. App. 1897) 45 N. E. Rep. 1113, it was held sufficient, in calling the attention of the witness to a particular conversation, to fix the time as "about one year ago."



the statements does not apply.<sup>1</sup> It is sufficient in such cases to show the witness the paper, or read it to him, and question him concerning its genuineness. If he admits that it is in his handwriting, or that he has signed it in its present form, it may, at the proper season, be received in evidence.<sup>2</sup>

**Where Witness Is a Party or Agent.**—Where material statements contradictory of his testimony have been made out of court by a witness who is also a party to the action, the opposing party may prove them without first laying a foundation for the reception of the evidence upon the cross-examination of the witness. The fact that a party chooses to take the witness stand in his own behalf can in no way limit or restrict the right of the opposing

1. *Romertze v. East River Nat. Bank*, 49 N. Y. 577; *Doud v. Donnelly*, (Supreme Ct.) 12 N. Y. Supp. 396; *Clapp v. Wilson*, 5 Den. (N. Y.) 285; *Hammond v. Dike*, 42 Minn. 273; *State v. Forsythe*, (Iowa 1896) 68 N. W. Rep. 446; *Hughes v. Delaware, etc., Canal Co.*, 176 Pa. St. 254.

2. *Alabama*.—*Gunter v. State*, 83 Ala. 96.

*California*.—*People v. Ching Hing Chang*, 74 Cal. 389.

*Florida*.—*Simmons v. State*, 32 Fla. 387.

*Georgia*.—*Georgia R., etc., Co. v. Smith*, 85 Ga. 530.

*Illinois*.—*Boeker v. Hess*, 34 Ill. App. 332.

*Iowa*.—*Morrison v. Myers*, 11 Iowa 538.

*Maryland*.—*Ecker v. McAllister*, 45 Md. 291.

*Michigan*.—*Lightfoot v. People*, 16 Mich. 511.

*Missouri*.—*Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471.

*Nevada*.—*State v. Tickle*, 13 Nev. 502.

*New Mexico*.—*U. S. v. Fuller*, 4 N. Mex. 358.

*New York*.—*Clapp v. Wilson*, 5 Den. (N. Y.) 287; *Honstine v. O'Donnell*, 5 Hun (N. Y.) 472; *Gaffney v. People*, 50 N. Y. 416.

**Introduction of Letters.**—In order that letters may be read to contradict a witness, the attention of the latter must be called to the letters, so that, if possible, he may explain the inconsistency. *Seckel v. York Nat. Bank*, 57 Ill. App. 579; *Burleson v. Collins*, (Tex. Civ. App. 1895) 28 S. W. Rep. 898.

**Representing Contents of Letters.**—It is not allowable, in cross-examination, in the statement of a question to a wit-

ness, to represent the contents of a letter and ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without first having shown the witness the letter and asking him if he wrote that letter. Two or three lines of a letter may be exhibited to a witness without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited, but if the witness denies that he wrote such part, he cannot be examined as to the contents of the letter. Opinion of the judges in *The Queen's Case*, 2 Brod. & B. 286, 6 E. C. L. 148.

**When Written Contract Admissible.**—A written contract is admissible in evidence for the purpose of impeaching a witness after he has admitted that he signed the contract as a party thereto. *Drew v. Wadleigh*, 7 Me. 94.

**Writing Must Be Read or Shown to Witness.**—A witness is not bound to answer as to matters reduced to writing by himself, or by another and subscribed by him, until the writing has been produced and read or shown to him. *Newcomb v. Griswold*, 24 N. Y. 298; *Bellinger v. People*, 8 Wend. (N. Y.) 595. See also *State v. Steeves*, 29 Oregon 85.

**Deposition.**—The deposition of a witness may be received in evidence for the purpose of discrediting his testimony only so far as the contents thereof were called to his attention during his examination at the trial. *Stephens v. People*, 19 N. Y. 549; *Grosse v. State*, 11 Tex. App. 364; *Hammond v. Dike*, 42 Minn. 273.

It is not proper, on the cross-examination of a witness, for the counsel, in order to contradict him, to read from what purports to be a deposition previously given by him, and then to ask

party to prove his admissions against interest.<sup>1</sup> The same is true also when the witness is the agent of a party, where contradictory statements were made in reference to a matter in which the agent had authority to bind his principal.<sup>2</sup> Where, however, a party's contradictory statements are offered for the sole purpose of impeaching him as a witness, and not as admissions against interest, it has been held that the proper foundation should be laid on cross-examination, as in the impeachment of other witnesses.<sup>3</sup>

**Error to Refuse Privilege of Laying Foundation.**—It is the right of the

him whether he has so testified. The correct rule in such case is first to prove the deposition to be his, and then to read it as part of the evidence in the case. After this has been done the witness may be cross-examined as to any supposed discrepancies between his testimony in court and the deposition. *Cropsey v. Averill*, 8 Neb. 151.

1. *Alabama*.—*Buchanan v. State*, 109 Ala. 7.

*Arkansas*.—*Collins v. Mack*, 31 Ark. 694.

*Colorado*.—*Rose v. Otis*, 18 Colo. 59.

*Connecticut*.—*State v. Griswold*, 67 Conn. 290.

*Georgia*.—*Klug v. State*, 77 Ga. 734.

*Illinois*.—*McCoy v. People*, 71 Ill. 111.

*Kentucky*.—*Logan v. Com.*, (Ky. 1895) 29 S. W. Rep. 632.

*Montana*.—*State v. Cadotte*, 17 Mont. 315.

*New York*.—*Kennedy v. Wood*, 52 Hun (N. Y.) 46; *Meyer v. Campbell*, 1 Misc. Rep. (N. Y. C. Ct.) 283.

*Pennsylvania*.—*Wilson v. Wilson*, 137 Pa. St. 269.

*South Carolina*.—*State v. Freeman*, 43 S. Car. 105.

*Texas*.—*Moffatt v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 344; *Thompson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 629.

*Wisconsin*.—*Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

**Statement by Defendant while in Jail.**—In *Thompson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 629, it is held that statements by defendant while in jail are admissible in evidence to discredit his testimony.

**Confession while in Jail.**—In *Quintana v. State*, 29 Tex. App. 401, it is held that a defendant who testifies in his own behalf may be impeached by confessions made by him in jail, although such confessions were made

under circumstances rendering them inadmissible against him as inculpatory evidence.

In *Morales v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 435, it was held that a defendant, when a witness in his own behalf, cannot be examined as to a confession made by him in jail without having been warned, and a predicate thus laid for his impeachment, and the state then be permitted to show by witnesses that while in jail he made a confession of the crime charged against him. In this case, the cases of *Quintana v. State*, 29 Tex. App. 401, and *Ferguson v. State*, 31 Tex. Crim. Rep. 93, are *distinguished*, and the case of *Phillips v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 272, is *overruled*.

**Admissibility of Confession for the Court.**—If, in a criminal case, such contradictory statements of the defendant are in fact confessions, the court should first pass upon their admissibility, precisely as if the impeachment of the defendant as a witness was not involved. *State v. Barrett*, 40 Minn. 65.

2. *Louisville*, etc., *R. Co. v. Lawson*, 88 Ky. 496.

**Must Be Within Scope of Authority.**—The contradictory statement must, however, have been made concerning a matter within the scope of the witness's authority as agent, otherwise the necessary foundation must be laid for his impeachment. *Stone v. Northwestern Sleigh Co.*, 70 Wis. 585.

3. *Conway v. Nicol*, 34 Iowa 533; *Browning v. Gosnell*, 91 Iowa 448.

**Exception.**—But no foundation, it is held, need be laid, even where this rule applies, if the declaration of a party is introduced as an admission of a fact and not for the purpose of impeaching him as a witness. *Lucas v. Flinn*, 35 Iowa 14; *State v. Hamilton*, 32 Iowa 574.

cross-examining party to lay a foundation for impeaching a witness who has given material evidence against him, and a denial of this privilege will constitute reversible error.<sup>1</sup>

(2) *Where the Witness Is Not Present to Testify* — **Admission to Avoid Continuance.** — Where a party admits, in order to avoid a continuance, that a witness who is absent would, if present, testify to certain material facts, he will not be permitted to adduce evidence of counter-declarations made by such witness at another time and place. The admission of such testimony would be in violation of the rule requiring the laying of a proper foundation before introducing impeaching evidence.<sup>2</sup>

**Testimony by Deposition.** — This is also true where the testimony has been taken under a commission and no predicate was laid for the impeachment of the witness at the time of his examination.<sup>3</sup> The proper manner of taking advantage of statements at variance with his testimony, made by a witness after the taking of his deposition, is to sue out a second commission and lay the necessary foundation for the reception of such statements in evidence.<sup>4</sup>

1. *Stacy v. Milwaukee, etc., R. Co.*, 72 Wis. 331; *Pruitt v. Brockmann*, 46 Ind. 56; *McFarlin v. State*, 41 Tex. 23; *Turney v. State*, 9 Tex. App. 192. See also *Miller v. Baker*, 160 Pa. St. 179.

2. *Pool v. Devers*, 30 Ala. 672; *St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287; *State v. Bartley*, 48 Kan. 421; *State v. Carter*, 8 Wash. 272; *North Chicago St. R. Co. v. Cottingham*, 44 Ill. App. 46.

In *Montana* it has been held that in such cases the right to impeach the witness may be reserved. *State v. Gibbs*, 10 Mont. 212, 213.

**Nebraska.** — In *Burris v. Court*, 48 Neb. 179, it is held that such admission is not equivalent to an admission that the proposed testimony is indisputable.

**Testimony of Absent Witness Given at Former Trial.** — Where the testimony of an absent witness, given at a former trial, is put in evidence, it cannot be discredited by evidence of contradictory statements of the witness, *Pruitt v. State*, 92 Ala. 41; but such evidence is subject to direct contradiction, the same as if the witness had testified in open court, *U. S. v. Taylor*, 35 Fed. Rep. 484.

**Witness Insane Since Former Trial.** — Where the testimony of a witness who has become insane since the former trial is put in evidence, proof of contradictory statements made by him after the first trial is not admissible.

*Stewart v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 203.

3. *Conrad v. Griffey*, 16 How. (U. S.) 38; *Howell v. Reynolds*, 12 Ala. 128; *Hubbard v. Briggs*, 31 N. Y. 536; *Fitch v. Kennard*, (City Ct.) 19 N. Y. Supp. 468; *Unis v. Charlton*, 12 Gratt. (Va.) 484; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

**Two Depositions in Same Case.** — Where two depositions of the same witness have been taken in the same case, the first one cannot be introduced for the purpose of impeaching the second, when no foundation was laid at the taking of the second by calling the attention of the witness to the contradictory statements made in the first. *Samuels v. Griffith*, 13 Iowa 103. A contrary view has been taken in *Colorado*. *Thompson v. Gregor*, 11 Colo. 531.

4. *Kimball v. Davis*, 19 Wend. (N. Y.) 437; *Brown v. Kimball*, 25 Wend. (N. Y.) 259; *Stacy v. Graham*, 14 N. Y. 492; *Conrad v. Griffey*, 16 How. (U. S.) 47.

**Interrogatories.** — In *Georgia* it is held that the former deposition cannot be introduced for the purpose of impeaching the latter, but the difficulty can be met by suing out interrogatories and therein calling the attention of the witness to the discrepancies, thus laying the foundation for impeaching him, and that a continuance may be had for this purpose. *Georgia*

Where, however, the contradictory declarations were made before the taking of the deposition, and the attention of the witness was not at that time called to them, they cannot be received in evidence to discredit his testimony after death has placed him beyond the power of explanation.<sup>1</sup> If a witness testify in a cause and subsequently make contradictory statements, evidence of such statements cannot be received at a second trial of the cause, though the witness is dead, and the party against whom his testimony is read has had no opportunity of laying a foundation for impeaching him.<sup>2</sup>

*b. INTRODUCTION OF IMPEACHING EVIDENCE — (1) Verbal Statements of the Witness — (a) Where Statement Is Admitted by the Witness.* — If the witness, upon being cross-examined, admits having made the statement by proving which it is intended to impeach him, no further proof of it is necessary, or, in fact, allowable.<sup>3</sup>

*(b) Where Statement Is Denied.* — Where upon being cross-examined, with the particularity just described, in regard to any material statement supposed to have been made by him which is contradictory of his present testimony, the witness denies that he has made such a statement, the proper foundation is thereby laid for his impeachment, and the party cross-examining may call other witnesses to contradict him.<sup>4</sup>

*R., etc., Co. v. Smith*, 85 Ga. 534; *Kilian v. Augusta, etc., R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410.

1. *Ayers v. Watson*, 132 U. S. 394; *Hubbard v. Briggs*, 31 N. Y. 536; *Epert v. Hall*, 133 Ind. 417; *Sharp v. Hicks*, 94 Ga. 624.

2. *Mattox v. U. S.*, 156 U. S. 237, *Shiras, Gray, and White, JJ., dissenting*; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459, *Ranney and Wilder, JJ., dissenting*; *Craft v. Com.*, 81 Ky. 250, 50 Am. Rep. 160.

*Contra.* — In *Pennsylvania* the rule is otherwise. Thus, where a witness, after the taking of his deposition, admitted that he had made a mistake in his testimony, and died before the trial, it was held that such admission might be proved at the trial, notwithstanding no foundation was laid for impeaching the witness. *Patterson v. Dushane*, 137 Pa. St. 23. See also *Hamblin v. State*, 34 Tex. Crim. Rep. 368.

3. *Illinois.* — *Swift v. Madden*, 165 Ill. 41.

*Kansas.* — *State v. Baldwin*, 36 Kan. 1.

*Louisiana.* — *State v. Goodbier*, 48 La. Ann. 770.

*Michigan.* — *Lightfoot v. People*, 16 Mich. 507.

*Nevada.* — *State v. Tickel*, 13 Nev. 502.

*Oregon.* — *State v. Ellsworth*, (Oregon 1896) 47 Pac. Rep. 199.

*Texas.* — *Rodriguez v. State*, 23 Tex. App. 503.

*England.* — *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737.

4. *Alabama.* — *Holley v. State*, 105 Ala. 100; *Cotton v. State*, 87 Ala. 75; *Allen v. State*, 87 Ala. 107; *Burney v. Torrey*, 100 Ala. 157.

*Arkansas.* — *Little Rock, etc., R. Co. v. Voss*, (Ark. 1892) 18 S. W. Rep. 172; *Billings v. State*, 52 Ark. 303.

*California.* — *People v. Murray*, 85 Cal. 350.

*Illinois.* — *Dick v. People*, 47 Ill. App. 223.

*Indiana.* — *Hess v. Redding*, 2 Ind. App. 199; *Staser v. Hogan*, 120 Ind. 207.

*Iowa.* — *Moeller v. Karhoff*, (Iowa 1896) 68 N. W. Rep. 446.

*Kentucky.* — *Joseph v. Com.*, (Ky. 1896) 1 S. W. Rep. 4.

*Louisiana.* — *State v. Lewis*, 44 La. Ann. 958.

*Maine.* — *Milford v. Veazzie*, (Me. 1888) 14 Atl. Rep. 730.

*Maryland.* — *Baltimore City Pass. R. Co. v. Kneee*, 83 Md. 77; *Turnbull v. Maddux*, 68 Md. 579.

(c) **Where Statement Is Neither Admitted Nor Denied.** — English authority is conflicting as to the admissibility of proving a previous statement of a witness conflicting with his testimony where he denies any recollection of having made such a statement. In some cases it has been held that no proof of the statement may be introduced unless the witness expressly denies having made

*Massachusetts.* — Hathaway v. Crocker, 7 Met. (Mass.) 262; Gould v. Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Brigham v. Clark, 100 Mass. 430; Parkenson v. Bemis, 153 Mass. 280; Liddle v. Old Lowell Nat. Bank, 158 Mass. 15.

*Michigan.* — McClellan v. Fort Wayne, etc., R. Co., 105 Mich. 101; Stackable v. Stackable, 65 Mich. 515; Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536; Swift Electric Light Co. v. Grant, 90 Mich. 469; Langworthy v. Green Tp., 95 Mich. 93.

*Minnesota.* — State v. Barrett, 40 Minn. 65.

*Missouri.* — State v. Higgins, 124 Mo. 640; Leahey v. Cass Ave., etc., R. Co., 97 Mo. 165, 10 Am. St. Rep. 300; Spohn v. Missouri Pac. R. Co., 101 Mo. 417; Trauerman v. Lippincott, 39 Mo. App. 478.

*Nebraska.* — Stratton v. Dole, 45 Neb. 472.

*New Hampshire.* — Judd v. Claremont, 66 N. H. 418.

*New York.* — Palmeri v. Manhattan R. Co., (Supreme Ct.) 14 N. Y. Supp. 468; Barrett v. Manhattan R. Co., (Supreme Ct.) 18 N. Y. Supp. 71; Frankel v. Wolf, 7 Misc. Rep. (N. Y. C. Pl.) 190; Dudley v. Satterlee, 8 Misc. Rep. (N. Y. City Ct.) 538; Patterson Gas Governor Co. v. Lichtenstein Bros. Co., 9 Misc. Rep. (N. Y. C. Pl.) 126; Humes v. Proctor, 73 Hun (N. Y.) 265; Quincy v. Warner, 78 Hun (N. Y.) 286; Patchin v. Astor Mut. Ins. Co., 13 N. Y. 268; Carpenter v. Ward, 30 N. Y. 243; Schell v. Plumb, 55 N. Y. 592; Sitterly v. Gregg, 90 N. Y. 686; People v. McCallam, 103 N. Y. 587; People v. Schuyler, 106 N. Y. 298; Woodrick v. Woodrick, 141 N. Y. 457.

*North Carolina.* — Ellis v. Harris, 106 N. Car. 395; State v. Crane, 110 N. Car. 530.

*Ohio.* — Mimms v. State, 16 Ohio St. 221.

*Oregon.* — Josephi v. Furnish, 27 Oregon 260.

*Pennsylvania.* — Dampman v. Penn-  
10 Encyc. Pl. & Pr. — 19

sylvania R. Co., 166 Pa. St. 520; Com. v. Werntz, 161 Pa. St. 591; Frack v. Gerber, 167 Pa. St. 316.

*South Carolina.* — Duckett v. Pool, 34 S. Car. 311.

*Texas.* — Texas, etc., Coal Co. v. Lawson, 10 Tex. Civ. App. 491; Missouri, etc., R. Co. v. Sanders, (Tex. Civ. App. 1895) 33 S. W. Rep. 245; Hawkins v. State, 27 Tex. App. 273; Levy v. State, 28 Tex. App. 203; Texas, etc., R. Co. v. Brown, 78 Tex. 397; Cross v. McKinley, 81 Tex. 332.

*Vermont.* — Manley v. Delaware, etc., Canal Co., (Vt. 1896) 37 Atl. Rep. 279.

*Washington.* — State v. Walters, 7 Wash. 246.

*West Virginia.* — Welch v. Franklin Ins. Co., 23 W. Va. 303.

*Wisconsin.* — Welch v. Abbot, 72 Wis. 512; Heddles v. Chicago, etc., R. Co., 74 Wis. 239; A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652.

*United States.* — Delaware, etc., R. Co. v. Converse, 139 U. S. 469.

**Must Tend to Contradict Witness's Evidence.** — A mere denial by a witness that he made a material statement imputed to him will not give the cross-examining party a right to prove it, unless it tends to contradict the evidence given by the witness. Lamb v. Ward, 114 N. Car. 255; Hall v. Young, 37 N. H. 134; Martin v. Farnham, 25 N. H. 195; Hall v. Simmons, 24 Tex. 227.

**Need Not Be Shown to Be Intentionally False.** — The credibility of a witness may be affected by evidence of contradictory statements without showing that they were intentionally false. Craig v. Rohrer, 63 Ill. 325.

**Statement of Another Assented to by Witness.** — A statement made by another in the presence of a witness, and assented to and adopted by him, may be proved for the purpose of impeaching him, if it contradicts his testimony in a material part, and he denies that it was made. State v. McGaffin, 36 Kan. 315; Easterwood v. State, 34 Tex. Crim. Rep. 400.

it.<sup>1</sup> The better opinion, however, would appear to be that where the suggested statement is a contradiction of the testimony of the witness upon the stand it may be proved, unless he admits that he made it, when he is questioned about it, provided always that such statement is material to the matter at issue.<sup>2</sup> The latter rule, it would seem, is the one in favor in the courts of this country whenever the question has arisen,<sup>3</sup> though cases are not

**Admission Without Foundation — How Cured.** — The subsequent denial by a witness that he made the contradictory statement proved will cure the error of its admission without a proper foundation. *Hartsfield v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 777.

1. So held by Lord Abinger, in *Long v. Hitchcock*, 9 C. & P. 619, 38 E. C. L. 255, and by Tindal, C. J., in *Pain v. Beeston*, 1 M. & Rob. 20.

2. In *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737, Parke, B., said: "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so, you could never contradict a witness who said he could not remember."

And upon this subject Mr. Phillipp remarks: "It is true, the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a contradictory statement, for, until further inquiry be made, there is no appar-

ent contradiction; but still, it seems, the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak truth in saying he did not remember making the statement. If the rule were otherwise, it might happen that, under the pretense of not remembering, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure. If the ruling of Parke, B., is adopted, and the statement imputed to the witness should appear on inquiry to contradict his evidence in court, it would evidently be proper to give him an opportunity, on re-examination, to make any explanation in his power as to the apparent contradiction." 2 Phillipp's on Evidence 960.

3. *Alabama*. — *Payne v. State*, 60 Ala. 80.

*California*. — *People v. Conkling*, 111 Cal. 616.

*Georgia*. — *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641.

*Illinois*. — *Ray v. Bell*, 24 Ill. 444; *Wood v. Shaw*, 48 Ill. 273; *Bressler v. People*, 117 Ill. 422; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688.

*Indiana*. — Ohio, etc., *R. Co. v. Stein*, 140 Ind. 61.

*Kentucky*. — *Wren v. Louisville, etc., R. Co.*, (Ky. 1892) 20 S. W. Rep. 215.

*Louisiana*. — *State v. Johnson*, 47 La. Ann. 1225.

*Massachusetts*. — *Chapman v. Coffin*, 14 Gray (Mass.) 454; *Elmer v. Fessenden*, 154 Mass. 428.

*Michigan*. — *Pringle v. Miller*, (Mich. 1897) 70 N. W. Rep. 345; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675.

*New Hampshire*. — *Nute v. Nute*, 41 N. H. 60.

*New York*. — *People v. Jackson*, 3 Park Cr. Rep. (N. Y. Supreme Ct.) 590; *Palmeri v. Manhattan R. Co.*, (Su-

wanting in which it was held that evidence of the imputed statement should not be received where the witness said that he had no recollection of having made it.<sup>1</sup>

(2) *Written Statements.* — The proper foundation having been laid, it is competent to impeach a witness by putting in evidence any material statement in contradiction of his testimony which he may have reduced to writing, or which may have been written by another and subscribed by him. This is most frequently done by introducing letters written by the witness,<sup>2</sup> though any other form of written statement is equally admissible. Thus an affidavit of the witness is admissible for this purpose,<sup>3</sup> as is a written report of railway employees.<sup>4</sup> A party who has testified in the

preme Ct.) 14 N. Y. Supp. 468; *Kelly v. Cohoes Knitting Co.*, 8 N. Y. App. Div. 156.

*Pennsylvania.* — *Gregg Tp. v. Jami-son*, 55 Pa. St. 468.

*South Carolina.* — *State v. Sullivan*, 43 S. Car. 205.

*Tennessee.* — *Janeway v. State*, 1 Head (Tenn.) 130.

*Texas.* — *Smith v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 554; *Gonzales v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 1091; *Fuller v. State*, 30 Tex. App. 559; *Edwards v. Osman*, 84 Tex. 656.

*Vermont.* — *Holbrook v. Holbrook*, 30 Vt. 432.

*Wisconsin.* — *Heddles v. Chicago*, etc., R. Co., 77 Wis. 228.

1. *Wiggins v. Holman*, 5 Ind. 502; *McVey v. Blair*, 7 Ind. 590; *Robinson v. Pitzer*, 3 W. Va. 335.

2. *Alabama.* — *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28.

*Illinois.* — *Western Manufacturers' Mut. Ins. Co. v. Boughton*, 136 Ill. 317, affirming 37 Ill. App. 183; *Perishable Freight Transp. Co. v. O'Neill*, 41 Ill. App. 423.

*Kansas.* — *Anthony v. Jones*, 39 Kan. 529.

*Maryland.* — *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535.

*Massachusetts.* — *Foster v. Worthing*, 146 Mass. 607.

*Michigan.* — *Prentis v. Bates*, 88 Mich. 567.

*Minnesota.* — *State v. Tall*, 43 Minn. 273.

*New Hampshire.* — *Tabor v. Judd*, 62 N. H. 285.

*New York.* — *People v. Cassidy*, (Supreme Ct.) 14 N. Y. Supp. 349; *People v. Hayes*, 140 N. Y. 484.

*Rhode Island.* — *Barrett v. Dodge*, 16 R. I. 740.

*Texas.* — *Dooley v. Miller*, 2 Tex. Civ. App. 132; *Davis v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 174.

*England.* — *De Saily v. Morgan*, 2 Esp. N. P. 691; *The Queen's Case*, 2 Brod. & B. 288, 6 E. C. L. 149.

**Letter Written by Another Not Admissible.** — A letter written by another person is not admissible to impeach a witness. *Prentis v. Bates*, 93 Mich. 234. Neither is his own letter admissible unless his attention has been called to it and an opportunity given to him to explain it. *Burleson v. Collins*, (Tex. Civ. App. 1895) 28 S. W. Rep. 898.

**Writing Executed Under Duress.** — A writing which the witness, while admitting the making, testifies was made under duress and is false, is not admissible in contradiction of his testimony. *State v. Baker*, 136 Mo. 74.

3. *California.* — *People v. Samonset*, 97 Cal. 448.

*New York.* — *Hine v. Cushing*, 53 Hun (N. Y.) 519.

*Texas.* — *Trinity County Lumber Co. v. Denham*, 88 Tex. 203.

*United States.* — *Tucker v. U. S.*, 151 U. S. 164; *U. S. v. Pagliano*, 53 Fed. Rep. 1001.

**Affidavit.** — An affidavit previously made by a witness, containing statements which are contradictory to evidence given by him on the stand, may be admitted to impeach him. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1. See also *Leslie v. State*, 35 Fla. 171; *People's Sav. Inst. v. Miles*, 76 Fed. Rep. 252.

4. *Freel v. Market St. Cable R. Co.*, 97 Cal. 40; *Chicago*, etc., R. Co. v. *Artery*, 137 U. S. 507.

case may be contradicted by the allegations in his verified pleadings,<sup>1</sup> or by statements in his petition for a new trial.<sup>2</sup> In a criminal case the prosecuting witness may be impeached by the statements in his sworn complaint against the defendant.<sup>3</sup> In a suit against a municipal corporation to recover damages resulting from a change in the grade of a street, the written report of the viewers is admissible to contradict their evidence on the trial.<sup>4</sup>

**Time for Putting in Evidence.** — As to the time when such papers may be put in evidence, it is the orderly course for the cross-examining party to introduce them after he has opened his case.<sup>5</sup> They may, however, be read in connection with the cross-examination of the witness sought to be impeached, but in either case they are a part of the evidence of the party who introduces them.<sup>6</sup>

(3) *Proof of Former Testimony.* — The proper foundation having been laid on the cross-examination, the witness may be impeached by proving that his testimony differs materially from that given by him at another time, in regard to the same matter,<sup>7</sup>

1. *Floyd v. Thomas*, 108 N. Car. 93; *Solari v. Snow*, 101 Cal. 387; *Com. v. Mosier*, 135 Pa. St. 221; *Smith v. Traders' Nat. Bank*, 74 Tex. 457.

2. *Bellows v. Sowles*, 59 Vt. 63.

3. *Com. v. Snee*, 145 Mass. 351.

4. *Dawson v. Pittsburgh*, 159 Pa. St. 317.

5. *The Queen's Case*, 2 Brod. & B. 288, 6 E. C. L. 149.

6. *The Queen's Case*, 2 Brod. & B. 288, 6 E. C. L. 149; *Nichol v. Laumeister*, 102 Cal. 658; *Bernheim v. Lyon*, 5 Tex. Civ. App. 716; *Plyer v. German-American Ins. Co.*, (Supreme Ct.) 1 N. Y. Supp. 395; *Wilder v. Peabody*, 21 Hun (N. Y.) 376.

7. *Alabama*. — *Floyd v. State*, 82 Ala. 16.

*Arkansas*. — *Cole v. State*, 59 Ark. 50.

*California*. — *People v. Bushton*, 80 Cal. 160.

*Georgia*. — *Williams v. State*, 69 Ga. 11; *Brown v. State*, 76 Ga. 623.

*Iowa*. — *Klotz v. James*, (Iowa 1895) 64 N. W. Rep. 648; *Henry v. Sioux City, etc.*, R. Co., 75 Iowa 84; *Hibbard v. Zenor*, 82 Iowa 505.

*Kentucky*. — *Wren v. Louisville, etc.*, R. Co., (Ky. 1892) 20 S. W. Rep. 215.

*Massachusetts*. — *Tobin v. Jones*, 143 Mass. 448; *Elmer v. Fessenden*, 154 Mass. 427.

*Michigan*. — *People v. Oblaser*, 104 Mich. 579; *Graham v. Meyers*, 67 Mich. 277.

*Minnesota*. — *Bennett v. Syndicate Ins. Co.*, 43 Minn. 45.

*Mississippi*. — *Magee v. State*, (Miss. 1897) 21 So. Rep. 130.

*New York*. — *Birnbaum v. Lord*, 6 Misc. Rep. (N. Y. City Ct.) 535; *Lustig v. New York, etc., R. Co.*, 65 Hun (N. Y.) 547.

*Pennsylvania*. — *Tisch v. Utz*, 142 Pa. St. 186.

*South Carolina*. — *State v. Jones*, 29 S. Car. 201; *Sherard v. Richmond, etc., R. Co.*, 35 S. Car. 467.

*Texas*. — *Jackson v. State*, 33 Tex. Crim. Rep. 281; *Allen v. Conn.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 192; *Galveston, etc., R. Co. v. Porfert*, 1 Tex. Civ. App. 716; *Clanton v. State*, 13 Tex. App. 139; *Scott v. State*, 23 Tex. App. 521; *Riphey v. State*, 29 Tex. App. 37.

*Virginia*. — *New York, etc., R. Co. v. Kellam*, 83 Va. 853.

*Wisconsin*. — *Waterman v. Chicago, etc., R. Co.*, 82 Wis. 613.

*United States*. — *Toplitz v. Hedden*, 146 U. S. 252; *U. S. v. Smith*, 47 Fed. Rep. 501; *U. S. v. Pagliano*, 53 Fed. Rep. 1001.

**Another Suit.** — It matters not that the testimony was given by the witness in another suit. *Tisch v. Utz*, 142 Pa. St. 186.

**Witness Must Be Present.** — Such former testimony may be used to impeach the witness only when he is present to testify. *Adams v. Thornton*, 82 Ala. 260.



and such former testimony may be proved by any competent witness who heard the same and recollects it.<sup>1</sup>

**Deposition.** — If the former testimony is in the form of a deposition, regularly taken, signed, and certified, it is undoubtedly the best evidence of what the testimony was, and is admissible for the purpose of impeaching him.<sup>2</sup>

**Minutes of Testimony** in the nature of private memoranda are not admissible to impeach a witness, though the person who made them may use such minutes to refresh his memory when called to the stand to prove the former testimony.<sup>3</sup>

**Record in Former Trial.** — In laying the foundation for such impeachment it is not necessary to produce the record in the former trial upon the cross-examination. *Oderkirk v. Fargo*, 61 Hun (N. Y.) 418.

1. *Brown v. State*, 76 Ga. 626; *Williams v. State*, 69 Ga. 11; *State v. McDonald*, 65 Me. 466; *Phares v. Barber*, 61 Ill. 272.

**Testimony before Grand Jury.** — A witness on a trial for murder may be impeached by members of the grand jury as to the testimony given by him before such grand jury, where the proper foundation has been laid. *State v. Brown*, 28 Oregon 147. See also *Jenkins v. State*, 35 Fla. 737; *State v. Smith*, 125 Mo. 2.

In *Carpenter v. State*, 62 Ark. 286, it was held not error to refuse to permit a grand juror to testify as to what the witness stated before the grand jury as to the position of deceased at time of killing, where such witness was not asked when testifying as to whether or not he had made such statement.

**Stenographer May Read Notes.** — A stenographer who took down the former statements of defendant may read his notes to show that such statements were contradictory of evidence given by defendant at the trial. *Miller v. Preble*, 142 Ind. 632. See also *Pennsylvania Co. v. Trainer*, 12 Ohio Cir. Ct. Rep. 66; *Redford v. Spokane St. R. Co.*, 15 Wash. 419.

In *People v. Considine*, 105 Mich. 149, the defense called the attention of a witness for the people to his evidence on the former trial, and asked him if he had made certain statements, and then attempted to impeach him by having the stenographer's notes of the former trial read. Such evidence was properly excluded where the stenographer was not asked the same questions as the witness whose impeachment was attempted.

2. *California.* — *People v. Hawley*, 111 Cal. 78; *People v. Devine*, 44 Cal. 452.

*Illinois.* — *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481; *Fein v. Covenant Mut. Ben. Assoc.*, 60 Ill. App. 274.

*Kansas.* — *Southern Kansas R. Co. v. Painter*, 53 Kan. 414.

*Maryland.* — *Ecker v. McAllister*, 45 Md. 291.

*New York.* — *Stephens v. People*, 19 N. Y. 549.

*Texas.* — *Jarvis-Conklin Mortg. Trust Co. v. Harrell*, (Tex. Civ. App. 1894) 26 S. W. Rep. 447.

*England.* — *Rex v. Oldroyd, R. & R. C. C.* 88.

**Entire Writing Need Not Be Put in Evidence.** — In *Miller v. Preble*, 142 Ind. 632, it was held that the entire deposition need not be read to the jury, but such parts may be selected as tend to contradict or impeach the witness upon the material point in question.

**Deposition before Coroner.** — Where the testimony before the coroner is taken in the form of a deposition and subscribed by the witness and certified by the coroner, the record should, if possible, be produced where it is sought to impeach the witness by proof of his testimony before the coroner. *Cole v. State*, 59 Ark. 50; *State v. Pugh*, 16 Mont. 343.

And in such case the whole of the testimony should be produced; the witness has a right to the benefit of any explanations which may be contained in any part of it. *Carden v. State*, 84 Ala. 417; *Kennedy v. State*, 85 Ala. 326; *Dunbar v. McGill*, 69 Mich. 297.

3. *State v. Adams*, 78 Iowa 292; *Phares v. Barber*, 61 Ill. 272; *People v. Considine*, 105 Mich. 149.

**Such Minutes Need Not Be Produced.** — Minutes of evidence taken before the grand jury or before a committing

*c. MATERIALITY OF THE EVIDENCE — (1) In General.* — In order to impeach a witness by proof of contradictory statements made by him, it is essential that such statements have reference to some matter which is relevant and material to the issue on trial.<sup>1</sup> To state the rule in another form, the cross-examining

magistrate are not admissible to impeach a witness who there testified. *State v. Hayden*, 45 Iowa 14. And it is not necessary to produce such minutes. The foundation may be laid by cross-examining the witness without the use of them. *Sanders v. State*, 105 Ala. 4.

1. *Alabama.* — *Orr v. State*, 107 Ala. 35; *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136; *Crawford v. State*, 112 Ala. 1; *Marx v. Bell*, 48 Ala. 497; *Washington v. State*, 63 Ala. 189; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Hussey v. State*, 87 Ala. 121; *Burney v. Torrey*, 100 Ala. 167.

*Arizona.* — *Territory v. Clanton*, (Arizona 1889) 20 Pac. Rep. 94.

*Arkansas.* — *Jones v. Malvern Lumbar Co.*, 58 Ark. 125.

*California.* — *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317; *People v. Furtado*, 57 Cal. 345; *People v. Webb*, 70 Cal. 120; *People v. Tiley*, 84 Cal. 651; *People v. Nonella*, 99 Cal. 333; *Faulkner v. Rondoni*, 104 Cal. 140; *People v. Worthington*, 105 Cal. 166; *Buckle v. Silverberg*, 113 Cal. 673.

*Colorado.* — *Denver Tramway Co. v. Owens*, 20 Colo. 107; *Mullen v. McKim*, 22 Colo. 468; *Askew v. People*, 23 Colo. 446; *Torris v. People*, 19 Colo. 438.

*Florida.* — *Hubbard v. State*, 37 Fla. 156.

*Georgia.* — *Futch v. State*, 90 Ga. 472.

*Illinois.* — *North Chicago St. R. Co. v. Southwick*, 165 Ill. 494.

*Indiana.* — *Stalcup v. State*, (Ind. 1896) 45 N. E. Rep. 334; *Reynolds v. State*, (Ind. 1897) 46 N. W. Rep. 31; *Pape v. Lathrop*, (Ind. App. 1897) 46 N. E. Rep. 154; *Fogleman v. State*, 32 Ind. 145; *Simons v. Busby*, 119 Ind. 13; *Robbins v. Spencer*, 121 Ind. 594; *Elkhart v. Witman*, 122 Ind. 538; *White v. New York, etc., R. Co.*, 142 Ind. 648.

*Iowa.* — *Swanson v. French*, 92 Iowa 695; *Madden v. Koester*, 52 Iowa 692; *Hoover v. Cary*, 86 Iowa 494.

*Kansas.* — *State v. Zimmerman*, 3 Kan. App. 172; *Butler v. Cooper*, 3 Kan. App. 145; *State v. Blakesley*, 43 Kan. 250; *State v. Ray*, 54 Kan. 160.

*Kentucky.* — *Randolph v. Com.*, (Ky.

1889) 11 S. W. Rep. 813; *Louisville, etc., R. Co. v. Webb*, (Ky. 1896) 35 S. W. Rep. 1117; *Com. v. Hourigan*, 89 Ky. 305.

*Louisiana.* — *State v. Collins*, 48 La. Ann. 1454; *State v. Conerly*, 48 La. Ann. 1561; *State v. Spencer*, 45 La. Ann. 1.

*Maine.* — *State v. Benner*, 64 Me. 267. *Maryland.* — *Hopper v. Beck*, 83 Md. 647; *Wise v. Ackerman*, 76 Md. 375.

*Massachusetts.* — *Carr v. West End St. R. Co.*, 163 Mass. 360; *Handy v. Canning*, 166 Mass. 107; *Kaler v. Builders' Mut. F. Ins. Co.*, 120 Mass. 333; *Davis v. Keyes*, 112 Mass. 436; *Com. v. Schaffner*, 146 Mass. 512; *Alexander v. Kaiser*, 149 Mass. 321; *Com. v. Jones*, 155 Mass. 170; *Chalmers v. Whitmore Mfg. Co.*, 164 Mass. 532.

*Michigan.* — *People v. DeFrance*, 104 Mich. 563; *Howard v. Patrick*, 43 Mich. 121; *People v. Hillhouse*, 80 Mich. 580; *Langworthy v. Green Tp.*, 95 Mich. 93.

*Minnesota.* — *State v. Spaulding*, 34 Minn. 361; *Paddock v. Kappahan*, 41 Minn. 528; *State v. Staley*, 14 Minn. 105.

*Mississippi.* — *Williams v. State*, 73 Miss. 820; *Garman v. State*, 66 Miss. 196.

*Missouri.* — *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567, 4 Am. Rep. 353; *Goltz v. Griswold*, 113 Mo. 144; *McFadin v. Catron*, 120 Mo. 252; *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Scharff v. Grossman*, 59 Mo. App. 199; *Carder v. Primm*, 1 Mo. App. Rep. 167.

*Nebraska.* — *McDuffie v. Bentley*, 27 Neb. 380; *Carpenter v. Lingenfelter*, 42 Neb. 728.

*New York.* — *Gandolfo v. Appleton*, 40 N. Y. 533; *Ankersmit v. Tuch*, 114 N. Y. 51; *Morris v. Atlantic Ave. R. Co.*, 116 N. Y. 552; *People v. Fleming*, (Supreme Ct.) 14 N. Y. Supp. 200; *Schwabeland v. Holahan*, 10 Misc. Rep. (N. Y. C. Pl.) 176; *Kopetzky v. Metropolitan El. R. Co.*, 14 Misc. Rep. (N. Y. C. Pl.) 311; *Wiley v. Goodsell*, 3 N. Y. App. Div. 452; *Leinkauf v. Lombard*, 12 N. Y. App. Div. 302.

*North Carolina.* — *Patterson v. Wilson*, 101 N. Car. 594.

party is concluded by the answer which a witness gives to a question concerning a collateral matter, and no contradiction will be allowed, even for the purpose of impeaching the witness.<sup>1</sup> This

*Ohio*. — *Clinton v. State*, 33 Ohio St. 27.

*Oregon*. — *Goodall v. State*, 1 Oregon 333.

*Pennsylvania*. — *Hester v. Com.*, 85 Pa. St. 139; *Com. v. Murray*, 36 Leg. Int. (Pa.) 392.

*Tennessee*. — *Hill v. State*, 91 Tenn. 521.

*Texas*. — *Turner v. State*, 33 Tex. Crim. Rep. 103; *Sutor v. Wood*, 76 Tex. 403; *Henderson v. State*, 1 Tex. App. 432; *Brite v. State*, 10 Tex. App. 368; *Johnson v. State*, 27 Tex. App. 163; *McCoy v. State*, 27 Tex. App. 415; *Battaglia v. Thomas*, 5 Tex. Civ. App. 563.

*Utah*. — *Fenstermaker v. Tribune Pub. Co.*, 12 Utah 439; *Rogers v. Cook*, 8 Utah 123.

*Vermont*. — *Perry v. Moore*, 66 Vt. 519.

*Virginia*. — *Robertson v. Com.*, (Va. 1894) 22 S. E. Rep. 362.

*West Virginia*. — *State v. Goodwin*, 32 W. Va. 177.

*United States*. — *U. S. v. Dickinson*, 2 McLean (U. S.) 325.

*England*. — *Crowley v. Page*, 7 C. & P. 789, 32 E. C. L. 737.

1. *Alabama*. — *Rosenbaum v. State*, 33 Ala. 354; *Blakey v. Blakey*, 33 Ala. 611; *Seale v. Chambliss*, 35 Ala. 19; *Haley v. State*, 63 Ala. 83.

*California*. — *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119; *Beckman v. Skaggs*, 59 Cal. 541; *Barkly v. Copeland*, 86 Cal. 483; *Young v. Brady*, 94 Cal. 128; *Faulkner v. Rondoni*, 104 Cal. 140; *People v. Collins*, 105 Cal. 504.

*Colorado*. — *McKeone v. People*, 6 Colo. 346.

*Connecticut*. — *Winton v. Meeker*, 25 Conn. 456.

*Florida*. — *Eldridge v. State*, 27 Fla. 162.

*Georgia*. — *Wilkinson v. Davis*, 34 Ga. 549; *Allgood v. State*, 87 Ga. 668.

*Illinois*. — *Moore v. People*, 108 Ill. 484; *Lake Erie, etc., R. Co. v. Morain*, 140 Ill. 117.

*Indiana*. — *Pennsylvania Co. v. Bray*, 125 Ind. 229.

*Iowa*. — *State v. Cokely*, 4 Iowa 477; *State v. Falconer*, 70 Iowa 416.

*Kansas*. — *Atchison, etc., R. Co. v. Townsend*, 39 Kan. 115.

*Kentucky*. — *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539.

*Louisiana*. — *State v. Lewis*, 44 La. Ann. 958; *State v. Donelon*, 45 La. Ann. 744.

*Maine*. — *Ware v. Ware*, 8 Me. 42; *State v. Reed*, 60 Me. 550; *Davis v. Roby*, 64 Me. 427; *Woodroffe v. Jones*, 83 Me. 21.

*Maryland*. — *Wolfe v. Hauver*, 1 Gill (Md.) 84; *Goodhand v. Benton*, 6 Gill & J. (Md.) 481; *Sloan v. Edwards*, 61 Md. 105.

*Massachusetts*. — *Harrington v. Lincoln*, 2 Gray (Mass.) 133; *Com. v. Farrar*, 10 Gray (Mass.) 6; *Com. v. Jones*, 155 Mass. 170.

*Michigan*. — *People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 438; *McDonald v. McDonald*, 67 Mich. 122; *People v. Hillhouse*, 80 Mich. 580.

*Mississippi*. — *Madden v. State*, 65 Miss. 176.

*Missouri*. — *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

*Nebraska*. — *Curran v. Percival*, 21 Neb. 434; *Carter v. State*, 36 Neb. 481.

*New Hampshire*. — *Tibbetts v. Flanners*, 18 N. H. 284; *Seavy v. Dearborn*, 19 N. H. 351; *Hersom v. Henderson*, 23 N. H. 498; *Dewey v. Williams*, 43 N. H. 384; *Sumner v. Crawford*, 45 N. H. 416.

*New York*. — *Morgan v. Frees*, 15 Barb. (N. Y.) 352; *Rosenweig v. People*, 63 Barb. (N. Y.) 635; *People v. Cox*, 21 Hun (N. Y.) 47; *Stape v. People*, 21 Hun (N. Y.) 399; *Hilsley v. Palmer*, 32 Hun (N. Y.) 472; *Crounse v. Fitch*, 1 Abb. App. Dec. (N. Y.) 475; *Green v. Rice*, 33 N. Y. Super. Ct. 292; *McCallan v. Brooklyn City R. Co.*, 48 Hun (N. Y.) 340; *Plato v. Reynolds*, 27 N. Y. 586; *Carpenter v. Ward*, 30 N. Y. 243; *People v. Ware*, 92 N. Y. 653; *Sherman v. Delaware, etc., R. Co.*, 106 N. Y. 542; *People v. Murphy*, 135 N. Y. 450.

*North Carolina*. — *State v. Hawn*, 107 N. Car. 810; *State v. Morris*, 109 N. Car. 820; *Clark v. Clark*, 65 N. Car. 655; *State v. Elliott*, 68 N. Car. 124; *State v. Patterson*, 74 N. Car. 157; *State v. Roberts*, 81 N. Car. 605; *State v. Ballard*, 97 N. Car. 443.

*North Dakota*. — *State v. McGahey*, 3 N. Dak. 293.

rule, however, is confined to evidence drawn out on the cross-examination. A party who draws from his own witness irrelevant testimony which is prejudicial to the opposing party ought not to be heard to object to its contradiction on the ground of its irrelevancy.<sup>1</sup>

The Test as to Whether a Matter Is Collateral within the meaning of the rule is this: that the cross-examining party be entitled to prove it in support of his case.<sup>2</sup> This test, however, applies only to the subject-matter of the inquiry, and not to the admissibility of the evidence offered in proof of it. If the witness is not a party to the action, his declarations out of court are merely hearsay and cannot be received as evidence in chief.<sup>3</sup> Proof of such declarations is confined strictly to the question of credibility, and the jury should be so instructed.<sup>4</sup>

Where the Witness Is Also a Party, the fact that his admissions against interest are admissible as evidence in chief affords no ground of objection to their reception for the purpose of impeaching him as a witness.<sup>5</sup>

*Pennsylvania.* — *Hildeburn v. Curran*, 65 Pa. St. 59; *Hester v. Com.*, 85 Pa. St. 139; *Reading Second Nat. Bank v. Wentzel*, 151 Pa. St. 142.

*South Carolina.* — *State v. Wyse*, 33 S. Car. 582.

*Tennessee.* — *Rocco v. Parczyk*, 9 Lea (Tenn.) 328; *Hill v. State*, 91 Tenn. 521.

*Texas.* — *Surrell v. State*, 29 Tex. App. 321; *Gulf, etc., R. Co. v. Coon*, 69 Tex. 730; *Davis v. State*, (Tex. Crim. App. 1893) 20 S. W. Rep. 923.

*Utah.* — *Rogers v. Cook*, 8 Utah 123.

*Vermont.* — *State v. Thibau*, 30 Vt. 100.

*Virginia.* — *Nuckols v. Jones*, 8 Gratt. (Va.) 275; *Langhorne v. Com.*, 76 Va. 1012.

*West Virginia.* — *State v. Goodwin*, 32 W. Va. 177.

*United States.* — *U. S. v. White*, 5 Cranch. (C. C.) 38; *Union Pac. R. Co. v. Reese*, 56 Fed. Rep. 288.

*England.* — *Atty.-Gen. v. Hitchcock*, 1 Exch. 91; *Spenceley v. De Willott*, 7 East 108; *Rex v. Watson*, 2 Stark. 116, 3 E. C. L. 342; *Harris v. Tippet*, 2 Campb. 637.

"The courts do not put the rule that a witness cannot be impeached upon collateral matters on the ground that the nearer the false statement is to the main issue, the stronger is its effect upon the testimony of the witness; it is put upon an entirely different ground. By one court it is put upon the ground that the time of the court is

too limited to permit collateral inquiries. *Atty.-Gen. v. Hitchcock*, 1 Exch. 91. An older and stronger reason is that stated in the leading case of *Spenceley v. De Willott*, 7 East 108, and that reason is that such a practice would confuse the jury by an interminable multiplication of issues." *Seller v. Jenkins*, 97 Ind. 436.

1. *State v. Sargent*, 32 Me. 429.

2. *Indiana.* — *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792; *Welch v. State*, 104 Ind. 347; *Staser v. Hogan*, 120 Ind. 207.

*Mississippi.* — *Williams v. State*, 73 Miss. 820.

*Pennsylvania.* — *Hildeburn v. Curran*, 65 Pa. St. 63.

*Texas.* — *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Johnson v. State*, 22 Tex. App. 206; *Drake v. State*, 29 Tex. App. 265.

*England.* — *Atty.-Gen. v. Hitchcock*, 1 Exch. 91.

3. *Law v. Fairfield*, 46 Vt. 425; *Patterson Gas Governor Co. v. Lichtenstein Bros. Co.*, 9 Misc. Rep. (N. Y. C. Pl.) 126; *Frankel v. Wolf*, 7 Misc. Rep. (N. Y. C. Pl.) 190; *Tyler v. Old Colony R. Co.*, 157 Mass. 336; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Catlin v. Michigan Cent. R. Co.*, 66 Mich. 358.

4. *Law v. Fairfield*, 46 Vt. 425; *Hicks v. Stone*, 13 Minn. 434; *Davis v. Hardy*, 76 Ind. 272; *Seller v. Jenkins*, 97 Ind. 430; *Drake v. State*, 25 Tex. App. 293.

5. *Winchell v. Winchell*, 100 N. Y.

(2) *Interest, Bias, and Hostility.*—Where a witness denies that he has made statements, or that facts exist, showing that he is interested in the event of the suit, or that he is influenced either by bias or hostility, the party cross-examining may call other witnesses for the purpose of contradicting him.<sup>1</sup> Thus, for instance, an attempt on his part to suborn another witness in the case to give false testimony may be proved,<sup>2</sup> or an attempt to

159; *Ankersmit v. Tuch*, 114 N. Y. 51; *Milligan v. Butcher*, 23 Neb. 683.

1. *Alabama.*—*Polk v. State*, 62 Ala. 237; *Haralson v. State*, 82 Ala. 47; *Prince v. State*, 100 Ala. 144.

*Arkansas.*—*Cornelius v. State*, 12 Ark. 782; *Butler v. State*, 34 Ark. 480.

*California.*—*People v. Murray*, 85 Cal. 350; *People v. Kilvington*, (Cal. 1894) 36 Pac. Rep. 13.

*Connecticut.*—*Atwood v. Welton*, 7 Conn. 66; *Beardsley v. Wildman*, 41 Conn. 515.

*Florida.*—*Selph v. State*, 22 Fla. 537; *Eldridge v. State*, 27 Fla. 162.

*Georgia.*—*Bishop v. State*, 9 Ga. 121; *Patman v. State*, 61 Ga. 379; *Conyers v. Field*, 61 Ga. 258.

*Illinois.*—*Phenix v. Castner*, 108 Ill. 207.

*Indiana.*—*Scott v. State*, 64 Ind. 400; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State*, 97 Ind. 345; *Ford v. State*, 112 Ind. 373; *Skinner v. State*, 120 Ind. 127; *Staser v. Hogan*, 120 Ind. 220; *Smith v. State*, 143 Ind. 685; *Robertson v. McPherson*, 4 Ind. App. 595.

*Iowa.*—*Lucas v. Flinn*, 35 Iowa 14. *Kentucky.*—*Louisville, etc., R. Co. v. Berry*, 96 Ky. 604; *Holly v. Com.*, (Ky. 1896) 36 S. W. Rep. 532.

*Louisiana.*—*State v. Goodbier*, 48 La. Ann. 770.

*Maryland.*—*Chelton v. State*, 45 Md. 564.

*Massachusetts.*—*Emerson v. Stevens*, 6 Allen (Mass.) 112; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *McGuire v. McDonald*, 99 Mass. 49; *Day v. Stickney*, 14 Allen (Mass.) 255.

*Michigan.*—*Helwig v. Lascowski*, 82 Mich. 619; *Tolbert v. Burke*, 89 Mich. 132.

*Missouri.*—*State v. Jones*, 106 Mo. 311; *State v. Punshon*, 133 Mo. 44.

*New Hampshire.*—*Titus v. Ash*, 24 N. H. 319; *Folsom v. Brawn*, 25 N. H. 114; *Drew v. Wood*, 26 N. H. 363.

*New York.*—*Starks v. People*, 5 Den. (N. Y.) 108; *Nation v. People*, 6

*Park. Cr. Rep.* (N. Y. Supreme Ct.) 258; *Newton v. Harris*, 6 N. Y. 345; *Gale v. New York Cent., etc., R. Co.*, 76 N. Y. 594; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 249; *Teets v. Middletown*, 106 N. Y. 651, 8 N. Y. St. Rep. 214; *Matter of Mason*, 63 Hun (N. Y.) 627, 19 N. Y. Supp. 1006; *Effray v. Masson*, 28 Abb. N. Cas. (N. Y. C. Pl.) 207; *Matter of Snelling's Will*, 136 N. Y. 515.

*Ohio.*—*Tullis v. State*, 39 Ohio St. 200.

*Oregon.*—*State v. Ellsworth*, (Oregon, 1896) 47 Pac. Rep. 199.

*Pennsylvania.*—*Philadelphia v. Reeder*, 173 Pa. St. 281.

*Texas.*—*Blum v. Jones*, (Tex. Civ. App. 1893) 23 S. W. Rep. 844; *Trinity County Lumber Co. v. Denham*, 88 Tex. 203; *Magruder v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 233; *McFarlin v. State*, 41 Tex. 23.

*Vermont.*—*Hutchinson v. Wheeler*, 35 Vt. 330; *State v. Glynn*, 51 Vt. 577.

*Virginia.*—*Langhorne v. Com.*, 76 Va. 1012.

*Wisconsin.*—*Schuster v. State*, 80 Wis. 107.

*England.*—*Thomas v. David*, 7 C. & P. 350, 32 E. C. L. 537.

**Facts Casting Suspicion of Crime.**—In a criminal case, a witness for the prosecution may be contradicted on any fact which casts suspicion on him as the perpetrator of the crime. *People v. Williams*, 18 Cal. 187; *Gaines v. Com.*, 50 Pa. St. 319.

**Cause of Enmity Not to Be Shown.**—It is not, however, permissible to prove the cause of the enmity or unfriendliness of the witness, or the details of any particular quarrel between him and the party against whom he is called. *Munden v. Bailey*, 70 Ala. 63. See also *Atchison, etc., R. Co. v. Briggs*, 2 Kan. App. 154.

2. *Florida.*—*Williams v. Dickenson*, 28 Fla. 108.

*Missouri.*—*Bates v. Holladay*, 31 Mo. App. 169.

*New York.*—*Morgan v. Frees*, 15

dissuade a witness from being present at the trial.<sup>1</sup> So, also, after laying proper foundation, it may be proved that a witness proposed for a consideration to leave the jurisdiction in order that he might not testify in the case. Such a proposition is not merely a collateral matter; it goes directly to show that the witness is corrupt.<sup>2</sup>

(3) *Matters of Opinion*. — In order that a witness may be impeached upon his statement, such statement must be not only relevant to the issue, but must also be of a matter of fact, and not merely a former opinion of the witness in regard to the matter at issue which is inconsistent with the conclusion which the facts testified to by him would tend to establish;<sup>3</sup> unless, indeed, the matter in question be one upon which the opinion of the witness is admissible in evidence, in which case his opinion is material to the matter at issue, and he may be contradicted by proof of a contrary opinion expressed by him out of court.<sup>4</sup>

d. DEGREE OF CONTRADICTION. — In order that the former statement of a witness may be admissible to impeach him, it must tend to contradict him in some material particular.<sup>5</sup> The

Barb. (N. Y.) 352; *O'Connor v. National Ice Co.*, 56 N. Y. Super. Ct. 410.

*Texas*. — *Missouri*, etc., R. Co. v. McGlamory, (Tex. Civ. App. 1896) 34 S. W. Rep. 359.

*England*. — *The Queen's Case*, 2 Brod. & B. 312; 6 E. C. L. 160; *Stafford's Case*, 7 How. St. Tr. 1400.

1. *Fitzpatrick v. Riley*, 163 Pa. St. 65; *State v. Hack*, 118 Mo. 92; *Scott v. State*, (Ala. 1897) 21 So. Rep. 425.

*Contra*. — The contrary was ruled in *Harris v. Tippet*, 2 Campb. 637, but it is a *nisi prius* decision, and does not seem to have had much consideration. It is criticised in *Morgan v. Frees*, 15 Barb. (N. Y.) 354, where the court said that it was undoubtedly wrongly decided.

2. *State v. Downs*, 91 Mo. 19; *Jenkins v. State*, 34 Tex. Crim. Rep. 201.

**Agreement to Suppress Testimony.** — The same is true of an agreement by the witness to suppress the testimony which he afterwards gives at the trial. *Barkly v. Copeland*, 86 Cal. 483.

3. *Indiana*. — *Rucker v. Beaty*, 3 Ind. 70.

*Iowa*. — *State v. Maxwell*, 42 Iowa 208.

*Massachusetts*. — *Com. v. Mooney*, 110 Mass. 99.

*Michigan*. — *People v. Stackhouse*, 49 Mich. 76.

*Missouri*. — *McFadin v. Catron*, 120 Mo. 252.

*New Hampshire*. — *City Bank v. Young*, 43 N. H. 457.

*New York*. — *Holmes v. Anderson*, 18 Barb. (N. Y.) 422; *Schell v. Plumb*, 55 N. Y. 599.

*Texas*. — *Drake v. State*, 29 Tex. App. 265; *Phipps v. State*, 34 Tex. Crim. Rep. 608.

*England*. — *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372.

**Opinion Showing Hostility of Witness.** — Where the opinion is of such a nature as to show the hostility of the witness, and is offered for that purpose, it seems that it may be received. *Dudley v. Satterlee*, 8 Misc. Rep. (N. Y. City Ct.) 538.

**Acts Showing a Contrary Opinion.** — If a witness who is not called as an expert has testified to facts tending to show that a party to a contract was, at the time of making it, incompetent to contract by reason of mental imbecility, and his own opinion is not asked for or given in evidence, it is not competent to show, by way of contradiction of his testimony, acts done by him indicating that he considered such party of sound mind. *Hubbell v. Bissell*, 2 Allen (Mass.) 196.

4. *Sanderson v. Nashua*, 44 N. H. 492; *Lane v. Bryant*, 9 Gray (Mass.) 247, 69 Am. Dec. 282; *Cochran v. Amsden*, 104 Ind. 282; *Dalton's Appeal*, 59 Mich. 352; *Daniels v. Conrad*, 4 Leigh (Va.) 401. *Compare Ripon v. Bittel*, 30 Wis. 619; *Beaubien v. Cicotte*, 12 Mich. 460.

5. *Lamb v. Ward*, 114 N. Car. 255;

admissibility of such statement does not, however, depend on the degree of variance between it and the subsequent testimony, that being a matter to be considered by the jury in estimating the weight to be given to the impeaching evidence.<sup>1</sup>

**4. Material Additions to Former Statement.** — Where a witness has made a previous statement of the transaction in regard to which he testifies, under such circumstances that he was called upon as a matter either of duty or interest to state the whole truth in regard to such transaction, the court may, in its discretion, allow evidence to be introduced to show that in his former statement he omitted material parts of the transaction to which he now testifies. The fact that he then omitted to state such material facts may afford some presumption that they did not happen, and may thus tend to contradict his testimony.<sup>2</sup>

**5. Attacking Reputation of Witness** — *a.* IN GENERAL. — A witness may also sometimes be directly impeached by proof of his general reputation as regards truthfulness in the community in which he lives.<sup>3</sup> The authorities differ as to the extent to which

Hall *v.* Young, 37 N. H. 134; Martin *v.* Farnham, 25 N. H. 195; Seller *v.* Jenkins, 97 Ind. 430; Hall *v.* Simmons, 24 Tex. 227.

1. Elmer *v.* Fessenden, 154 Mass. 428; Seller *v.* Jenkins, 97 Ind. 430; Tinklepaugh *v.* Rounds, 24 Minn. 298; Craig *v.* Rohrer, 63 Ill. 325.

2. *Georgia.* — Miller *v.* State, 97 Ga. 653.

*Massachusetts.* — Hayden *v.* Stone, 112 Mass. 346; Perry *v.* Breed, 117 Mass. 165; Com. *v.* Harrington, 152 Mass. 488.

*Montana.* — Territory *v.* Clayton, 8 Mont. 1.

*Nebraska.* — Wheeler *v.* Van Sickle, 37 Neb. 651.

*New York.* — Cowan *v.* Third Ave. R. Co. (Supreme Ct.), 9 N. Y. Supp. 610; Bickford *v.* Menier (Supreme Ct.), 9 N. Y. Supp. 775; People *v.* Chapleau, 121 N. Y. 266.

*South Carolina.* — State *v.* Turner, 36 S. Car. 534.

*Vermont.* — Briggs *v.* Taylor, 35 Vt. 57.

*United States.* — Becker *v.* Haynes, 29 Fed. Rep. 443.

Thus, in Hayden *v.* Stone, 112 Mass. 346, a witness for the plaintiff having testified that a former owner of a piece of land had stated to him that he owned beyond the fence which was its apparent boundary, the presiding judge permitted the defendant to show that the witness was one of the appraisers of the estate of such owner, and when

appraising this land did not state that the late owner claimed beyond the fence. It was his duty, as appraiser, to inform his associates of his knowledge as to the extent of the land to be appraised, and the fact that he did not inform them that the owner claimed beyond the fence afforded some presumption that he was mistaken when he testified that the owner so informed him.

**Omissions Must Be Substantially a Denial of Facts Omitted.** — It has been held that a witness cannot be impeached in this manner unless the previous omissions were so made as to be substantially a denial of the omitted facts; as where the witness was questioned concerning such facts, or was cautioned to tell all he knew about the matter, and then failed or refused to state the facts which he afterwards supplied. Hyden *v.* State, 31 Tex. Crim. Rep. 404; Williams *v.* State, 24 Tex. App. 637; Lewis *v.* State, 15 Tex. App. 647.

3. *California.* — People *v.* Markham, 64 Cal. 163, 49 Am. Rep. 700; People *v.* Bentley, 77 Cal. 7, 11 Am. St. Rep. 225; People *v.* Hickman, 113 Cal. 80.

*Kansas.* — Stevens *v.* Blake, (Kan. App. 1897) 48 Pac. Rep. 888.

*Massachusetts.* — Bates *v.* Barber, 4 Cush. (Mass.) 107.

*Minnesota.* — State *v.* Barrett, 40 Minn. 65.

*Nebraska.* — Watson *v.* Roode, 30 Neb. 264.

inquiry into the character of a witness sought to be impeached is admissible. Thus, according to numerous decisions, the party attempting to impeach the witness may not only adduce evidence as to the general reputation of the witness for truth and veracity, but may also offer proof derogatory to his general moral character.<sup>1</sup>

The Better Rule, however, would seem to be that impeaching evidence of this sort, except when coming from the witness himself on cross-examination, should be confined to proving the general reputation of the witness for truth and veracity at his present place of residence or at the place where he has recently resided. An adherence to this rule will always suffice successfully to impeach a witness who is notorious for his disregard of truth, and it has the additional advantage of preventing any confusion which might arise from a multiplicity of collateral issues.<sup>2</sup>

*South Carolina.* — State v. Murphy, 48 S. Car. 1.

*Texas.* — Browder v. State, 30 Tex. App. 614.

*United States.* — Knode v. Williamson, 17 Wall. (U. S.) 586; U. S. v. Hughes, 34 Fed. Rep. 732.

1. *Alabama.* — Ward v. State, 28 Ala. 53; De Kalb County v. Smith, 47 Ala. 407; Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Motes v. Bates, 80 Ala. 382; McNerny v. Irvin, 90 Ala. 275; Mitchell v. State, 94 Ala. 68; Byers v. State, 105 Ala. 31; Yarbrough v. State, 105 Ala. 43.

*Kentucky.* — Noel v. Dickey, 3 Bibb (Ky.) 268; Tackett v. May, 3 Dana (Ky.) 79; Hume v. Scott, 3 A. K. Marsh. (Ky.) 260; Thurman v. Virgin, 18 B. Mon. (Ky.) 785; Blue v. Kibby, 1 T. B. Mon. (Ky.) 195, 15 Am. Dec. 95; Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

*Missouri.* — Day v. State, 13 Mo. 422; State v. Shields, 13 Mo. 236, 53 Am. Dec. 147; State v. Hamilton, 55 Mo. 520; State v. Breeden, 58 Mo. 507; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506; State v. Miller, 71 Mo. 590; State v. Grant, 76 Mo. 239; State v. Rider, 95 Mo. 486; State v. Shroyer, 104 Mo. 441, 24 Am. St. Rep. 344; State v. Raven, 115 Mo. 419; State v. Rugar, 5 Mo. App. 592.

*North Carolina.* — State v. Boswell, 2 Dev. L. (N. Car.) 209; State v. Stallings, 2 Hayw. (N. Car.) 300.

*Tennessee.* — Gilliam v. State, 1 Head (Tenn.) 38, 73 Am. Dec. 161; Ford v. Ford, 7 Humph. (Tenn.) 92; Peck v. State, 86 Tenn. 259.

*England.* — Rex v. Bispham, 4 C. & P. 392, 19 E. C. L. 437.

**By Statute.** — In other jurisdictions this rule has been adopted by statute. *Majors v. State*, 29 Ark. 112; *Lawson v. State*, 32 Ark. 220; *Anderson v. State*, 34 Ark. 262; *Cline v. State*, 51 Ark. 143; *Morrison v. State*, 76 Ind. 335; *Kilburn v. Mullen*, 22 Iowa 503; *State v. Kirkpatrick*, 63 Iowa 554; *State v. Hart*, 67 Iowa 142; *State v. Froelick*, 70 Iowa 213.

In *California* it is provided by statute that the inquiry may extend to general reputation for truth, honesty, and integrity. *People v. Markham*, 64 Cal. 163, 49 Am. Rep. 700; *Heath v. Scott*, 65 Cal. 548.

**Evidence Must Tend to Show Want of Veracity.** — Such evidence must have some tendency to show a want of veracity. For example, it is not competent to prove that a witness is a rash, turbulent, and dangerous man, and under the influence of liquor. *State v. Nelson*, 101 Mo. 464.

2. *Alabama.* — Spicer v. State, 105 Ala. 123.

*California.* — *People v. Un Dong*, 106 Cal. 83.

*Connecticut.* — *State v. Randolph*, 24 Conn. 368.

*Georgia.* — *Killian v. Georgia R., etc., Co.*, 97 Ga. 727.

*Illinois.* — *Frye v. Illinois Bank*, 11 Ill. 367; *Crabtree v. Kile*, 21 Ill. 180; *Dimick v. Downs*, 82 Ill. 570.

*Indiana.* — *Griffith v. State*, 140 Ind. 163.

*Iowa.* — *Carter v. Cavanaugh*, 1 Greene (Iowa) 171.



*b. EXAMINATION OF IMPEACHING WITNESS* — (1) *Direct Examination*. — When a witness has been called for the purpose of impeaching the credit of another as to his reputation, he must know what is generally said of the witness whose credit is to be impeached, by those among whom the latter resides, in order that he may be able to answer intelligently the inquiry either as to his

*Kansas*. — Taylor v. Clendening, 4 Kan. 452.

*Maine*. — Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760; State v. Bruce, 24 Me. 71; Shaw v. Emery, 42 Me. 59.

*Massachusetts*. — Com. v. Moore, 3 Pick. (Mass.) 194; Quinsigamond Bank v. Hobbs, 11 Gray (Mass.) 257; Com. v. Smith, 162 Mass. 508.

*Michigan*. — Michigan Pipe Co. v. North British, etc., Ins. Co., 97 Mich. 493; People v. Abbott, 97 Mich. 487.

*Mississippi*. — Newman v. Mackin, 13 Smed. & M. (Miss.) 383; Smith v. State, 58 Miss. 867; Tucker v. Tucker, (Miss. 1896) 19 So. Rep. 955.

*Missouri*. — State v. Gesell, 124 Mo. 531; State v. Donnelly, 130 Mo. 642; Gardner v. St. Louis, etc., R. Co., 135 Mo. 90.

*New Hampshire*. — State v. Howard, 9 N. H. 485.

*New Jersey*. — Atwood v. Impson, 20 N. J. Eq. 150.

*New York*. — Gilbert v. Sheldon, 13 Barb. (N. Y.) 623; Bakeman v. Rose, 14 Wend. (N. Y.) 110; Jackson v. Lewis, 13 Johns. (N. Y.) 504.

*Ohio*. — Perkins v. Mobley, 4 Ohio St. 668; Craig v. State, 5 Ohio St. 605.

*Pennsylvania*. — Smith v. Hine, 179 Pa. St. 203.

*South Carolina*. — State v. Alexander, 2 Mill (S. Car.) 171; Clark v. Bailey, 2 Strobb. Eq. (S. Car.) 143; State v. Rob-  
ertson, 26 S. Car. 117.

*Texas*. — Boon v. Weathered, 23 Tex. 675; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657; Kennedy v. Upshaw, 66 Tex. 442; Pennsylvania F. Ins. Co. v. Faires, (Tex. Civ. App. 1896) 35 S. W. Rep. 55; Hill v. Dons, (Tex. Civ. App. 1896) 37 S. W. Rep. 638; Freedman v. Bonner, (Tex. Civ. App. 1897) 40 S. W. Rep. 47; Parker v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 265; Brittain v. State, (Tex. Crim. App. 1896) 37 S. W. Rep. 758; Williford v. State, (Tex. Crim. App. 1896) 37 S. W. Rep. 761; Stewart v. State, (Tex. Crim. App. 1897) 38 S. W. Rep. 1144.

*Vermont*. — State v. Smith, 7 Vt. 141; State v. Fournier, 68 Vt. 262.

*Virginia*. — Rixey v. Bayse, 4 Leigh (Va.) 330; Uhl v. Com., 6 Gratt. (Va.) 706.

*Wisconsin*. — Ketchingman v. State, 6 Wis. 426.

*United States*. — Gass v. Stinson, 2 Sumn. (U. S.) 610; U. S. v. Vansickle, 2 McLean (U. S.) 219; Teese v. Huntingdon, 23 How. (U. S.) 2; Patriotic Bank v. Coote, 3 Cranch (C. C.) 169; U. S. v. Masters, 4 Cranch (C. C.) 479; U. S. v. White, 5 Cranch (C. C.) 38.

**Inquiry Restricted to Credibility.** — In Rudsdill v. Slingerland, 18 Minn. 380, the court said: "The only object in inquiring into the character of a witness is to ascertain whether his statements, in themselves, are entitled to credit. If he is a truthful person they are, otherwise they are not. A witness, therefore, in coming into court would perhaps properly be considered as asserting his character for truthfulness to be good, and be charged with notice to defend it; but we are unable to see why a witness should be held responsible to answer for or be required to meet an attack upon his character in any other respect. A man may indulge in vices which destroy his general character, yet his truthfulness and his reputation for truthfulness may be unimpeachable. An inquiry in such a case as to his moral character would mislead instead of assist in arriving at the object of the investigation, namely, his credibility; it would, in any event, be an unnecessary attack and exposure of him to contempt and disgrace. Further, by such general inquiry as to character, the administration of justice would be hindered and delayed by collateral issues, and be more easily made the channel of venting private hatred and malice. For these among other reasons, we think the better general rule is that in impeaching the character of a witness in this mode the inquiry in chief must be restricted to his credibility; that is, his general reputation for truth and veracity."

general character, or as to his general reputation for truth and veracity. The preliminary step, therefore, in the examination of such a witness is to inquire if he possesses this knowledge.<sup>1</sup> If an affirmative answer is given, he may then be asked as to the general reputation of the witness for morality, or for truth and veracity, according as the rule of the jurisdiction may require, and if he answers that it is bad, he may then be asked whether or not, from his knowledge of such general reputation, he would believe the impeached witness under oath.<sup>2</sup>

1. *Alabama*. — Sorrelle v. Craig, 9 Ala. 534; Hadjo v. Gooden, 13 Ala. 721; Ward v. State, 28 Ala. 53.

*Arkansas*. — Cole v. State, 59 Ark. 50. *California*. — People v. Rodrigo, 69 Cal. 601.

*Florida*. — Nelson v. State, 32 Fla. 244.

*Illinois*. — Eason v. Chapman, 21 Ill. 33; Cook v. Hunt, 24 Ill. 536; Foulk v. Eckert, 61 Ill. 318.

*Iowa*. — State v. Hart, 67 Iowa 142.

*Kentucky*. — Young v. Com., 6 Bush (Ky.) 312.

*Louisiana*. — Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596.

*Massachusetts*. — Bates v. Barber, 4 Cush. (Mass.) 107; Wetherbee v. Norris, 103 Mass. 566.

*New Hampshire*. — Kelley v. Proctor, 41 N. H. 139.

*New York*. — Carlson v. Winterson, 147 N. Y. 652.

*North Carolina*. — State v. Parks, 3 Ired. L. (N. Car.) 296; State v. O'Neale, 4 Ired. L. (N. Car.) 88.

*United States*. — Teese v. Huntingdon, 23 How. (U. S.) 13.

**Denial of Knowledge.** — If the witness says he has no knowledge of the general reputation of the person sought to be impeached, he ought to be told to stand aside. Counsel have no right to cross-examine their own witnesses to elicit impeaching testimony. *State v. Perkins*, 66 N. Car. 126; *Com. v. Lawler*, 12 Allen (Mass.) 585; *Young v. Com.*, 6 Bush (Ky.) 312; *Sorrelle v. Craig*, 9 Ala. 534; *Buchanan v. State*, 109 Ala. 7; *Overstreet v. Dunlap*, 56 Ill. App. 486.

**No Preliminary Question of Competency.** — But a witness who is competent to testify to any fact is competent to testify to reputation for truth. There is no preliminary question of competency to be decided by the court, as in the case of experts. The amount of information and means of knowledge of a witness

to reputation are matters for the consideration of the jury. *Bates v. Barber*, 4 Cush. (Mass.) 108.

2. *Alabama*. — M'Cutchen v. M'Cutchen, 9 Port. (Ala.) 650; *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 721; *Crawford v. State*, 112 Ala. 1. *Arkansas*. — Hudspeth v. State, 50 Ark. 534.

*California*. — Stevens v. Irwin, 12 Cal. 306; *People v. Tyler*, 35 Cal. 553.

*Florida*. — Robinson v. State, 16 Fla. 835; *Nelson v. State*, 32 Fla. 244.

*Georgia*. — Taylor v. Smith, 16 Ga. 7; *Stokes v. State*, 18 Ga. 17.

*Illinois*. — Eason v. Chapman, 21 Ill. 33; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

*Kansas*. — State v. Johnson, 40 Kan. 266.

*Kentucky*. — Mobley v. Hamit, 1 A. K. Marsh. (Ky.) 590.

*Maryland*. — Knight v. House, 29 Md. 194, 96 Am. Dec. 515.

*Michigan*. — Hamilton v. People, 29 Mich. 173; *Keator v. People*, 32 Mich. 486.

*New Hampshire*. — State v. Howard, 9 N. H. 485; *Titus v. Ash*, 24 N. H. 319.

*New York*. — People v. Mather, 4 Wend. (N. Y.) 229; *People v. Rector*, 19 Wend. (N. Y.) 569; *People v. Davis*, 21 Wend. (N. Y.) 309; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166.

*North Carolina*. — State v. Boswell, 2 Dev. L. (N. Car.) 209.

*Pennsylvania*. — Lyman v. Philadelphia, 56 Pa. St. 488.

*South Carolina*. — State v. Murphy, (S. Car. 1896) 25 S. E. Rep. 43.

*Tennessee*. — Ford v. Ford, 7 Humph. (Tenn.) 92.

*Texas*. — Griffin v. State, 26 Tex. App. 157; *Mayes v. State*, 33 Tex. Crim. Rep. 33; *Ware v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 198.

*Virginia*. — Uhl v. Com., 6 Gratt. (Va.) 706.

(2) *Cross-examination.* — Witnesses are exceedingly liable to substitute their own impressions or their own prejudices in place of facts, when testifying on the subject of character; and on this account, as well as for the reason that reputation is often made the subject of detraction in order that it may be attacked on the trial where it is to be made the subject of inquiry,<sup>1</sup> the impeaching witness may be required on his cross-examination to give the names of those whom he has heard speak disparagingly of the other witness, and also what such persons said concerning him. In short, he may be required to answer all such questions as will serve to ascertain the extent of his information and the source from which he acquired his knowledge.<sup>2</sup>

*Wisconsin.* — *Wilson v. State*, 3 Wis. 798.

*United States.* — *U. S. v. Masters*, 4 Cranch (C. C.) 479; *U. S. v. Vansickle*, 2 McLean (U. S.) 219.

*England.* — *Mawson v. Hartsink*, 4 Esp. N. P. 104; *Carlos v. Brook*, 10 Ves. Jr. 50.

*Contra.* — In *State v. Miles*, 15 Wash. 534, it was held that where testimony has been introduced which tends to show that a certain witness's reputation for truth and veracity is bad, the witnesses should not be asked whether, from their knowledge of such person's reputation, they would believe him under oath. In this case the court said: "We think the weight of authority is now against permitting witnesses to testify to their opinions in this respect."

Professor Greenleaf seemed to be of the opinion that the weight of American authority was against permitting the witness to testify as to whether he would believe the impeached witness under oath, and he is supported in this opinion by the cases of *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760, and *Willard v. Goodenough*, 30 Vt. 393; but the text writers generally, and the great weight of authority, support the rule as laid down in the text. Thus, in *Hamilton v. People*, 29 Mich. 186, the court said: "Until Mr. Greenleaf allowed a statement to creep into his work on evidence to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. See 1 Greenl. Ev., § 461. It is a little remarkable that of the cases referred to to sustain this idea not one contained a decision upon the question, and only one contained more than a passing dictum, not in any way called for. *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760. The

authorities referred to in that case contained no such decision, and the court, after reasoning out the matter somewhat carefully, declared the question was not presented by the record for decision. The American editors of *Phillips and Starkie* do not appear to have discovered any such conflict and do not allude to it. \* \* \* So far as the reports show, the American decisions, instead of shaking the English doctrine, are very decidedly in favor of it, and have so held upon repeated and careful consideration, and we have not been referred to, nor have we found, any considerable conflict."

**Opinion Must Be Based on General Reputation.** — The opinion of the impeaching witness must be based on general reputation. He should not be asked if he would believe the impeached witness where he was interested. *Massey v. Farmers' Nat. Bank*, 104 Ill. 327.

**Need Not Have Heard Party Testify Under Oath.** — It is not essential that witnesses who state that they would not believe another person on oath should ever have heard such person give evidence under oath. The real question is whether they have sufficient knowledge of his character to give such testimony. *Rex v. Bispham*, 4 C. & P. 392, 19 E. C. L. 437.

1. *Church, C. J.*, in *Weeks v. Hull*, 19 Conn. 379.

2. *Alabama.* — *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 721.

*Connecticut.* — *Weeks v. Hull*, 19 Conn. 379, 50 Am. Dec. 249.

*Florida.* — *Robinson v. State*, 16 Fla. 835; *Nelson v. State*, 32 Fla. 244.

*Indiana.* — *Hutts v. Hutts*, 62 Ind. 215.

*Massachusetts.* — *Bates v. Barber*, 4 Cush. (Mass.) 107.

*Missouri.* — *State v. Miller*, 71 Mo. 89.

c. **REQUISITE KNOWLEDGE OF IMPEACHING WITNESS.** — The object of an inquiry of the sort now under consideration is to bring to light the true character of the witness sought to be impeached, in order that the jury may be better able to judge as to his credibility; and the legal evidence of his character is his general reputation in the community where he resides, that is, what the persons who have the best opportunity of knowing him say about him, in their social and business intercourse.<sup>1</sup> The impeaching witness is not, therefore, required to speak from his own knowledge as to the acts and transactions from which the character or reputation of the other witness has been derived; in fact, he is not allowed to do so, but must speak from his own knowledge of what is generally said of the other by those among whom he resides, and any question which does not demand such knowledge should be rejected as improper.<sup>2</sup>

*New Hampshire.* — State v. Howard, 9 N. H. 485.

*New York.* — Fulton Bank v. Benedict, 1 Hall (N. Y.) 480; People v. Mather, 4 Wend. (N. Y.) 232; Lower v. Winters, 7 Cow. (N. Y.) 263.

*South Carolina.* — State v. Merriman, 34 S. Car. 16.

*West Virginia.* — State v. Meadows, 18 W. Va. 658.

*England.* — Mawson v. Hartsink, 4 Esp. N. P. 102.

In *People v. Annis*, 13 Mich. 517, Cooley, J., said: "In nothing may parties be more easily mistaken than in judging of the general reputation of another for truth and veracity. They may either be mistaken in assuming the speech of one or two to be the voice of the community, or they may confound a reputation for something else with a reputation for untruth, or they may misconstrue reports, or they may honestly be mistaken in regard to their purport. Nothing is more common in practice than to see a witness placed upon the stand to impeach the general reputation of another for veracity, when a cross-examination demonstrates that the reports only relate to a failure, probably an honest one, to meet obligations, while the party's real reputation for truth is above suspicion. Nothing short of a cross-examination, which compels the impeaching witness to state both the source of the reports and their nature, will enable the party either to test the correctness of the impeaching evidence or to protect the witness who is assailed, if he is assailed unjustly."

**Knowledge Should Not Be Tested on Direct Examination.** — The time for testing the knowledge of the witness is on cross-examination; the judge may properly prevent inquiries on the direct examination as to whether the impeaching witness has ever heard discussed the reputation of the witness sought to be impeached.

*Wood v. State*, 31 Fla. 221; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110. 1. *Illinois.* — *Crabtree v. Kile*, 21 Ill. 180; *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324.

*Iowa.* — *Dance v. McBride*, 43 Iowa 624.

*Kansas.* — *Coates v. Sulau*, 46 Kan. 341.

*Massachusetts.* — *Bates v. Barber*, 4 Cush. (Mass.) 107; *Boynton v. Kellogg*, 3 Mass. 189.

*New York.* — *Douglass v. Tousey*, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616.

*Pennsylvania.* — *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 337, 8 Am. Dec. 655.

*Tennessee.* — *Ford v. Ford*, 7 Humph. (Tenn.) 92.

2. *Alabama.* — *Martin v. Martin*, 25 Ala. 211; *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17.

*California.* — *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225; *People v. Webster*, 89 Cal. 572.

*Colorado.* — *Benesch v. Waggner*, 12 Colo. 534; *Benesch v. Mitchelson*, 12 Colo. 539.

*Florida.* — *Nelson v. State*, 32 Fla. 244.

*Georgia.* — *Savannah, etc., R. Co. v. Wideman*, (Ga. 1896) 25 S. E. Rep. 400.

*Kentucky.* — *White v. Com.*, 96 Ky. 180.

**Personal Knowledge of Reputation.**—Although the impeaching witness may not speak from his personal knowledge as to the facts which establish a reputation, he must speak from his personal knowledge of that reputation as established. What has been told him by others as to the reputation of the witness sought to be impeached does not qualify him to testify as an impeaching witness, since this is but hearsay, or reputation of reputation.<sup>1</sup>

*Minnesota.*—State v. Barrett, 40 Minn. 65.

*Texas.*—Boon v. Weathered, 23 Tex. 675; Griffin v. State, 26 Tex. App. 157.

*United States.*—Clifford, J., in Teese v. Huntingdon, 23 How. (U. S.) 13.

**Inquiry Confined to General Reputation.**—The inquiry must be confined to the general reputation of the witness. The impeaching witness may not give his own opinion based on his personal knowledge. People v. Markham, 64 Cal. 157, 49 Am. Rep. 700; State v. Boswell, 2 Dev. L. (N. Car.) 209; Bucklin v. State, 20 Ohio 18; Fulton Bank v. Benedict, 1 Hall (N. Y.) 550; Kitteringham v. Dance, 58 Iowa 632; State v. Egan, 59 Iowa 636; State v. Woodworth, 65 Iowa 141; Ayres v. Duprey, 27 Tex. 593.

**Opinion Mistaken for Reputation.**—When the impeaching witness has declared under oath that he knows the general reputation of the witness sought to be impeached, in the community where he lives, he is qualified to proceed with his testimony. If he has mistaken his opinion based on personal knowledge for general reputation, it remains for the cross-examining party to develop that fact. Bullard v. Lambert, 40 Ala. 204; State v. Christian, 44 La. Ann. 950; Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 597; State v. Reed, 41 La. Ann. 581; Nelson v. State, 32 Fla. 244; Morrison v. Press Pub. Co., 59 N. Y. Super. Ct. 216; Long v. State, 23 Neb. 33; State v. Meadows, 18 W. Va. 658.

**Not Proper to Inquire What Others Say of Witness.**—It is not proper to inquire what is said of the witness by others. The inquiry, on the examination in chief, must be as to what is said by people in general. Hadjo v. Gooden, 13 Ala. 721; Wike v. Lightner, 11 S. & R. (Pa.) 198; Boynton v. Kellogg, 3 Mass. 189; Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760.

**Personal Acquaintance Unnecessary.**—It is not necessary that the impeaching witness be personally acquainted with

the other. It is sufficient if he knows the latter's general reputation in the community. State v. Turner, 36 S. Car. 539.

**What Two or Three Say Not Sufficient.**

—But to be acquainted with the general reputation of a person for truth and veracity it is not necessary to know what a majority of his neighbors and associates think and say of him, Robinson v. State, 16 Fla. 835; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; Crabtree v. Kile, 21 Ill. 180; Dave v. State, 22 Ala. 23; though a witness should not take as his estimate of general reputation what two or three persons say of one. Taylor v. Ryan, 15 Neb. 573; Matthewson v. Burr, 6 Neb. 312.

1. Douglass v. Tousey, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616; Curtis v. Fay, 37 Barb. (N. Y.) 64; White v. Com., 96 Ky. 180. Compare Carlson v. Winter-son, 10 Misc. Rep. (N. Y. C. Pl.) 388; State v. Allen, (Iowa 1896) 69 N. W. Rep. 274.

**Knowledge from Rumor Insufficient.**—

In Haley v. State, 63 Ala. 86, a witness called to impeach another witness was asked and permitted to answer the question whether he knew the general character of the other witness in his neighborhood from rumor. This the court held to be an improper question, saying: "Rumor is not always reputation. The word has many meanings. Its most common and accepted signification is a flying report traceable to no known or responsible source. Hence, a knowledge of character derived from rumor may be no more nor less than that furnished by a flying report brought to the knowledge of the witness. He may know nothing of the estimate in which the person of whom he testifies is held, beyond that which is brought to him by a flying report. Still, a nonprofessional witness having only this information might ignorantly and innocently answer that he knew the general character from rumor. All legal practitioners have encountered

Thus, for instance, a stranger who has been sent by one of the parties into the witness's neighborhood for the purpose of learning his general reputation will not be permitted to testify as to the result of such inquiry.<sup>1</sup>

*d. TIME AND PLACE OF ACQUIRING REPUTATION — Place.* — As a rule, the impeaching evidence should relate to the general reputation of the witness in his present or recent place of residence.<sup>2</sup> A person's reputation is not, however, to be impeached by the evidence of only a certain number of his nearest neighbors, nor are impeaching witnesses to be confined to what is said of a man among a few of those living nearest to him. For this purpose one's neighborhood or place of residence extends as far as people are acquainted with him and his character.<sup>3</sup>

*Time.* — Although the material object of inquiry is the character of the witness at the time when he testifies,<sup>4</sup> yet, if no latitude

difficulty in bringing to the comprehension of witnesses the legal import of the words 'general character' when they became the subject of inquiry."

1. *Douglass v. Tousey*, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616; *Reid v. Reid*, 17 N. J. Eq. 101.

2. *Alabama*. — *Sorrelle v. Craig*, 9 Ala. 534.

*California*. — *Heath v. Scott*, 65 Cal. 548.

*Indiana*. — *Aurora v. Cobb*, 21 Ind. 492; *Rawles v. State*, 56 Ind. 433; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43; *Gemmell v. State*, (Ind. App. 1896) 43 N. E. Rep. 909.

*Kansas*. — *Fisher v. Conway*, 21 Kan. 25, 30 Am. Rep. 419.

*Michigan*. — *People v. Lyons*, 51 Mich. 215.

*Minnesota*. — *Buse v. Page*, 32 Minn. 111.

*Missouri*. — *Waddingham v. Hulett*, 92 Mo. 528.

*Nebraska*. — *Marion v. State*, 20 Neb. 242, 57 Am. Rep. 825; *Long v. State*, 23 Neb. 34; *Sun Fire Office v. Ayerst*, 37 Neb. 184.

*New Hampshire*. — *Kelley v. Proctor*, 41 N. H. 139.

*Vermont*. — *Willard v. Goodenough*, 30 Vt. 393.

*Wisconsin*. — *Wallis v. White*, 58 Wis. 26.

*United States*. — *Teese v. Huntington*, 23 How. (U. S.) 2.

3. *Kelley v. Proctor*, 41 N. H. 146; *Chess v. Chess*, 1 P. & W. (Pa.) 39; *Houk v. Branson*, (Ind. App. 1896) 45 N. E. Rep. 78; *Hauk v. State*, (Ind. 1897) 46 N. E. Rep. 127.

*Reputation in County of Residence.* — It

has been held that an inquiry as to the general reputation of a man in the county of his residence is not too broad. *Kimmel v. Kimmel*, 3 S. & R. (Pa.) 336, 8 Am. Dec. 655; *Boswell v. Blackman*, 12 Ga. 591.

But evidence of his reputation in a county where he has never resided is not admissible. *Combs v. Com.*, 97 Ky. 24.

4. *Stratton v. State*, 45 Ind. 468; *Walker v. State*, 6 Blackf. (Ind.) 1; *Rogers v. Lewis*, 19 Ind. 405; *Aurora v. Cobb*, 21 Ind. 492; *Willard v. Goodenough*, 30 Vt. 393; *Smith v. Hine*, 179 Pa. St. 203.

In *Fisher v. Conway*, 21 Kan. 25, 30 Am. Rep. 419, it appeared that the court excluded evidence of the reputation of a witness subsequent to the commencement of the action. This was held to be error. *Brewer, J.*, delivering the opinion of the court, said: "Another matter of alleged error is in the ruling of the court in reference to impeaching testimony. It excluded all testimony of knowledge of plaintiff's reputation for truth and veracity based upon rumors and reports since the commencement of the action. In other words, the court made this inquiry: 'What was the plaintiff's reputation for truth and veracity before the commencement of this action?' and not, 'What is his reputation to-day, when he is testifying?' In this was error. Impeaching testimony is for the purpose of discrediting the witness by showing that the community in which he lives do not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credi-

in this regard were allowed, it would often be impossible to impeach the most corrupt witness.<sup>1</sup> The principle that the existence of a state of things once established by proof is presumed to continue the same until the contrary is shown is applicable, within reasonable limits, to the character of a witness proved to have once sustained a bad reputation for truth and veracity.<sup>2</sup> A witness may, therefore, be impeached by proof of his reputation in a neighborhood in which he formerly resided if such evidence be not too remote as to time.<sup>3</sup>

**Remote Evidence — Length of Time.** — The length of time which must intervene in order to render such evidence too remote is a matter resting within the discretion of the court, where the proposed evidence is not so recent or remote as to preclude all difference of opinion on the point.<sup>4</sup> As to what constitutes a proper exercise

bility that is to be attacked; is he now to be believed? What do his neighbors think and say of him at the present time? not, what did they think and say months or years ago? True, general reputation is not established in a day; and so the inquiry is not to be restricted to any particular week or month or year. The reputation a man has in any community is based upon all the years, few or many, of his living in such community. He may not have entered the community until after the commencement of the action, and still have established a reputation for truth and veracity, or the reverse; for oftentimes a case is not tried until years after its commencement."

1. *Stratton v. State*, 45 Ind. 468; *Manion v. Lambert*, 10 Bush (Ky.) 295.

**Time of Examination.** — It is not necessary that evidence of reputation have reference to the precise time of the examination. *Rucker v. Beaty*, 3 Ind. 70.

2. *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431.

In *State v. Lanier*, 79 N. Car. 622, the court said: "Witnesses are not and cannot be, in testifying on the subject of general character, limited to the times precisely when they speak, because reputation depends very greatly on reports which the witness must have heard before he is put on the stand for examination. Then, how long before, is the question. No doubt evidence referring to the character of the witness sought to be impeached at a recent period would have more influence with the jury than evidence at a more remote period, still, the evidence in each instance is of the same grade, and we cannot say that either would not aid the

jury in estimating the value of what has been said by the witness. Men's characters, no doubt, change frequently, but in the eye of the law they are not presumed to change suddenly."

**Reputation After Two Years' Absence.** — Evidence of the reputation of a witness in a neighborhood from which he removed two years before the trial is admissible. *Norwood, etc., Co. v. Andrews*, 71 Miss. 641.

**Law Does Not Presume Reform.** — The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has reformed so as to have acquired an unimpeachable reputation since that time. *Rathbun v. Ross*, 46 Barb. (N. Y.) 127.

3. *Alabama*. — *Prater v. State*, 107 Ala. 26.

*Illinois*. — *Holmes v. Stateler*, 17 Ill. 453; *Blackburn v. Mann*, 85 Ill. 222; *Brown v. Luehrs*, 1 Ill. App. 74.

*Indiana*. — *Pape v. Wright*, 116 Ind. 509; *Gemmell v. State*, (Ind. App. 1896) 43 N. E. Rep. 909.

*Michigan*. — *Hamilton v. People*, 29 Mich. 173; *Keator v. People*, 32 Mich. 486.

*North Carolina*. — *State v. Lanier*, 79 N. Car. 622.

*Texas*. — *Mynatt v. Hudson*, 66 Tex. 66; *Brown v. Perez*, (Tex. 1896) 34 S. W. Rep. 725.

4. *Watkins v. State*, 82 Ga. 231, 14 Am. St. Rep. 155; *Snow v. Grace*, 29 Ark. 131; *Holliday v. Cohen*, 34 Ark. 707; *Walker v. State*, 6 Blackf. (Ind.) 1; *Stratton v. State*, 45 Ind. 473.

In *Teese v. Huntingdon*, 23 How. (U. S.) 2, the court said: "Such testimony undoubtedly may properly be excluded

of this discretion, there is a great diversity of opinion as shown in the decisions of the courts of different states.<sup>1</sup>

**e. PARTICULAR ACTS OF MISCONDUCT.**—Without regard to whether the inquiry into the character of the witness must be confined to his reputation for truth and veracity, or may extend to his general moral character, the rule seems uniform that evidence of specific crimes, or of particular acts of misconduct on his part, is not admissible for the purpose of impeaching his credit. The impeaching evidence must be confined to the general reputation of the witness.<sup>2</sup>

by the court when it applies to a period of time so remote from the transaction involved in the controversy as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court."

**1. Evidence Held Admissible.**—In *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 434, the court said: "No certain limit, in point of duration, can be laid down for inquiries like this. The impeaching party is not restricted in his evidence to the present time, but may look to the past. And it is only necessary to say here that the law does not absolutely shut out, as immaterial, an inquiry into the character of the witness four years before the trial."

It has been held that evidence of the bad reputation for truth and veracity of a witness sought to be impeached, at a time one and one-half years before the trial, was not too remote. *Com. v. Billings*, 97 Mass. 405. And the same has been held of evidence of a reputation two years before the trial. *Lawson v. State*, 32 Ark. 220; or three years, *Kelly v. State*, 61 Ala. 19; or four years, *Keator v. People*, 32 Mich. 484; *Sleeper v. Van Middlesworth*, 4 Den. (N. Y.) 431.

Where a witness left the jurisdiction seven or eight years before the trial, it was held that proof of the reputation he left behind was admissible for the purpose of impeaching him, it not appearing that any one within reach of the process of the court was acquainted with his reputation in his new domicile. *Watkins v. State*, 82 Ga. 233, 14 Am. St. Rep. 155. See also *Snow v. Grace*, 29 Ark. 131.

Where there is some evidence of the bad reputation of the witness in the neighborhood where he at present resides, there is no objection to evidence tending to prove also that he had a bad

reputation at his former place of residence. *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *People v. Abbot*, 19 Wend. (N. Y.) 192.

**Evidence Held Too Remote.**—On the other hand, it has been held that where the witness sought to be impeached had resided in another jurisdiction for two years he could not be impeached, except by witnesses who knew his general reputation there. *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472. Compare *Stratton v. State*, 45 Ind. 468.

In *Missouri* it has been held that such evidence relating to a period three years back was too remote. *Wood v. Matthews*, 73 Mo. 482.

Where a witness has resided in a jurisdiction five years and is well known, it is permissible to attack his credibility by proof of his general reputation in the place of his former abode. *Webber v. Hanke*, 4 Mich. 198; *State v. Potts*, 78 Iowa 656; *Rucker v. Beaty*, 3 Ind. 70.

**Reputation After Commencement of Action.**—The fact that the testimony of a witness was taken by commission some time before the trial is no objection to proof of his bad reputation for truth and veracity at the time of the trial. *Dollner v. Lintz*, 84 N. Y. 669; unless the testimony touching his reputation is founded on opinions expressed *post litem motam*. *Reid v. Reid*, 17 N. J. Eq. 101.

And even in that case, it seems that the impeaching testimony should be received, leaving it to the party who called the impeached witness to show by cross-examination or by direct testimony that a conspiracy had been formed, after the institution of the prosecution or suit, to destroy the credit of his witnesses. *State v. Howard*, 9 N. H. 485; *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419.

**2. Alabama.**—*Nugent v. State*, 18 Ala. 521; *Lowery v. State*, 98 Ala. 45;



*f. PARTICULAR TRAITS OF CHARACTER—(1) When Not Material to the Issue—General Rule.*—It is also a general rule that peculiar traits of character, aside from that of habitual lying, shall not be made the subject of inquiry for the purpose of impeaching a witness.<sup>1</sup>

*Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180.

*Arkansas.*—*McArthur v. State*, 59 Ark. 431.

*California.*—*Sharon v. Sharon*, 79 Cal. 633; *Barkly v. Copeland*, 86 Cal. 483; *Jones v. Duchow*, 87 Cal. 109; *People v. O'Brien*, 96 Cal. 171; *People v. Bowers*, (Cal. 1888) 18 Pac. Rep. 660; *People v. Sherman*, (Cal. 1893) 32 Pac. Rep. 879; *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920.

*Georgia.*—*Johnson v. State*, 61 Ga. 305; *Ratteree v. Chapman*, 79 Ga. 574.

*Illinois.*—*Frye v. Illinois Bank*, 11 Ill. 367; *Sheahan v. Collins*, 20 Ill. 326, 71 Am. Dec. 271; *Eason v. Chapman*, 21 Ill. 33; *Crabtree v. Kile*, 21 Ill. 180; *Hansell v. Erickson*, 28 Ill. 257; *Dimick v. Downs*, 82 Ill. 570; *Gifford v. People*, 87 Ill. 210.

*Indiana.*—*Wilson v. State*, 16 Ind. 392; *Rawles v. State*, 56 Ind. 433; *Griffith v. State*, 140 Ind. 163; *Blough v. Parry*, (Ind. 1895) 40 N. E. Rep. 70.

*Kentucky.*—*Evans v. Smith*, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; *Taylor v. Com.*, 3 Bush (Ky.) 508; *Young v. Com.*, 6 Bush (Ky.) 312; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Com. v. Wilson*, (Ky. 1895) 32 S. W. Rep. 166.

*Massachusetts.*—*Utley v. Merrick*, 11 Met. (Mass.) 302.

*Michigan.*—*Clink v. Gunn*, 90 Mich. 135.

*Minnesota.*—*Warner v. Lockerby*, 31 Minn. 421; *Matthews v. Hershey Lumber Co.*, (Minn. 1896) 67 N. W. Rep. 1008.

*Missouri.*—*State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Bulla*, 89 Mo. 595; *State v. Rogers*, 108 Mo. 202; *State v. Gesell*, 124 Mo. 531; *State v. Donnelly*, 130 Mo. 642; *State v. Sibley*, 131 Mo. 519; *Gardner v. St. Louis, etc., R. Co.*, 135 Mo. 90.

*New York.*—*Macdonald v. Garrison*, 2 Hilt. (N. Y.) 510; *People v. Herrick*, 13 Johns. (N. Y.) 84, 7 Am. Dec. 364; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110; *People v. Rector*, 19 Wend. (N. Y.) 580; *Gilpin v. Daly*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 91; *Carlson v.*

*Winterson*, 10 Misc. Rep. (N. Y. C. Pl.) 388.

*North Carolina.*—*State v. Boswell*, 2 Dev. L. (N. Car.) 209; *Barton v. Morphes*, 2 Dev. L. (N. Car.) 520; *State v. Garland*, 95 N. Car. 671.

*North Dakota.*—*State v. Kent*, 5 N. Dak. 516.

*Oregon.*—*Leverich v. Frank*, 6 Oregon 212.

*Pennsylvania.*—*Wike v. Lightner*, 11 S. & R. (Pa.) 198.

*Tennessee.*—*Merriman v. State*, 3 Lea (Tenn.) 393.

*Texas.*—*Boon v. Weathered*, 23 Tex. 675; *Moore v. Moore*, 73 Tex. 383; *Brittain v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 758; *Freedman v. Bonner*, (Tex. Civ. App. 1897) 40 S. W. Rep. 47.

*Vermont.*—*Crane v. Thayer*, 18 Vt. 162; *Bishop v. Wheeler*, 46 Vt. 409.

*Virginia.*—*Rixey v. Bayse*, 4 Leigh (Va.) 330; *Vance v. Com.*, (Va. 1894) 19 S. E. Rep. 785.

*Wisconsin.*—*Ketchingman v. State*, 6 Wis. 426; *Muetze v. Tuteur*, 77 Wis. 236.

*England.*—*Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Layer's Case*, 16 How. St. Tr. 286; *R. v. Watson*, 32 How. St. Tr. 496.

**Rule Applies in Equity.**—And the ruling is the same in equity as at law. *Troup v. Sherwood*, 3 Johns. Ch. (N. Y.) 558; *Purcell v. M'Namara*, 8 Ves. Jr. 324; *Wood v. Hammerton*, 9 Ves. Jr. 145; *Carlos v. Brook*, 10 Ves. Jr. 49; *White v. Fussell*, 1 Ves. & B. 151; *Watmore v. Dickinson*, 2 Ves. & B. 267.

**Evidence of a Previous Falsehood.**—Evidence that a witness lied on another occasion is not admissible for the purpose of impeaching him. *Com. v. Kenyon*, 130 Mass. 39; *Luther v. Skeen*, 8 Jones L. (N. Car.) 356; *Walker v. State*, 6 Blackf. (Ind.) 1.

1. *Ward v. State*, 28 Ala. 63; *Cline v. State*, 51 Ark. 142. While the law so recognizes the affinity of vices as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the conclusion that a person guilty of one immoral habit is

**Association with Lewd Women.** — Thus, for instance, a witness may not be impeached by evidence that he is in the habit of associating with lewd and unchaste women.<sup>1</sup>

**Female Witness — Chastity.** — Nor, as a rule, may a female witness be impeached by attacking her reputation for chastity,<sup>2</sup> even where it is proposed to prove her to be a common prostitute.<sup>3</sup> In some instances, however, this rule has been disregarded.<sup>4</sup>

necessarily disposed to practice all others. *Bakeman v. Rose*, 18 Wend. (N. Y.) 154.

**Reputation for Honesty Not Open to Inquiry.** — A witness's reputation for honesty is not open to inquiry for the purpose of impeachment. *Leonard v. Pope*, 27 Mich. 145. A witness may not be impeached by proof that he is a confidence man and a thief. *Conway v. State*, 33 Tex. Crim. Rep. 327.

1. *State v. Jackson*, 44 La. Ann. 160; *State v. Parker*, 7 La. Ann. 84; *Cline v. State*, 51 Ark. 140; *State v. Sibley*, 131 Mo. 519.

2. *Alabama.* — *Holland v. Barnes*, 53 Ala. 86, 25 Am. Rep. 595; *Spicer v. State*, 105 Ala. 123; *Crawford v. State*, 112 Ala. 1.

*California.* — *People v. Yslas*, 27 Cal. 630; *People v. Sherman*, (Cal. 1893) 32 Pac. Rep. 879.

*Connecticut.* — *State v. Randolph*, 24 Conn. 363.

*Iowa.* — *Kilburn v. Mullen*, 22 Iowa 502.

*Kentucky.* — *Turner v. King*, 98 Ky. 260.

*Massachusetts.* — *Com. v. Churchill*, 11 Met. (Mass.) 538, 45 Am. Dec. 229.

*Michigan.* — *People v. Whitson*, 43 Mich. 419; *People v. Mills*, 94 Mich. 630; *People v. Abbott*, 97 Mich. 487.

*Mississippi.* — *Smith v. State*, 58 Miss. 867; *Tucker v. Tucker*, (Miss. 1896) 19 So. Rep. 955.

*Nevada.* — *State v. Larkin*, 11 Nev. 314.

*New York.* — *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Bakeman v. Rose*, 14 Wend. (N. Y.) 110.

*Oregon.* — *Leverich v. Frank*, 6 Oregon 212.

*Pennsylvania.* — *Gilchrist v. McKee*, 4 Watts (Pa.) 380, 28 Am. Dec. 721.

*Tennessee.* — *Merriman v. State*, 3 Lea (Tenn.) 393.

*Texas.* — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

*Vermont.* — *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435.

*United States.* — *U. S. v. Masters*, 4 Cranch (C. C.) 479; *Teese v. Huntingdon*, 23 How. (U. S.) 2.

*England.* — *Macbride v. Macbride*, 4 Esp. N. P. 242; *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Reg. v. Hodgson*, R. & R. C. C. 211.

In *Com. v. Murphy*, 14 Mass. 387, it was held that a female witness might be impeached by proof that she was a common prostitute, but the authority of this case was greatly shaken by the case of *Com. v. Moore*, 3 Pick. (Mass.) 196; and it was subsequently overruled in *Com. v. Churchill*, 11 Met. (Mass.) 583, 45 Am. Dec. 229.

3. *Alabama.* — *Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *McInerny v. Irvin*, 90 Ala. 275; *Rhea v. State*, 100 Ala. 119.

*California.* — *People v. Chin Hane*, 108 Cal. 597.

*Connecticut.* — *State v. Randolph*, 24 Conn. 363.

*Louisiana.* — *State v. Hobgood*, 46 La. Ann. 855.

*Massachusetts.* — *Com. v. Churchill*, 11 Met. (Mass.) 538, 45 Am. Dec. 229, overruling *Com. v. Murphy*, 14 Mass. 387.

*New York.* — *Jackson v. Lewis*, 13 Johns. (N. Y.) 504; *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

*Texas.* — *Stayton v. State*, 32 Tex. Crim. Rep. 33.

*Vermont.* — *Morse v. Pineo*, 4 Vt. 281; *Spears v. Forrest*, 15 Vt. 435; *State v. Fournier*, 68 Vt. 262.

4. Thus it has been held that inquiry may be made into the general character of a witness for chastity, though specific acts of lewdness may not be proved. *State v. Shields*, 13 Mo. 236, 53 Am. Dec. 147; *State v. Grant*, 79 Mo. 133, 49 Am. Rep. 218; *Weathers v. Barksdale*, 30 Ga. 888; *Evans v. Smith*, 5 T. B. Mon. (Ky.) 365, 17 Am. Dec. 74. See also *State v. Spurling*, 118 N. Car. 1250; *Thompson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 629.

**Application to Male Witnesses.** — It was intimated in *State v. Grant*, 76 Mo. 236,

**Keeping House of Ill Fame.** — The reputation of a witness may not be attacked by proof that he or she is the keeper of a house of ill fame.<sup>1</sup>

**Action for Seduction.** — In an action by a father for the seduction of a daughter, proof of a want of chastity, loose conduct, and bad character of the latter is always admissible in mitigation of damages, and particular instances thereof may be given in evidence.<sup>2</sup>

**In a Bastardy Case** the mother may be cross-examined in regard to her sexual intercourse with other men about the period of conception, in order to show that it cannot be known who the father is.<sup>3</sup> It is not, however, competent in such case to prove her bad reputation for chastity prior to the period of conception merely for the purpose of discrediting her as a witness.<sup>4</sup>

**Drunkennes, etc.** — While a witness is not to be impeached by proof that he is a common drunkard,<sup>5</sup> or an opium eater,<sup>6</sup> yet it is competent to show that at the time of the event about which the witness testifies such witness was drunk<sup>7</sup> or under the influence of opium.<sup>8</sup>

that this rule did not apply to male witnesses, and indeed it has been expressly so decided by the appellate court of that state. *State v. Clawson*, 30 Mo. App. 144; *State v. Coffey*, 44 Mo. App. 455. But in *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344, the Supreme Court of the state held that the rule applied to male as well as to female witnesses, remarking: "If it be true that the general character of a man is not affected by his reputation for unchastity, the evidence of such reputation will do him no injury." It may be remarked that such reasoning merely dodges the question and affords no justification for the admission of irrelevant testimony, and, besides, it ignores the injury which may be done to the cause of the party who called the witness thus attacked. The court *cited*, in support of its ruling, the case of *State v. Rider*, 95 Mo. 486.

1. *State v. Fournier*, 68 Vt. 262; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8; *Vance v. Com.*, (Va. 1894) 19 S. E. Rep. 785; *Wilson v. State*, 16 Ind. 392. Compare *State v. Cagle*, 114 N. Car. 835.

But a witness may be asked on cross-examination if she has not kept girls for the purpose of prostitution. *State v. Hack*, 118 Mo. 92.

2. *Hogan v. Cregan*, 6 Robt. (N. Y.) 138; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236. Compare *Ford v. Jones*, 62 Barb. (N. Y.) 484. See, in general,

title *Seduction*, Am. and Eng. Encyc. of Law.

3. Anonymous, 37 Miss. 54; *State v. Perkins*, 117 N. Car. 698. See also *Davis v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 174.

4. Anonymous, 37 Miss. 54, Com. v. Moore, 3 Pick. (Mass.) 194; *Rawles v. State*, 56 Ind. 433; *Morse v. Pineo*, 4 Vt. 281.

**Seduction under Promise of Marriage.** — But on the trial of an indictment for seduction under a promise of marriage, the general character of the complainant for chastity is open to inquiry. *McTyler v. State*, 91 Ga. 254.

5. *Brindle v. McIlvaine*, 10 S. & R. (Pa.) 282; *People v. Kahler*, 93 Mich. 625.

**Contra.** — In *Missouri*, where the rule is very liberal as to the admission of impeaching testimony, it has been held proper to prove that a female witness is a drunkard and a common prostitute. *State v. Grant*, 79 Mo. 133, 49 Am. Rep. 218.

6. *Eldridge v. State*, 27 Fla. 162; *State v. Gleim*, 17 Mont. 17.

7. *State v. Rollins*, 113 N. Car. 732; *Com. v. Brady*, 147 Mass. 583; *Willis v. State*, 43 Neb. 102; *State v. Nolan*, 92 Iowa 491; *Mace v. Reed*, 89 Wis. 440.

8. *People v. Webster*, 139 N. Y. 73.

**Cross-examination as to Morphine Habit.** — It is not error to refuse to allow a witness to be asked on cross-examination, for the purpose of affect-

(2) *When Material to the Issuc.* — In those cases where the reputation of the witness for chastity has a direct bearing upon the probability of the facts stated by the witness, it may be proved for the purpose of impeachment. Thus, in a prosecution for rape, or for assault with intent to commit a rape, the defendant may prove the unchaste character of the prosecutrix as tending to show the improbability of her story.<sup>1</sup> It is not, however, competent, according to the weight of authority, to prove specific acts of illicit intercourse, except with the defendant,<sup>2</sup> which may

ing her credibility, whether or not she is addicted to the morphine habit, unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testifies, or at the time of testifying, or that her powers of recollection were impaired by its use. *State v. Gleim*, 17 Mont. 17.

1. *Alabama.* — *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

*Arkansas.* — *Pleasant v. State*, 15 Ark. 652.

*Connecticut.* — *State v. De Wolf*, 8 Conn. 100, 20 Am. Dec. 90.

*Georgia.* — *Camp v. State*, 3 Ga. 419.

*Indiana.* — *Anderson v. State*, 104 Ind. 467.

*Iowa.* — *State v. Ward*, 73 Iowa 532.

*Louisiana.* — *State v. Reed*, 41 La. Ann. 581.

*Massachusetts.* — *Com. v. Kendall*, 113 Mass. 210.

*Michigan.* — *People v. McLean*, 71 Mich. 309.

*Missouri.* — *State v. White*, 35 Mo. 500.

*New Hampshire.* — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

*New York.* — *People v. Abbot*, 19 Wend. (N. Y.) 192.

*North Carolina.* — *State v. Daniel*, 87 N. Car. 507.

*Ohio.* — *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Ohio St. 332, 82 Am. Dec. 444; *Pratt v. State*, 19 Ohio St. 277.

*Texas.* — *Dorsey v. State*, 1 Tex. App. 33; *Rogers v. State*, 1 Tex. App. 187; *Jenkins v. State*, 1 Tex. App. 346; *Wilson v. State*, 17 Tex. App. 532; *Shields v. State*, 32 Tex. Crim. Rep. 498.

*England.* — *Reg. v. Mercer*, 6 Jur. 243; *Rex v. Martin*, 6 C. & P. 562, 25 E. C. L. 544; *Rex v. Clarke*, 2 Stark 241, 3 E. C. L. 393; *Rex v. Barker*, 3 C. & P. 589, 14 E. C. L. 467. See, in general, title *Rape*, Am. and Eng. Encyc. of Law.

**Cross-examination as to Character.** — In *Fry v. Com.*, 82 Va. 336, it was held that the complainant might not be asked, on cross-examination, if she had not before been a person of unchaste character, though the court said it might have been proved by other witnesses, if the defendants were able to produce them.

2. *Alabama.* — *Boddie v. State*, 52 Ala. 395; *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

*Arkansas.* — *Pleasant v. State*, 15 Ark. 624.

*Illinois.* — *Shirwin v. People*, 69 Ill. 55.

*Indiana.* — *Wilson v. State*, 16 Ind. 392; *Richie v. State*, 58 Ind. 355.

*Kansas.* — *State v. Brown*, 55 Kan. 766.

*Maryland.* — *Shartzer v. State*, 63 Md. 149, 52 Am. Rep. 501.

*Massachusetts.* — *Com. v. Regan*, 105 Mass. 593; *Com. v. Harris*, 131 Mass. 336.

*Missouri.* — *State v. White*, 35 Mo. 500.

*New Hampshire.* — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132; *State v. Knapp*, 45 N. H. 148.

*Ohio.* — *McCombs v. State*, 8 Ohio St. 643; *McDermott v. State*, 13 Ohio St. 332, 82 Am. Dec. 444.

*Rhode Island.* — *State v. Fitzsimon*, 18 R. I. 236.

*Texas.* — *Dorsey v. State*, 1 Tex. App. 33, *Wilson v. State*, 17 Tex. App. 533; *Pefferling v. State*, 40 Tex. 491.

*England.* — *Rex v. Clarke*, 2 Stark 241, 3 E. C. L. 393; *Reg. v. Hodgson*, R. & R. C. C. 211; *Reg. v. Dean*, 6 Cox C. C. 23; *Reg. v. Cockroft*, 11 Cox 410.

**Civil Action for Indecent Assault.** — In *Miller v. Curtis*, 158 Mass. 127, it was held that the same rule applies in a civil action for damages for an indecent assault.

always be proved in order to show the improbability of resistance.<sup>1</sup> This rule, however, has never been entirely satisfactory either to the bench or the bar, and there is good authority holding that previous illicit intercourse with other men may be shown as bearing directly on the principal question at issue; that is, whether the intercourse was by force or with the consent of the prosecutrix; and this for the reason that no impartial mind can resist the conclusion that a female who has recently been in the habit of indulging in illicit intercourse with others will not be so likely to resist as one who is spotless and pure.<sup>2</sup>

Where the Prosecutrix is Under the Age of Consent, it is a conclusive presumption of law that she is incapable of consent, and evidence of her reputation for chastity is inadmissible, every act of intercourse with her being a crime committed against her.<sup>3</sup>

**Assault with Intent to Commit Rape.** — In *Minnesota* this rule applies where the alleged offense is assault with intent to commit rape. *State v. Vadnais*, 21 Minn. 384.

In *Reg. v. Robins*, 2 M. & Rob. 512, Coleridge, J., after consultation with Erskine, J., was of the opinion that the prosecutrix might be asked, on cross-examination, if she had had sexual intercourse with other men, and that witnesses might be called to contradict her if she answered in the negative. But if this case was ever considered authority it was expressly overruled in *Reg. v. Holmes*, L. R. 1 C. C. 334.

1. *Alabama*. — *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

*Arkansas*. — *Pleasant v. State*, 15 Ark. 624.

*Indiana*. — *Bedgood v. State*, 115 Ind. 275.

*Iowa*. — *State v. Cook*, 65 Iowa 560.

*Michigan*. — *People v. Jenness*, 5 Mich. 305; *Strang v. People*, 24 Mich. 1; *Hall v. People*, 47 Mich. 638.

*New Hampshire*. — *State v. Forshner*, 43 N. H. 89.

*New York*. — *People v. Abbot*, 19 Wend. (N. Y.) 192; *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309.

*North Carolina*. — *State v. Jefferson*, 6 Ired. L. (N. Car.) 305.

*Texas*. — *Wilson v. State*, 17 Tex. App. 525.

*Vermont*. — *State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337.

*England*. — *Rex v. Martin*, 6 C. & P. 562, 25 E. C. L. 544.

See, in general, title *Rape*, Am. and Eng. Encyc. of Law.

2. *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Vt. 417, 94 Am. Dec.

337; *People v. Benson*, 6 Cal. 222, 65 Am. Dec. 506; *Benstine v. State*, 2 Lea (Tenn.) 172, 31 Am. Rep. 593; *Titus v. State*, 7 Baxt. (Tenn.) 132. In *State v. Jefferson*, 6 Ired. L. (N. Car.) 305, it was held that the prisoner might give evidence that the woman had been his concubine, but that he might not give in evidence, to prove her a strumpet, that she had had criminal connection with one or more other individuals. But in *State v. Murray*, 63 N. Car. 31, a judgment of conviction was reversed because the trial court refused to allow the prisoner to prove that the prosecutrix had had intercourse with other men; and in *State v. Freeman*, 100 N. Car. 435, it was held proper to ask the prosecutrix, on cross-examination, if she had not given birth to a bastard child. This rule was sanctioned in *People v. Abbot*, 19 Wend. (N. Y.) 192.

The general term of the *New York* Supreme Court refused to follow this decision in *People v. Jackson*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 391; but in *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309, reversing 1 Thomp. & C. (N. Y.) 610, it was held that evidence of the complainant's habits of receiving men at her dwelling, for the purpose of promiscuous intercourse with them, was competent on the question of consent. And in *Brennan v. People*, 7 Hun (N. Y.) 171, the court followed the rule laid down in *People v. Abbot*, 19 Wend. (N. Y.) 192, citing *People v. Dohring*, 59 N. Y. 383, 17 Am. Rep. 349, and *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309. Compare *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

3. *People v. Abbott*, 97 Mich. 484;

*g.* **CONVICTION OF AN INFAMOUS CRIME.** — Even where, as is the case in many jurisdictions, the common-law disability of a witness resulting from his having been convicted of an infamous crime has been removed by statute,<sup>1</sup> such conviction may still be proved for the purpose of impeachment.<sup>2</sup>

**Nature of Crime.** — In some jurisdictions it is not competent to prove the conviction of any crime which would not have rendered the witness infamous at common law.<sup>3</sup> In other jurisdictions the record of conviction of any crime is admissible, whether it be a

*People v. Glover*, 71 Mich. 303; *State v. Eberline*, 47 Kan. 155.

**1. Exceptions.** — In a few states an exception is made in the case of a person convicted of perjury, such person not being permitted to testify, even though he has received a pardon or has suffered the full punishment provided by law for the offense. Among these states are *Florida*, Thompson's Dig. 334, 335; Dig. of Law 1881, p. 518; *Maryland*, Rev. Code 1878, p. 741, § 1; *Mississippi*, Rev. Code 1880, § 1600, and *South Carolina*, Gen. Stat. 1882, § 2532.

**In Arkansas** the parties may consent to receive the testimony of a person convicted of one of the higher grades of crime. Dig. of Stat. 1874, § 24.

**In Tennessee** such incompetency remains until the full rights of citizenship are restored according to the statute provided. Stat. of 1871, § 3812.

**Where Incompetency at Common Law Has Been Relieved** by statute and it is sought to impeach the credibility of the witness, the judgment of conviction must be offered in evidence. *Com. v. Gorham*, 99 Mass. 420.

**In Texas**, to disqualify a witness convicted of perjury on information from another state, it should be shown that perjury is a felony in such foreign state, and that it could be prosecuted upon such information. *Pitner v. State*, 23 Tex. App. 366.

**2. Georgia.** — *Coleman v. State*, 94 Ga. 85; *Ford v. State*, 91 Ga. 162; *Georgia R. Co. v. Homer*, 73 Ga. 251.

*Indiana.* — *Glenn v. Clore*, 42 Ind. 60. *Massachusetts.* — *Com. v. Hall*, 4 Allen (Mass.) 305; *Com. v. Knapp*, 9 Pick. (Mass.) 497.

*Missouri.* — *State v. Kelsoe*, 76 Mo. 507; *State v. Loehr*, 93 Mo. 103.

*Ohio.* — *Coble v. State*, 31 Ohio St. 100.

*Texas.* — *Darbyshire v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 173;

*Bratton v. State*, 34 Tex. Crim. Rep. 477.

*United States.* — *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Baltimore, etc., R. Co. v. Rambo*, 59 Fed. Rep. 75.

**Remoteness Not a Bar.** — The fact that the conviction occurred many years before the trial does not render evidence thereof inadmissible. *Wolff v. Van Housen*, 55 Ill. App. 295.

**Judgment in Action to Recover Penalty.** — In an action to recover a penalty the judgment is not a conviction of a crime, though the penalty be for the commission of a crime. *Arhart v. Stark*, 6 N. Y. Misc. Rep. (Buffalo Super. Ct.) 579.

**Admissibility Not Affected by Pardon.** — The record of conviction is competent impeaching evidence, though the witness has been pardoned. *Dudley v. State*, 24 Tex. App. 163; *Bennett v. State*, 24 Tex. App. 73; *Long v. State*, 23 Neb. 33.

The fact that an accomplice who is a witness for the state has been released on his own recognizance, though previously convicted of crime, may be shown as affecting his credibility. *Territory v. Chavez*, (N. Mex. 1896) 45 Pac. Rep. 1107.

**3.** *Card v. Foot*, 57 Conn. 427; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97; *State v. Taylor*, 98 Mo. 240.

**Must Be for Felony.** — Nothing less than a conviction of a felony is admissible. *Hanners v. McClelland*, 74 Iowa 318; *Pitner v. State*, 23 Tex. App. 366.

**Misdemeanor, Etc.** — The conviction of a misdemeanor is immaterial. *State v. Payne*, 6 Wash. 563; *State v. Taylor*, 98 Mo. 240; *State v. Smith*, 125 Mo. 2.

A conviction under a city ordinance against disorderly conduct and other minor offenses cannot be shown to impeach a witness. *Coble v. State*, 31

felony or a misdemeanor.<sup>1</sup> Still a third rule is to the effect that the crime of which the witness has been convicted must from its nature imply moral turpitude or lack of veracity in the perpetrator.<sup>2</sup>

**Indictment or Arrest.**—It is not competent to prove, for the purpose of impeachment, that the witness is under indictment,<sup>3</sup> nor is evidence of his arrest upon a criminal charge admissible for that purpose.<sup>4</sup>

Ohio St. 100; *Arhart v. Stark*, 6 N. Y. Misc. Rep. (Buffalo Super. Ct.) 579; *State v. Taylor*, 98 Mo. 240; *Goode v. State*, 32 Tex. Crim. Rep. 505; *Gardner v. St. Louis, etc., R. Co.*, 135 Mo. 90; *Williford v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 761.

**Gambling.**—In *State v. Donnelly*, 130 Mo. 642, it was held that the record of a conviction for gambling is not admissible.

1. *Com. v. Ford*, 146 Mass. 131; *Helm v. State*, 67 Miss. 562; *McLaughlin v. Mencke*, 80 Md. 83.

**Conviction for Assault and Battery.**—The record of conviction for assault and battery may be received to impeach the witness. *Quigley v. Turner*, 150 Mass. 108; *State v. Sauer*, 42 Minn. 258.

2. *Langhorne v. Com.*, 76 Va. 1012; *Uhl v. Com.*, 6 Gratt. (Va.) 706.

**Conviction of Petit Larceny.**—Proof of conviction of petit larceny is competent by way of impeachment. *Carpenter v. Nixon*, 5 Hill (N. Y.) 260; *Newcomb v. Griswold*, 24 N. Y. 300; *State v. Wyse*, 33 S. Car. 582.

3. *Com. v. Sullivan*, 161 Mass. 59; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *West v. Lynch*, 7 Daly (N. Y.) 245; *People v. Gay*, 7 N. Y. 378; *Van Bokkelen v. Berdell*, 130 N. Y. 141; *Sullivan v. Newman*, (Supreme Ct.) 17 N. Y. Supp. 424; *Brittain v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 758.

**Question May Be Asked on Cross-examination.**—It has been held, however, that the witness may be asked, on cross-examination, whether he is not under indictment. *Carroll v. State*, 32 Tex. Crim. Rep. 431; *Oats v. U. S.*, (Indian Ter. 1897) 38 S. W. Rep. 673; *Roberts v. Com.*, (Ky. 1892) 20 S. W. Rep. 267. See also *Ryan v. State*, 97 Tenn. 206; *Linz v. Skinner*, 11 Tex. Civ. App. 512; *Texas, etc., Coal Co. v. Lawson*, 10 Tex. Civ. App. 491; *Tippett v. State*, (Tex. Crim. App.

1897) 39 S. W. Rep. 120; *Peryda v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 981; *People v. Hite*, 8 Utah 461.

**Contra.**—In *Bates v. State*, 60 Ark. 450, it was held improper to ask the accused on cross-examination if he had not previously been three times indicted for felony.

**Indictment and Trial.**—Proof that witness has been indicted and tried for a criminal offense is not admissible without proof of a conviction. *Killian v. Georgia R., etc., Co.*, 97 Ga. 727; *Hill v. Dons*, (Tex. Civ. App. 1896) 37 S. W. Rep. 638.

**Court May Introduce Record of Judgment.**—In *Moore v. State*, 96 Tenn. 209, it was held that after the admission by a witness on cross-examination that he has been indicted for a certain crime, the court may introduce the record containing the judgment in such case, showing the crime to be infamous, and disqualifying the witness.

**When Witness Has Not Been Tried.**—The extent to which a witness may be cross-examined as to crimes for which he has not been put on trial is, to a great extent, matter for the discretion of the court. *People v. Williams*, 92 Hun (N. Y.) 354.

**Prosecution Dismissed After Indictment.**—In *Matkins v. State*, 33 Tex. Crim. Rep. 605, it was held that on a trial for murder it is admissible to prove that two of defendant's witnesses had been indicted for the same murder, though their prosecutions had been dismissed.

4. *State v. Brown*, (Iowa 1896) 69 N. W. Rep. 277; *State v. Howard*, 102 Mo. 142; *Pullen v. Pullen*, 43 N. J. Eq. 136; *Loewer's Gambinus Brewery Co. v. Bachman* (C. Pl.) 18 N. Y. Supp. 138; *Stewart v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 1144. But see *Ledbetter v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 903, in which it is held that evidence that the witness had been charged with theft was admissible to impeach his credibility. And see

The Record Is the Best Evidence of conviction, and in direct impeachment it is the only admissible evidence,<sup>1</sup> though, according to numerous decisions, the witness himself may be cross-examined on the subject.<sup>2</sup> Even where this is not permitted, the witness may nevertheless be asked whether he has ever been in prison, that being an independent fact capable of proof without the production of documentary evidence.<sup>3</sup>

**6. Impeachment of One's Own Witness**—*a. IN GENERAL.*—Where a party voluntarily calls a witness in support of his case, he thereby so far vouches for the credibility of such witness that he will not, as a general rule, be permitted to impeach him by proof either of his general reputation, or of his contradictory statements made out of court at another time.<sup>4</sup>

also *Rutherford v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 271.

**Arrest for Misdemeanors.**—In *Hill v. State*, 42 Neb. 503, it was held that it was no error to permit a witness for the defendant to be asked on cross-examination whether he had been arrested for vagrancy, drunkenness, and other misdemeanors.

1. *Connecticut.*—*Hall v. Brown*, 30 Conn. 551.

*Georgia.*—*Johnson v. State*, 48 Ga. 116.

*Massachusetts.*—*Ccm. v. Gorham*, 99 Mass. 420; *Com. v. Green*, 17 Mass. 515; *Com. v. Sullivan*, 161 Mass. 59.

*Missouri.*—*Berman v. Hoke*, 61 Mo. App. 376.

*New York.*—*Newcomb v. Griswold*, 24 N. Y. 298; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182.

*Tennessee.*—*Boyd v. State*, 94 Tenn. 505.

*Washington.*—*State v. Payne*, 6 Wash. 563.

*United States.*—*U. S. v. Biebusch*, 1 Fed. Rep. 213; *Baltimore, etc., R. Co. v. Rambo*, 59 Fed. Rep. 75.

**The Whole Record** should be introduced in evidence. *Kirby v. People*, 123 Ill. 436; *Doggett v. Simms*, 79 Ga. 253; *Norton v. Perkins*, 67 Vt. 203.

**Record Must Show Conviction.**—A record which shows merely that a witness was charged with having found property which had been stolen, and that said witness was found guilty and was fined, does not show him to have been convicted of any crime and is inadmissible. *Norton v. Perkins*, 67 Vt. 203.

2. *California.*—*People v. Chin Hane*, 108 Cal. 597.

*Iowa.*—*State v. O'Brien*, 81 Iowa 95.

*Kansas.*—*State v. Pfefferle*, 36 Kan. 90; *State v. Probasco*, 46 Kan. 310.

*Maryland.*—*McLaughlin v. Mencke*, 80 Md. 83.

*Michigan.*—*Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Clemens v. Conrad*, 19 Mich. 170; *People v. Cummins*, 47 Mich. 334.

*Missouri.*—*State v. Miller*, 100 Mo. 606; *State v. Tailor*, 118 Mo. 159; *State v. Pratt*, 121 Mo. 566; *State v. Martin*, 124 Mo. 514. *Contra*, *Berman v. Hoke*, 61 Mo. App. 376.

*North Carolina.*—*State v. Garrett*, Busb. L. (N. Car.) 357; *State v. Patterson*, 2 Ired. L. (N. Car.) 346, 38 Am. Dec. 699; *State v. Lawhorn*, 88 N. Car. 634.

*Rhode Island.*—*State v. Ellwood*, 17 R. I. 763.

**Naming Felony.**—In *People v. Chin Hane*, 108 Cal. 597, it was held that in asking a witness if he had ever been convicted of a felony, the name of the particular felony might be mentioned.

3. *Real v. People*, 42 N. Y. 270; *Newcomb v. Griswold*, 24 N. Y. 298; *Lights v. State*, 21 Tex. App. 313; *Smith v. State*, 64 Md. 25, 54 Am. Rep. 752.

**As to Working Out Fine.**—A witness may be asked, on cross-examination, if he is working out a fine for theft. *Sentell v. State*, 34 Tex. Crim. Rep. 260.

4. *California.*—*In re Kennedy*, 104 Cal. 429; *Hyde v. Buckner*, 108 Cal. 522.

*Colorado.*—*Babcock v. People*, 13 Colo. 515; *Moffatt v. Tenney*, 17 Colo. 189.

*Connecticut.*—*Wheeler v. Thomas*, 67 Conn. 577.

*Georgia.*—*Dixon v. State*, 86 Ga. 754.



*b. CONTRADICTION ONE'S OWN WITNESS.* — It must not, however, be understood from this that a party, by calling a witness who unexpectedly gives evidence against him, is concluded by such evidence. He may call other witnesses to prove that the facts are otherwise than as stated, and it is no objection to any relevant evidence of the material facts upon which he relies to support his case or defense that it may incidentally contradict and discredit one or more of his own witnesses.<sup>1</sup>

*Iowa.* — *Deere v. Bagley*, 80 Iowa 197; *Hall v. Chicago, etc.*, R. Co., 84 Iowa 311; *Smith v. Dawley*, 92 Iowa 312.

*Kansas.* — *State v. Keefe*, 54 Kan. 197.

*Kentucky.* — *Helm v. Handley*, 1 Litt. (Ky.) 219.

*Louisiana.* — *State v. Vickers*, 47 La. Ann. 1574.

*Michigan.* — *Webber v. Jackson*, 79 Mich. 175; *Pickard v. Bryant*, 92 Mich. 430.

*Missouri.* — *Jamison v. Bagot*, 106 Mo. 240; *State v. Burks*, 132 Mo. 363; *Price v. Lederer*, 33 Mo. App. 426.

*New York.* — *People v. Safford*, 5 Den. (N. Y.) 118; *Thompson v. Blanchard*, 4 N. Y. 311; *Sanchez v. People*, 22 N. Y. 147; *Bullard v. Pearsall*, 53 N. Y. 230; *Pollock v. Pollock*, 71 N. Y. 137; *Thalheimer v. Klapetzky*, (Supreme Ct.) 12 N. Y. Supp. 941; *Mason v. Corbin*, 88 Hun (N. Y.) 540.

*North Carolina.* — *Kendrick v. Delinger*, 117 N. Car. 491.

*Ohio.* — *Hurley v. State*, 46 Ohio St. 320.

*Oregon.* — *State v. Steeves*, 29 Oregon 851.

*Pennsylvania.* — *Stockton v. Demuth*, 7 Watts (Pa.) 39.

*Tennessee.* — *Story v. Saunders*, 8 Humph. (Tenn.) 663.

*Texas.* — *Erwin v. State*, 32 Tex. Crim. Rep. 519; *Scott v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 549.

*Wisconsin.* — *Perkins v. State*, 78 Wis. 551; *Richards v. State*, 82 Wis. 172.

*United States.* — *Hickory v. U. S.*, 151 U. S. 303.

*England.* — *Ewer v. Baker*, 3 B. & C. 746, 10 E. C. L. 220; *Bull. N. P.* 297.

**Estopped to Prove Insanity.** — A party who introduces a witness is estopped to prove him insane at the time of the transaction attempted to be proved. *Montgomery v. Hunt*, 5 Cal. 366.

**Deposition Taken by Both Parties.** — Where the deposition of a witness is

taken by both parties, neither can impeach his credibility. *Story v. Saunders*, 8 Humph. (Tenn.) 663.

But where the party who took a deposition refuses to put it in evidence, and the other party uses it, the former is then at liberty to impeach the witness, as the act of putting the deposition in evidence makes him the witness of the party who does so. *Cudworth v. South Carolina Ins. Co.*, 4 Rich. L. (S. Car.) 416, 55 Am. Dec. 692; *Richmond v. Richmond*, 10 Verg. (Tenn.) 343. See also *Salt Springs Nat. Bank v. Fancher*, 92 Hun (N. Y.) 327.

1. *Alabama.* — *Winston v. Moseley*, 2 Stew. (Ala.) 137; *Bradford v. Bush*, 10 Ala. 386; *Hemingway v. Garth*, 51 Ala. 530; *White v. State*, 87 Ala. 24.

*California.* — *Norwood v. Kenfield*, 30 Cal. 393.

*Colorado.* — *Babcock v. People*, 13 Colo. 515; *Moffatt v. Tenney*, 17 Colo. 189.

*Connecticut.* — *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Wheeler v. Thomas*, 67 Conn. 577.

*Georgia.* — *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Skipper v. State*, 59 Ga. 63; *Cronan v. Roberts*, 65 Ga. 678; *Hollingsworth v. State*, 79 Ga. 605.

*Illinois.* — *Rockwood v. Poundstone*, 38 Ill. 199; *McFarland v. Ford*, 32 Ill. App. 173; *Rindskoph v. Kuder*, 145 Ill. 607.

*Iowa.* — *Thorn v. Moore*, 21 Iowa 285; *State v. Cummins*, 76 Iowa 133.

*Kentucky.* — *Gray v. Gray*, 3 Litt. (Ky.) 465.

*Maine.* — *Brown v. Osgood*, 25 Me. 505; *Hall v. Houghton*, 37 Me. 411.

*Massachusetts.* — *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Com. v. Starkweather*, 10 Cush. (Mass.) 59.

*Michigan.* — *Pickard v. Bryant*, 92 Mich. 430; *Darling v. Thompson*, (Mich. 1896) 65 N. W. Rep. 754.

*Mississippi.* — *Fairly v. Fairly*, 38 Miss. 280.

*c. PARTY ENTRAPPED BY HOSTILE WITNESS.* — Where, as frequently happens, a party has been entrapped into calling a hostile witness, who, having given one account of a state of facts before the trial, gives a materially different one on the witness stand, there is great diversity of opinion as to how far the party thus surprised and deceived may impeach the witness by proof of his statements made out of court.

**Calling Up Contrary Statement.** — If a witness unexpectedly gives material evidence against the party who called him, such party may, for the purpose of refreshing his memory and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement.<sup>1</sup>

**Proving Contrary Statement.** — Thus far the authorities are agreed, but the question is whether the inquiry should stop here. If the witness admits that he has made a contrary statement, there is, of course, no necessity for other evidence of it; and, according to

*Missouri.* — *Brown v. Wood*, 19 Mo. 475; *Price v. Lederer*, 33 Mo. App. 426; *Meyer Bros. Drug Co. v. McMahon*, 50 Mo. App. 18.

*Nebraska.* — *Blackwell v. Wright*, 27 Neb. 269.

*New Hampshire.* — *Seavy v. Dearborn*, 19 N. H. 351; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457.

*New Jersey.* — *Skellinger v. Howell*, 8 N. J. L. 311.

*New York.* — *Hunt v. Fish*, 4 Barb. (N. Y.) 324; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *People v. Skeehean*, 49 Barb. (N. Y.) 217; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301; *Jackson v. Leek*, 12 Wend. (N. Y.) 105; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Parsons v. Suydam*, 3 E. D. Smith (N. Y.) 276; *Steinbach v. Columbian Ins. Co.*, 2 Cai. (N. Y.) 131; *Sisson v. Conger*, 1 Thomp. & C. (N. Y.) 564; *Bemis v. Kyle*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 232; *Bok v. Vincent*, 12 Abb. Pr. (N. Y. C. Pl.) 137; *Cruse v. Findlay*, 16 Misc. Rep. (N. Y. Supreme Ct.) 576; *Thompson v. Blanchard*, 4 N. Y. 303; *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 555, 38 Am. Rep. 544.

*North Carolina.* — *Spencer v. White*, 1 Ired. L. (N. Car.) 236; *Shelton v. Hampton*, 6 Ired. L. (N. Car.) 216; *Hice v. Cox*, 12 Ired. L. (N. Car.) 315; *Crowell v. Kirk*, 3 Dev. L. (N. Car.) 357; *Chester v. Wilhelm*, 111 N. Car. 314; *Kendrick v. Dellinger*, 117 N. Car. 491.

*Pennsylvania.* — *Stockton v. Demuth*,

7 Watts (Pa.) 39; *De Lisle v. Priestman*, 1 Browne (Pa.) 176; *Lewis v. Baker*, 162 Pa. St. 510.

*South Carolina.* — *Farr v. Thompson*, Cheves L. (S. Car.) 37; *Perry v. Massey*, 1 Bailey L. (S. Car.) 32.

*Texas.* — *Kirk v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 1045.

*United States.* — *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *Hickory v. U. S.*, 151 U. S. 309; *U. S. v. Hall*, 44 Fed. Rep. 864.

*England.* — *Alexander v. Gibson*, 2 Campb. 555; *Bradley v. Ricardo*, 8 Bing. 57, 21 E. C. L. 220; *The Lochlibo*, 1 Eng. L. & Eq. 645; *Ewer v. Baker*, 3 B. & C. 746, 10 E. C. L. 220; *Richardson v. Allan*, 2 Stark. 334, 3 E. C. L. 433; *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193, 24 E. C. L. 47; *Melhuish v. Collier*, 15 Q. B. 887, 69 E. C. L. 887.

**In Texas**, under Code Crim. Pro. 1895, art. 795, which provides that a party may attack the testimony of his own witness when it is injurious to him, it was held in *Storms v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 439, that where, in a prosecution for stealing cattle, the prosecuting witness denied that the defendant admitted to him the taking of the cattle, but testified instead that another admitted the taking, the state might, in order to impeach such witness, show a contradictory statement by him. See also *Williford v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 761.

1. *Alabama.* — *Campbell v. State*, 23 Ala. 76; *Hemingway v. Garth*, 51 Ala.

the weight of judicial authority, if he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses where it would not be admissible as independent evidence, and can therefore have no effect but to impair the credit of the witness with the jury.<sup>1</sup> On the other hand, it has been urged with much reason that a party should not thus be placed at the mercy of a designing witness, and there are many cases in which it is held that, where a party has been surprised and entrapped by his own witness, the court may, in its discretion, allow him to call other witnesses to prove that such treacherous witness had previously made statements contrary to his testimony, not for the purpose of proving the truth of such previous statements, but to show the treachery of the witness and to set the party right before the jury.<sup>2</sup> In many jurisdictions this discussion has been

530; *Griffith v. State*, 90 Ala. 583; *Feibelman v. Manchester F. Ins. Co.*, 108 Ala. 180.

*Iowa*. — *Hall v. Chicago, etc., R. Co.*, 84 Iowa 311; *Spaulding v. Chicago, etc., R. Co.*, (Iowa 1896) 67 N. W. Rep. 227.

*North Dakota*. — *George v. Triplett*, 5 N. Dak. 50.

*Ohio*. — *Hurley v. State*, 46 Ohio St. 320.

*Pennsylvania*. — *McNerney v. Reading*, 150 Pa. St. 611.

*England*. — *Melhuish v. Collier*, 15 Q. B. 878, 69 E. C. L. 878; *Dunn v. Aslett*, 2 M. & Rob. 122; *Reg. v. Williams*, 6 Cox C. C. 343.

**Witness May Be Shown His Deposition.** — If, in a criminal case, a witness gives an answer different from what was expected, his deposition before the coroner or justice, as the case may be, may be put in his hands for the purpose of refreshing his memory, and the question may then be repeated. *Reg. v. Williams*, 6 Cox C. C. 343.

1. *Alabama*. — *Griffin v. Wall*, 32 Ala. 149.

*California*. — *In re Kennedy*, 104 Cal. 429.

*Illinois*. — *Rockwood v. Poundstone*, 38 Ill. 199.

*Iowa*. — *Smith v. Dawley*, 92 Iowa 312.

*Massachusetts*. — *Com. v. Starkweather*, 10 Cush. (Mass.) 59; *Com. v. Hudson*, 11 Gray (Mass.) 64; *Brown v. Bellows*, 4 Pick. (Mass.) 194; *Whitaker v. Salisbury*, 15 Pick. (Mass.) 544; *Adams v. Wheeler*, 97 Mass. 68.

*Mississippi*. — *Fairly v. Fairly*, 38 Miss. 280.

*New Jersey*. — *Brewer v. Porch*, 17 N. J. L. 377.

*New York*. — *People v. Safford*, 5 Den. (N. Y.) 112; *Thalheimer v. Klapetzky*, (Supreme Ct.) 12 N. Y. Supp. 941; *Thompson v. Blanchard*, 4 N. Y. 311; *Sanchez v. People*, 22 N. Y. 147; *Bullard v. Pearsall*, 53 N. Y. 230.

*Ohio*. — *Hurley v. State*, 46 Ohio St. 320.

*Pennsylvania*. — *Rapp v. Le Blanc*, 1 Dall. (Pa.) 63; *Smith v. Price*, 8 Watts (Pa.) 447; *Stearns v. Merchants' Bank*, 53 Pa. St. 490.

*Tennessee*. — *Roundtree v. Tibbs*, 4 Hayw. (Tenn.) 108.

*Wisconsin*. — *Richards v. State*, 82 Wis. 172.

*United States*. — *Hickory v. U. S.*, 151 U. S. 309.

*England*. — *Rex v. Moran*, Jebb C. C. 91; *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193, 24 E. C. L. 47; *The Lochlibo*, 1 Eng. L. & Eq. 645; *Holdsworth v. Dartmouth*, 2 M. & Rob. 153; *Winter v. Butt*, 2 M. & Rob. 357; *Reg. v. Ball*, 8 C. & P. 745, 34 E. C. L. 616; *Reg. v. Farr*, 8 C. & P. 768, 34 E. C. L. 627.

It cannot be said of a party, however, that he gives credit for honesty to a witness whom he puts upon the stand to prove his own fraud. *Webber v. Jackson*, 79 Mich. 179, 19 Am. St. Rep. 165; *Roberts v. Miles*, 12 Mich. 297; *Becker v. Koch*, 104 N. Y. 394; 58 Am. Rep. 515; *Cross v. Cross*, 108 N. Y. 628, 13 N. Y. St. Rep. 470. 2. *Johnson v. Leggett*, 28 Kan. 605; *State v. Sorter*, 52 Kan. 531; *National Syrup Co. v. Carlson*, 42 Ill. App. 178; *Miller v. Cook*, 127 Ind. 339; *Smith v.*

settled by the statutory adoption of the rule last stated.<sup>1</sup> In order, however, that this rule may apply, it is not sufficient that the witness has merely failed to give evidence which he was expected to give, since in such case his credibility is immaterial, as he has done no damage; it is necessary for him to have actually testified against the party calling him, and in favor of his opponent, in some material matter, in order that he may be thus impeached.<sup>2</sup>

Briscoe, 65 Md. 561; Moore v. Chicago, etc., R. Co., 59 Miss. 243; Dunn v. Dunnaker, 87 Mo. 600; Selover v. Bryant, 54 Minn. 434; Rex v. Oldroyd, R. & R. C. C. 88.

This rule was vigorously supported by Lord Denman, C. J. See Wright v. Beckett, 1 M. & Rob. 414, for his reasoning on the subject. In this case he cited Bernasconi v. Fairbrother, 10 B. & C. 549, 21 E. C. L. 128, 5 M. & R. 364, a *nisi prius* case in which he had received similar evidence. See also Dunn v. Aslett, 2 M. & Rob. 122, where he adhered to this opinion. In Wright v. Beckett, 1 M. & Rob. 414, Mr. Baron Bolland, differing from Lord Denman, was of the opinion that the evidence was not admissible, and the same opinion was afterwards expressed by Parke, Baron, in Holdsworth v. Dartmouth, 2 M. & Rob. 153, and by Erskine, J., in Winter v. Butt, 2 M. & Rob. 357. See also other English cases cited in the last preceding note. The matter was, however, set at rest by Stat. 17 and 18 Vict., c. 125, which declares such evidence admissible, thus establishing by statute the rule contended for by Lord Denman.

**Not Permitted in Civil Action.**—In State v. Norris, 1 Hayw. (N. Car.) 429, 1 Am. Dec. 564, the prosecution was permitted to impeach one of its own witnesses by proof that he had made statements out of court at variance with his testimony, though the court conceded that a party to a civil action could not be permitted thus to impeach his witness. This distinction is not sound in principle, and the case was expressly overruled in State v. Taylor, 88 N. Car. 697.

1. *California*.—People v. De Witt, 68 Cal. 586; People v. Mitchell, 94 Cal. 550; People v. Kruger, 100 Cal. 523.

*Florida*.—Williams v. Dickenson, 28 Fla. 90.

*Georgia*.—Skipper v. State, 59 Ga. 66; Dixon v. State, 86 Ga. 754.

*Indiana*.—Conway v. State, 118 Ind.

482; Ohio, etc., R. Co. v. Stein, 140 Ind. 61.

*Kentucky*.—Champ v. Com., 2 Metc. (Ky.) 23; Blackburn v. Com., 12 Bush (Ky.) 181.

*Massachusetts*.—Ryerson v. Abington, 102 Mass. 530; Brooks v. Weeks, 121 Mass. 433; Com. v. Donahoe, 133 Mass. 407.

*Texas*.—White v. State, 10 Tex. App. 381; Bennett v. State, 24 Tex. App. 73; Williams v. State, 25 Tex. App. 76; Thompson v. State, 29 Tex. App. 208; Davis v. State, (Tex. Crim. App. 1893) 21 S. W. Rep. 369.

*Vermont*.—Hurlburt v. Hurlburt, 63 Vt. 667.

*England*.—Greenough v. Eccles, 5 C. B. N. S. 786, 94 E. C. L. 786; Rice v. Howard, 16 Q. B. Div. 681.

**Predicate Must Be Laid.**—In *Massachusetts* a predicate must be laid by calling the attention of the witness to the contradictory statement intended to be proved and the particular occasion when he made it. This is required by the statute, though it is not required in that state in the impeachment of opponents' witnesses. Batchelder v. Batchelder, 139 Mass. 1; Newell v. Homer, 120 Mass. 277; Com. v. Smith, 163 Mass. 411.

2. *California*.—People v. Jacobs, 49 Cal. 384; People v. Wallace, 89 Cal. 164; People v. Mitchell, 94 Cal. 556; People v. Crespi, 115 Cal. 50.

*Florida*.—Adams v. State, 34 Fla. 185.

*Georgia*.—McDaniel v. State, 53 Ga. 253.

*Indiana*.—Blough v. Parry, (Ind. 1895) 40 N. E. Rep. 70.

*Kentucky*.—Champ v. Com., 2 Metc. (Ky.) 22.

*Massachusetts*.—Com. v. Welsh, 4 Gray (Mass.) 535; Batchelder v. Batchelder, 139 Mass. 1.

*Mississippi*.—Moore v. Chicago, etc., R. Co., 59 Miss. 243.

*Texas*.—Thomas v. State, 14 Tex. App. 70; Bennett v. State, 24 Tex.

*d.* WHERE PARTY IS BOUND TO CALL THE WITNESS. — Where a party is obliged by law to produce a certain witness, as, for instance, a subscribing witness to a will, deed, or other paper, he is not deemed to vouch for such witness's credit, and should such witness give damaging evidence against the party calling him, he may be contradicted or impeached by proof of his previous declaration at variance with his testimony.<sup>1</sup>

*e.* WHERE PARTY CALLS AN OPPOSING WITNESS. — If, after the examination and cross-examination of a witness, the party cross-examining calls him in support of his own case, he thereby makes him his own witness and may not impeach him as the witness of the opposing party.<sup>2</sup> A party may not impeach

App. 77; *Erwin v. State*, 32 Tex. Crim. Rep. 520; *Scott v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 549; *Gibson v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 471; *Bailey v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 281.

Upon the trial of Warren Hastings the judges delivered the following answer to the House of Lords: "Where a witness, produced and examined in a criminal proceeding by the prosecutor, disclaimed all knowledge of any matter so interrogated, it is not competent for such prosecutor to pursue such examination by proposing a question containing the particulars of an answer supposed to have been made by such witness before a committee of the House of Commons, or in any other place, and by demanding of him whether the particulars so suggested were not the answers he had so made." *Journ. D. P.*, Ap. 10, 1788, quoted in *Starkie on Evidence* (10th Am. ed.) 251. See also *Com. v. Welsh*, 4 Gray (Mass.) 535; *Moore v. Chicago, etc.*, R. Co., 59 Miss. 243.

**Party Must Be Injured by Testimony.** — A party, though surprised, may not impeach his own witness if he is not hurt by the witness's testimony. *Chism v. State*, 70 Miss. 742; *People v. Mitchell*, 94 Cal. 550; *Smith v. Briscoe*, 65 Md. 561; *Bennett v. State*, 24 Tex. App. 77; *Thomas v. State*, 14 Tex. App. 70; *Williford v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 761; *Adams v. State*, 34 Fla. 185.

1. *Indiana*. — *Diffenderfer v. Scott*, 5 Ind. App. 243.

*Louisiana*. — *Olinde v. Saizan*, 10 La. Ann. 153.

*Maine*. — *Dennett v. Dow*, 17 Me. 19; *Shorey v. Hussey*, 32 Me. 579.

*Michigan*. — *People v. Case*, 105 Mich. 92.

*Pennsylvania*. — *Cowden v. Reynolds*, 12 S. & R. (Pa.) 281; *Harden v. Hays*, 9 Pa. St. 151.

*South Carolina*. — *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291, 46 Am. Dec. 53.

*Vermont*. — *Thornton v. Thornton*, 39 Vt. 122.

*England*. — *Lowe v. Jolliffe*, 1 W. Bl. 365; *Goodtitle v. Clayton*, 4 Burr. 2224.

**Evidence of Bad Character.** — In *Massachusetts* a party under the necessity of calling a subscribing witness may contradict his statement of facts, *Brown v. Bellows*, 4 Pick. (Mass.) 179; but cannot impeach his general character for truth and veracity, *Whitaker v. Salisbury*, 15 Pick. (Mass.) 534.

*Pub. Stat. of Massachusetts*, c. 169, § 22, authorizes the party producing a witness to prove that he has, at other times, made statements inconsistent with his present testimony, but expressly declares that he shall not be allowed to impeach such witness's credit by evidence of bad character.

**Impeachment of Defendant in Equity Suit.** — In *New Jersey* it has been held that the complainant in a suit in equity cannot impeach the general character of the defendant for truth and veracity, though he cannot avoid taking his answer under oath, thus making it evidence in the case. *Brown v. Bulkley*, 14 N. J. Eq. 306.

2. *Craig v. Grant*, 6 Mich. 447; *Tourtelotte v. Brown*, 4 Colo. App. 377; *Richards v. State*, 82 Wis. 172.

**Witness Called by District Attorney.** — In *Com. v. Hudson*, 11 Gray (Mass.) 66, *Shaw, C. J.*, said: "The district attorney called a witness, and thereby undertook that, so far as he knew, he was entitled to credit, and held him up to the court and jury as a credible wit-

his own witness who is called by the opposing party later in the trial.<sup>1</sup>

**Damaging Testimony on Cross-examination.** — It has been held, however, that where the party who has called a witness is unable to prove anything by him, and the witness, on being cross-examined, gives damaging testimony against the party calling him, such witness may, for the purpose of impeachment, be deemed a witness of the party cross-examining.<sup>2</sup>

**Cross-examiner Making Witness His Own.** — So, also, in those jurisdictions where cross-examination is confined to such matters as are inquired of in the examination in chief, a party traveling beyond the legitimate bounds of cross-examination, and thereby eliciting new and material matter, to that extent makes the witness his own and will not be allowed to impeach him.<sup>3</sup> Where, however, the cross-examination may properly be extended to all matters which are material to the issue, the witness remains the witness of the party calling him, and the right of the other party to impeach him is not jeopardized by the extent of the cross-examination.<sup>4</sup>

ness. Can he afterwards impeach him? Sometimes the attorney may be disappointed. The witness may even have told him that he would testify that way, and courts in such case are inclined to allow him to disparage the witness, but the general rule is that he must not. Here, the district attorney must have known that he testified before the grand jury, but we do not put it on that ground. The attempt is not to prove the fact which he testified to before the grand jury. It can only be to disparage him by showing that he testified differently. The whole course of practice is otherwise in this commonwealth. A witness, when called by one party, is liable to be examined, and bound to answer, as to all facts material to the case, whether examined upon that subject by the party calling him or not. It is said the defendant, by calling the witness again, makes him his own witness to all purposes. He does to some purposes; it would be very difficult to determine what. But the party who first called him cannot be allowed to say or to show that he was unworthy of credit."

1. *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Smith v. Provident Sav. L. Assur. Soc.*, 65 Fed. Rep. 765.

**Exception.** — In *Hall v. Manson*, (Iowa 1896) 68 N. W. Rep. 922, it was held that where a witness has been

called by both parties, he may be impeached by the party first calling him by proof of contradictory statements as to a matter to which he testified only when cross-examined as the witness of the other party.

2. *Beebe v. Tinker*, 2 Root (Conn.) 160.

**Use by Other Party after Dismissal.** — In *Artz v. Chicago, etc.*, R. Co., 44 Iowa 284, it was held that where a witness has been dismissed by the party calling him, and he then testifies, upon examination by the other party, to new matter, he becomes the witness of the latter, and it is competent for the party first calling him to contradict him in respect of the new matter to which he has testified.

3. *California*. — *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317.

*Iowa*. — *Artz v. Chicago, etc.*, R. Co., 44 Iowa 286; *Deere v. Bagley*, 80 Iowa 197.

*New York*. — *People v. Moore*, 15 Wend. (N. Y.) 419; *First Baptist Church v. Brooklyn F. Ins. Co.*, 23 How. Pr. (N. Y. Supreme Ct.) 448; *Hill v. Froehlick* (Supreme Ct.) 14 N. Y. Supp. 610.

*Texas*. — *Shackelford v. State*, (Tex. Crim. App. 1894) 27 S. W. Rep. 8.

*Vermont*. — *Fairchild v. Bascomb*, 35 Vt. 398.

4. *Johnson v. Armstrong*, 97 Ala. 731; *Lewis v. Hodgdon*, 17 Me. 267; *State v. Jones*, 64 Mo. 391; *Sawrey v. Murrell*, 2 Hayw. (N. Car.) 397.

*f.* WHERE ONE PARTY IS CALLED BY THE OTHER. — Where a party calls his opponent to the witness stand, he is no more concluded by his testimony than by that of any other witness, but may prove the facts as they really exist by other witnesses if possible, though in so doing he incidentally discredits the opponent as a witness. By calling him as such, however, he precludes himself, as in the case of other witnesses, from attacking him merely for the purpose of impeachment,<sup>1</sup> and he will not, as a rule, be heard to question his veracity in an argument to the court or jury.<sup>2</sup>

**Admissions of Party Called as Witness.** — The fact that one has called the opposing party as a witness will not preclude him from proving material admissions which have been made by such party at other times, such admissions being admissible as independent evidence, even though they may contradict the testimony given by the witness.<sup>3</sup>

1. *Alabama.* — *Warren v. Gabriel*, 51 Ala. 235.

*Arkansas.* — *Drennen v. Lindsey*, 15 Ark. 359.

*Illinois.* — *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567.

*Iowa.* — *Hunt v. Coe*, 15 Iowa 197; *Thorn v. Moore*, 21 Iowa 289; *Humble v. Shoemaker*, 70 Iowa 223; *Gardner v. Connelly*, 75 Iowa 205.

*Kansas.* — *Wallach v. Wylie*, 28 Kan. 138; *Griffis v. Whitson*, 3 Kan. App. 437.

*Missouri.* — *Chandler v. Fleeman*, 50 Mo. 239; *Claffin v. Dodson*, 111 Mo. 195; *Bensberg v. Harris*, 46 Mo. App. 404.

*New York.* — *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *Hunter v. Wet-sell*, 84 N. Y. 555, 38 Am. Rep. 544; *Becker v. Koch*, 104 N. Y. 394, 58 Am. Rep. 515; *De Meli v. De Meli*, 120 N. Y. 490, 17 Am. St. Rep. 652; *Hankinson v. Vantine*, 152 N. Y. 20.

*North Carolina.* — *Kendrick v. Del-linger*, 117 N. Car. 491.

*Texas.* — *Paxton v. Boyce*, 1 Tex. 317; *Cook v. Carroll Land, etc., Co.*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1006.

*Vermont.* — *Good v. Knox*, 64 Vt. 97.

*Wisconsin.* — *Garny v. Katz*, 89 Wis. 230.

*United States.* — *Tarsney v. Turner*, 2 Flipp. (U. S.) 735; *Dravo v. Fabel*, 25 Fed. Rep. 116.

*England.* — *Ewer v. Baker*, 3 B. & C. 746, 10 E. C. L. 220.

**Where a Party Entraps His Opponent.** — If a party relies on what his adversary swore at a former trial, and calls him

as a witness, and is surprised and deceived by a material change in his testimony, he may impeach him in jurisdictions where he would be allowed to impeach another witness called by him in such case. *Cox v. Prater*, 67 Ga. 588.

**Interrogatories to Nonresident Opponent.** — In *Standard L., etc., Ins. Co. v. Tinney*, 73 Miss. 726, it is held that a party filing interrogatories to the nonresident adverse party may contradict the answers given thereto, upon laying the proper foundation.

2. *Tarsney v. Turner*, 48 Fed. Rep. 818, 2 Flipp. (U. S.) 735; *Graves v. Davenport*, 50 Fed. Rep. 881.

**Contra.** — In *Minnesota* the rule is otherwise. Thus in *Schmidt v. Dur-nam*, 50 Minn. 96, Gilfillan, C. J., said: "Whether a party who calls the opposite party to be examined as a witness under Laws 1885, c. 193, accredits him, so that he cannot offer evidence to impeach his general character for truth and veracity, we need not, in this case, consider. He certainly may question the truth of his statements of fact, either by independent opposing evidence or by inference or arguments drawn from the testimony of the party himself. Thus if, in a case like this, the party so called testify that the conveyance was made in good faith, the party calling him is not concluded by such testimony, but may insist that upon the entire account of the transaction given by the party testifying, the inference may be drawn that the conveyance was not *bona fide*."

3. *Jamison v. Bagot*, 106 Mo. 257; *Thomas v. McDanel*, 88 Iowa 374;

**II. CORROBORATION — 1. When Allowed.** — In all cases where corroboration is required by law it is permissible to strengthen the witness's testimony by proof of connected incidents tending to show its consistency.<sup>1</sup> In other cases, however, a party will not be allowed to introduce evidence for the purpose of sustaining the testimony of his witness before the credibility of such witness has been attacked.<sup>2</sup>

**Witness Merely Contradicted.** — Thus, for instance, where a witness is merely contradicted by evidence disproving the facts as testified to by him, no other attempt being made to impeach him, other witnesses cannot be called for the purpose of corroborating him.<sup>3</sup>

Kelly v. Jay, 79 Hun (N. Y.) 535; Brubaker v. Taylor, 76 Pa. St. 83.

**Introduction of Deposition.** — The introduction by one party of a deposition of an opposing party taken in another proceeding does not make the deponent the witness of the one introducing the deposition so as to prevent his impeaching the statements made by the deponent. Jamison v. Bagot, 106 Mo. 240.

1. Bruton v. State, 21 Tex. 337.

2. Bryant v. Tidgewell, 133 Mass. 86; Hamilton v. Conyers, 28 Ga. 277; State v. Rorabacher, 19 Iowa 154; Adams v. Greenwich Ins. Co., 70 N. Y. 170; State v. Grant, 79 Mo. 133, 49 Am. Rep. 218; State v. Thomas, 78 Mo. 327; Reynolds v. Richmond, etc., R. Co., 92 Va. 400.

**Good Character Presumed.** — The general character of a witness is presumed to be good until he is impeached, and evidence of his good character is not admissible until his character has been impugned by the other party. Dodd v. Norris, 3 Campb. 519; U. S. v. Holmes, 1 Cliff. (U. S.) 98; Rogers v. Moore, 10 Conn. 13; Johnson v. State, 21 Ind. 329; Magee v. People, 139 Ill. 138; Braddee v. Brownfield, 9 Watts (Pa.) 124; Wertz v. May, 21 Pa. St. 279; People v. Rector, 19 Wend. (N. Y.) 579; Fulkerson v. Murdock, 53 Mo. App. 151; Funderberg v. State, 100 Ala. 36; Osmun v. Winters, 25 Oregon 260.

**Not Admissible on Examination in Chief.** — Corroborating evidence is not admissible on the examination in chief. Jackson v. Etz, 5 Cow. (N. Y.) 314; People v. Vane, 12 Wend. (N. Y.) 78; Adams v. Greenwich Ins. Co., 70 N. Y. 170; Conway v. State, 33 Tex. Crim. Rep. 327.

In Harrison's Case, 12 How. St. Tr. 861, corroborating evidence was re-

ceived in connection with the examination in chief, but the law is now settled the other way. See Dodd v. Norris, 3 Campb. 519, where Lord Ellenborough excluded evidence of good character in rebuttal of the cross-examination, observing that there was ample opportunity for explanation on the redirect examination.

3. Georgia. — Miller v. Western, etc., R. Co., 93 Ga. 480.

Illinois. — Tedens v. Schumers, 112 Ill. 267.

Indiana. — Pruitt v. Cox, 21 Ind. 15; Presser v. State, 77 Ind. 274; Brann v. Campbell, 86 Ind. 516; Fitzgerald v. Goff, 99 Ind. 34; Diffenderfer v. Scott, 5 Ind. App. 243; Garr v. Shaffer, 139 Ind. 191.

Kentucky. — Vance v. Vance, 2 Metc. (Ky.) 581.

New York. — Leonori v. Bishop, 4 Duer (N. Y.) 420; Starks v. People, 5 Den. (N. Y.) 106.

Pennsylvania. — Wertz v. May, 21 Pa. St. 279.

Texas. — Texas, etc., R. Co. v. Raney, 86 Tex. 365; Gulf, etc., R. Co. v. Younger, (Tex. Civ. App. 1897) 40 S. W. Rep. 423; Tomson v. Heidenheimer, (Tex. Civ. App. 1897) 40 S. W. Rep. 425.

Washington. — State v. Nelson, 13 Wash. 523.

In Durham v. Beaumont, 1 Campb. 207, Lord Ellenborough refused to admit evidence of the good character of a witness who stood contradicted by other witnesses. To the same effect are State v. Ward, 49 Conn. 429; Owens v. White, 28 Ala. 413; Heywood v. Reed, 4 Gray (Mass.) 574; Atwood v. Dearborn, 1 Allen (Mass.) 483, 79 Am. Dec. 755; Paxton v. Dye, 26 Ind. 393.

**Contradiction Involving Charge of Fraud.** — If, however, the contradiction involves a charge of fraud or other



**Strengthening Evidence.**—The party calling the witness is not, however, precluded from strengthening the evidence upon which he first rested his case, though in so doing he may incidentally corroborate an unimpeached witness.<sup>1</sup>

**2. Right to Corroborate.**—Whenever a shadow has been cast upon the reputation of a witness for truth and veracity by competent impeaching evidence, the party calling such witness may introduce evidence corroborating him.<sup>2</sup> For this purpose an impeaching witness may in turn be impeached.<sup>3</sup>

**3. Evidence of Good Character.**—Where the general character of a witness, or his general reputation for truth and veracity, has been directly assaulted, the party calling such witness may support his testimony by proof of his good reputation.<sup>4</sup>

grossly improper conduct on the part of the witness, evidence of his good character is then admissible. *Annesley v. Anglesea*, 17 How. St. Tr. 1348; *George v. Pilcher*, 28 Gratt. (Va.) 318, 26 Am. Rep. 350. Compare *Provis v. Reed*, 3 M. & P. 4, 5 Bing. 435, 15 E. C. L. 490.

1. *John v. State*, 16 Ga. 200.

In *Outlaw v. Hurdle*, 1 Jones L. (N. Car.) 163, Pearson, J., said: "We conclude, with his Honor, that the practice in *North Carolina* has been, and we think it is sustained by good sense, for a party to offer as many witnesses as may be deemed necessary to establish his allegation. If the other party chooses, he may rest the case upon it, or he may call witnesses in his turn, and the first party may call witnesses in reply, and for the purpose of adding to the strength of the evidence upon which he at first rested the case. Lord Kenyon, who had as much good sense as any judge that ever tried a case, somewhere remarks: 'It is not worth while to jump until you get to the fence;' that is, there is no use in meeting objections until they are presented, or in piling up proof until it is made necessary by what is done on the other side." Compare *Wade v. Thayer*, 40 Cal. 578.

*Contra.*—*State v. Parish*, 22 Iowa 284.

2. *California.*—*Wade v. Thayer*, 40 Cal. 584.

*Massachusetts.*—*Green v. Gould*, 3 Allen (Mass.) 465.

*North Carolina.*—*March v. Harrell*, 1 Jones L. (N. Car.) 329; *State v. Cherry*, 63 N. Car. 495; *Isler v. Dewey*, 71 N. Car. 16.

*South Carolina.*—*State v. Jones*, 29 S. Car. 201.

*Texas.*—*Holbert v. State*, 9 Tex. App. 219, 35 Am. Rep. 738; *Loomis v. Stuart*, (Tex. Civ. App. 1893) 24 S. W. Rep. 1078; *Howard v. Galbraith*, (Tex. Civ. App. 1894) 30 S. W. Rep. 689.

**Introducing Portion of Former Testimony.**—Where it is attempted to impeach a witness by the introduction of a portion of his testimony on a former occasion, it is error to exclude another portion which corroborates his testimony on the witness stand. *Jones v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 634. See also *Lowe v. State*, 97 Ga. 792.

**Incidental Impeachment of Own Witness.**—Where a party, in attempting to impeach a witness for the opposing party, incidentally impeaches one of his own witnesses, he cannot afterwards introduce evidence to corroborate such witness. *Mealer v. State*, 32 Tex. Crim. Rep. 102.

3. *State v. Cherry*, 63 N. Car. 495; *Starks v. People*, 5 Den. (N. Y.) 106; *Evans v. State*, 95 Ga. 468.

**Extent of Such Recrimination.**—Judge Taylor remarks that it has not yet been formally settled how far this plan of recrimination may be carried, but that the practice has been said by some lawyers to conform to the rule of the civil law; that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses may be called to attack the characters of these last. 2 Tayl. on Ev., § 1473, *citing* *Stafford's Trial*, 7 How. St. Tr. 1484.

4. *Alabama.*—*M'Cutchén v. M'Cutchén*, 9 Port. (Ala.) 650; *Holley v. State*, 105 Ala. 100; *Towns v. State*, 111 Ala. 1.

*Indiana.*—*Clackner v. State*, 33 Ind. 412.

**Limits of Rule.**—While there appears to be no difference of opinion as regards the rule stated above, there is no little conflict of authority as to its limits. According to some of the best text-writers, where the character of the witness has been impeached, although upon cross-examination only, evidence may be given on the other side to support his character by proving his general good reputation.<sup>1</sup> It is accordingly held, in some jurisdictions, that whenever a witness's character for truth is attacked the party calling him may give general evidence in support of his good character.<sup>2</sup> Under this rule, the credibility of a witness who has

*Iowa.*—State *v.* Nelson, 58 Iowa 208.

*Kentucky.*—Warren *v.* Com., (Ky. 1896) 35 S. W. Rep. 1028.

*Louisiana.*—State *v.* Desforages, 48 La. Ann. 74.

*Maine.*—Prentiss *v.* Roberts, 49 Me. 127.

*Maryland.*—Sloan *v.* Edwards, 61 Md. 89.

*Michigan.*—Hamilton *v.* People, 29 Mich. 173.

*New York.*—People *v.* Rector, 19 Wend. (N. Y.) 569; Stape *v.* People, 85 N. Y. 390.

*Texas.*—Anderson *v.* State, 34 Tex. Crim. Rep. 546; Farmer *v.* State, (Tex. Crim. App. 1895) 33 S. W. Rep. 232.

1. Stark. Ev. (10th Am. ed.) 252; 1 Greenl. Ev., § 469.

The case of Rex *v.* Clarke, 2 Stark. 241, 3 E. C. L. 393, is generally cited in support of this text, but, as we shall presently see, it does not go to the full extent claimed for it by the text writers.

**Credibility Attacked on Cross-examination.**—In pursuance of this rule, it has been held that where the credibility of a witness is vigorously attacked on cross-examination, evidence of his good reputation for truthfulness is admissible. State *v.* Fruge, 44 La. Ann. 165; State *v.* Boyd, 38 La. Ann. 374; State *v.* Johnson, 47 La. Ann. 1225; Texas, etc., R. Co. *v.* Raney, 86 Tex. 363; Richmond *v.* Richmond, 10 Yerg. (Tenn.) 343; Vernon *v.* Tucker, 30 Md. 462; State *v.* Cherry, 63 N. Car. 495; Isler *v.* Dewey, 71 N. Car. 16.

In Stevenson *v.* Gunning, 64 Vt. 609, the court said: "It is observable that a distinction is taken between an attack upon the character of the witness, as such, for credibility, and the character of the testimony given for belief. It is only when the character of the witness for credibility is directly attacked by general evidence regarding his standing and character for truth and veracity, or

by showing that he has made contradictory or inconsistent statements, either out of court or in court, or that he has been convicted of some crime, or engaged in some act affecting his credibility, like suborning or attempting to suborn a witness, or suppress testimony in the case on trial, that sustaining evidence can be used. But when the character of the testimony given by a witness is attacked only by showing its improbability, or by other testimony conflicting with the testimony of the witness, sustaining testimony cannot be admitted. If admitted when there is only a conflict in the testimony of opposing witnesses, the opposing witnesses on both sides could be supported by sustaining testimony in regard to their standing and character by reputation as witnesses, and the trial would be prolonged indefinitely. Besides, the character of the testimony given by a witness does not directly attack the character of the witness for credibility." Compare Sweet *v.* Sherman, 21 Vt. 23.

2. *Alabama.*—Hadjo *v.* Gooden, 13 Ala. 718.

*Missouri.*—Walker *v.* Phoenix Ins. Co., 1 Mo. App. Rep. 478.

*North Carolina.*—State *v.* Cherry, 63 N. Car. 495; Isler *v.* Dewey, 71 N. Car. 16.

*Texas.*—Ledbetter *v.* State, (Tex. Crim. App. 1895) 29 S. W. Rep. 479.

*Vermont.*—State *v.* Roe, 12 Vt. 93; Paine *v.* Tilden, 20 Vt. 554; Sweet *v.* Sherman, 21 Vt. 23; Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142; Stevenson *v.* Gunning, 64 Vt. 609.

*Virginia.*—George *v.* Pilcher, 28 Gratt. (Va.) 318, 26 Am. Rep. 350.

**Challenge as to Veracity Sufficient.**—In order to admit evidence of good character for truth, it is not necessary that the general character of a witness be first impeached. It is sufficient that his

been impeached by proof of a former declaration at variance with his testimony may be supported by evidence of his general good character for truth and veracity.<sup>1</sup>

This liberal reception of evidence as to character is not, however, warranted by the English authorities, which hold that, as a rule, evidence supporting the good character of a witness is not admissible unless other witnesses have been called for the purpose of attacking his general reputation, and that admissions drawn from him on cross-examination will not warrant the reception of such evidence unless in their nature they amount to an attack on his general reputation.<sup>2</sup> This is also the rule in a number of American jurisdictions,<sup>3</sup> and where it obtains, proof that a

veracity as a witness has been fairly challenged. *Texas, etc., R. Co. v. Raney*, (Tex. Civ. App. 1893) 23 S. W. Rep. 340. See also *Howard v. Galbraith*, (Tex. Civ. App. 1894) 30 S. W. Rep. 689.

1. *Alabama*. — *Hadjo v. Gooden*, 13 Ala. 718; *Lewis v. State*, 35 Ala. 380; *Haley v. State*, 63 Ala. 83; *Holley v. State*, 105 Ala. 100.

*Indiana*. — *Clark v. Bond*, 29 Ind. 555; *Harris v. State*, 30 Ind. 131; *Stratton v. State*, 45 Ind. 468; *Carroll County v. O'Connor*, 137 Ind. 622; *Garr v. Shaffer*, (Ind. 1894) 36 N. E. Rep. 208.

*North Carolina*. — *Isler v. Dewey*, 71 N. Car. 14.

*Oregon*. — *Glaze v. Whitley*, 5 Oregon 164.

*Texas*. — *Dixon v. State*, 15 Tex. App. 271; *Coombes v. State*, 17 Tex. App. 258; *Thomas v. State*, 18 Tex. App. 214; *Phillips v. State*, 19 Tex. App. 164; *Tipon v. State*, 30 Tex. App. 530; *Burrell v. State*, 18 Tex. 730; *Johnson v. Brown*, 51 Tex. 65; *Ledbetter v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 479.

*Vermont*. — *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23.

**Evidence of Statements Must Be Introduced.** — Evidence of the contradictory statements must actually be introduced. Merely laying the foundation is not sufficient to let in evidence of good character. *State v. Cooper*, 71 Mo. 436.

2. *Dodd v. Norris*, 3 Campb. 519; *Doe v. Harris*, 7 C. & P. 330, 32 E. C. L. 529; *Bamfield v. Massey*, 1 Campb. 460.

The case of *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393, generally cited in support of the more liberal rule, went no further than this: The prosecutrix admitted on cross-examination that she

had twice been sent to the house of correction on charges of theft, and *Holroyd, J.*, considering this an attack upon her general reputation, admitted evidence of her subsequent good conduct.

**Exception — Deceased Attesting Witnesses.** — The English cases make an exception of attesting witnesses to wills who are dead at the time of the trial. If the reputation of such witnesses is impugned by a charge of fraud in the execution of the will, the proponent may prove their general good character, though no direct attack has been made on their general reputation. *Doe v. Stephenson*, 3 Esp. N. P. 284; *Doe v. Walker*, 4 Esp. N. P. 50; *Provis v. Reed*, 3 M. & P. 4; *Durham v. Beaumont*, 1 Campb. 207. Compare *Wright v. Littler*, 3 Burr. 1245.

This exception is allowed, however, only when the witness is dead at the time of the trial. *Coleridge, J.*, in *Doe v. Harris*, 7 C. & P. 330, 32 E. C. L. 529.

3. *Connecticut*. — *Rogers v. Moore*, 10 Conn. 13.

*Massachusetts*. — *Brown v. Mooers*, 6 Gray (Mass.) 451; *Russell v. Coffin*, 8 Pick. (Mass.) 154; *McCarty v. Leary*, 118 Mass. 509.

*New York*. — *People v. Hulse*, 3 Hill (N. Y.) 309; *People v. Rector*, 19 Wend. (N. Y.) 569; *Hannah v. McKellip*, 49 Barb. (N. Y.) 342; *Burpee v. People*, 1 Thomp. & C. (N. Y.) 289; *People v. Gay*, 7 N. Y. 378, affirming 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 308, and overruling *Carter v. People*, 2 Hill (N. Y.) 317. See also *Pratt v. Andrews*, 4 N. Y. 493.

**Inquiry of Another Witness as to Reputation.** — It has been held that an attempt to impeach a witness by asking another witness what is his character

witness has been convicted of crime constitutes such an assault on his character as will render admissible evidence as to his good reputation.<sup>1</sup> Mere proof, however, that statements at variance

for truth warrants the introduction of evidence in support of his character, though the impeaching witness answers that his character is good. *Com. v. Ingraham*, 7 Gray (Mass.) 46.

**Where Witness Is a Stranger.** — In *Connecticut* an exception to the rule permits evidence of general good character for veracity, without a general impeachment, where the witness is in the situation of a stranger. *Merriam v. Hartford*, etc., R. Co., 20 Conn. 364, 52 Am. Dec. 344; *Rogers v. Moore*, 10 Conn. 13. See also *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

Mr. Greenleaf has stated the more liberal rule first considered in the following language: "Where evidence of contradictory statements by a witness, or of other particular facts, as, for example, that he has been committed to the house of correction, is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth." 1 *Greenl. Ev.*, § 469, citing *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393. But notwithstanding the great reputation of the author, it has been said that this statement is not law. Thus in *Brown v. Mooers*, 6 Gray (Mass.) 451, it was attempted to introduce evidence of the good reputation for truth of a witness who had been impeached by proof of material false statements made by him, but the court said: "The evidence as to the general character of Shaw for truth was not competent. His general character had not been impeached. The case of *Russell v. Coffin*, 8 Pick. (Mass.) 143, cited by the plaintiff, is directly against him on the precise point at issue. See pp. 146, 154. The statement in 1 *Greenl. Ev.*, § 469, is not sustained by the case the author cites of *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393, and is not law."

In *Russell v. Coffin*, 8 Pick. (Mass.) 153, the same court, after stating the rule as laid down by Starkie, said: "The position, as laid down by Starkie, cannot be carried to the extent contended for. He probably meant only

that where the questions put in the cross-examination and the answers did impeach his general character, the other party might rebut by proving a good general character. And so far we do not object to the principle. As in the case stated by Starkie, the witness was asked whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation, and the party who called her was allowed to prove that since those commitments her character had been fair and good. But it never was decided that if a witness was contradicted as to any fact of his testimony, either by his own declarations at other times, or by other witnesses, evidence might be admitted to prove his general good character. If this were the practice, great delay and confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted, and, indeed, it would be a trial of the witnesses and not of the action."

1. *People v. Amanacus*, 50 Cal. 233; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *Com. v. Green*, 17 Mass. 541; *Webb v. State*, 29 Ohio St. 351; *Wick v. Baldwin*, 51 Ohio St. 51; *Rex v. Clark*, 2 Stark. 241, 3 E. C. L. 393.

**Admission of Trial and Acquittal.** — But an admission by a witness, upon cross-examination, that he had been tried for crime in another state and acquitted does not authorize the introduction of evidence in support of his good character. *Harrington v. Lincoln*, 4 Gray (Mass.) 563.

**Rebuttal of Record of Conviction.** — Where the record of conviction of crime is introduced as impeaching evidence, it may be rebutted by evidence of the good reputation of the witness for truth and veracity, but it may not be shown that the witness was innocent of the crime for which he was convicted; the record is conclusive evidence on that point. *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *Com. v. Gallagher*, 126 Mass. 54.

**Object of Sustaining Proof.** — The sustaining proof should go to character

with his testimony have been made out of court by the witness, does not warrant a reception of such evidence.<sup>1</sup> See also *The American and English Encyclopædia of Law* (2d ed.), vol. 5, p. 850, tit. *Character in Evidence*.

**4. Prior Consistent Statements.** — In an early English case it was held that the party calling the witness against whom contradictory statements were proved might show that such witness had at other times made statements harmonizing with his testimony, and that he was consistent in his relation of the facts;<sup>2</sup> and this rule has been adopted in many cases in this country.<sup>3</sup> Its sound-

generally, and not to the disproof of particular facts brought out on the cross-examination of an impeaching witness. *Surles v. State*, 89 Ga. 167.

1. *Georgia*. — *Stamper v. Griffin*, 12 Ga. 456.

*Kentucky*. — *Vance v. Vance*, 2 Metc. (Ky.) 581.

*Massachusetts*. — *Brown v. Mooers*, 6 Gray (Mass.) 451; *Russell v. Coffin*, 8 Pick. (Mass.) 143.

*New York*. — *People v. Gay*, 7 N. Y. 378; *People v. Hulse*, 3 Hill (N. Y.) 313; *Frost v. McCargar*, 29 Barb. (N. Y.) 617.

*Ohio*. — *Webb v. State*, 29 Ohio St. 357.

*Pennsylvania*. — *Wertz v. May*, 21 Pa. St. 274.

*South Carolina*. — *Chapman v. Cooley*, 12 Rich. L. (S. Car.) 654.

**Such Evidence an Assault upon Credit.** — Evidence tending to show that a witness has made contradictory statements in reference to the matter under inquiry is more properly an assault upon the credit than upon the character of the witness, and therefore does not open the way for evidence to sustain the general character of the witness. Such evidence is admissible only when the general character of the witness is directly assailed by the party against whom he is called to testify. *Chapman v. Cooley*, 12 Rich. L. (S. Car.) 654; *State v. Jones*, 29 S. Car. 201; *Miller v. Western*, etc., R. Co., 93 Ga. 480.

2. *Lutterell v. Reynell*, 1 Mod. 282. Chief Baron Gilbert was of this opinion, *Gilb. Ev.* 135, and the law is so stated in *Hawk. Pl. Cr.*, bk. 2, c. 46, § 48. See also 2 *Phil. Ev.*, p. 973.

The same ruling was made in the trial of *Friend's Case*, 13 How. St. Tr. 32. Compare *Harrison's Case*, 12 How. St. Tr. 861.

3. *Connecticut*. — *Lockwood v. Betts*, 8 Conn. 133.

*District of Columbia*. — *U. S. v. Neversen*, 1 Mackey (D. C.) 152.

*Indiana*. — *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Dailey v. State*, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Dodd v. Moore*, 92 Ind. 397; *Hobbs v. State*, 133 Ind. 404; *Ramey v. State*, 127 Ind. 243.

*Kansas*. — *State v. Hendricks*, 32 Kan. 563.

*Louisiana*. — *State v. Waggoner*, 39 La. Ann. 919; *State v. Dudoissat*, 47 La. Ann. 977.

*Maryland*. — *Cooke v. Curtis*, 6 Har. & J. (Md.) 93; *Washington F. Ins. Co. v. Davison*, 30 Md. 105; *McAleer v. Horsey*, 35 Md. 463; *Bloomer v. State*, 48 Md. 537.

*Missouri*. — *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

*North Carolina*. — *Johnson v. Patterson*, 2 Hawks (N. Car.) 183, 11 Am. Dec. 756; *State v. Twitty*, 2 Hawks (N. Car.) 449; *State v. George*, 8 Ired. L. (N. Car.) 324, 49 Am. Dec. 392; *State v. Dove*, 10 Ired. L. (N. Car.) 469; *Hoke v. Fleming*, 10 Ired. L. (N. Car.) 263; *March v. Harrell*, 1 Jones L. (N. Car.) 331; *Burnett v. Wilmington*, etc., R. Co., (N. Car. 1897) 26 S. E. Rep. 819; *State v. Laxton*, 78 N. Car. 564; *State v. Whitfield*, 92 N. Car. 831; *Davenport v. McKee*, 98 N. Car. 500; *State v. Brewer*, 98 N. Car. 607; *State v. Rowe*, 98 N. Car. 629; *State v. Jacobs*, 107 N. Car. 873; *State v. Morton*, 107 N. Car. 890; *Wallace v. Grizzard*, 114 N. Car. 488; *State v. Staton*, 114 N. Car. 813.

*Pennsylvania*. — *Henderson v. Jones*, 10 S. & R. (Pa.) 322, 13 Am. Dec. 676; *Hester v. Com.*, 85 Pa. St. 139.

*Tennessee*. — *Hayes v. Cheatham*, 6 Lea (Tenn.) 10; *Nashville Third Nat. Bank v. Robinson*, 1 Baxt. (Tenn.) 479; *Dossett v. Miller*, 3 Sneed (Tenn.) 72; *Green v. State*, 97 Tenn. 50.

*Texas*. — *Bailey v. State*, 9 Tex.

ness, however, was doubted by Mr. Justice Buller,<sup>1</sup> and it was afterwards rejected by the English courts on the ground that what has been said by a witness when not upon oath should not be admitted to confirm his sworn statement.<sup>2</sup> The weight of American authority would appear to reject evidence that the witness on other occasions made statements harmonizing with his testimony,<sup>3</sup> unless it be charged that his story is a recent fabrica-

App. 98; *Williams v. State*, 24 Tex. App. 637; *Ball v. State*, 31 Tex. Crim. Rep. 214; *Goode v. State*, 32 Tex. Crim. Rep. 505; *Stephens v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 728; *Dicker v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 541; *Campbell v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 774; *Kirk v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 1045; *Parker v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 265.

*Vermont*. — *State v. Dennin*, 32 Vt. 158.

**Similar Testimony before Grand Jury.** — Where this rule obtains, it is permissible to corroborate a witness by proof that he gave the same testimony before the grand jury which he gave upon the trial. *Goode v. State*, 32 Tex. Crim. Rep. 505; *Perkins v. State*, 4 Ind. 222.

So, also, the testimony of a witness on the inquest substantially similar to that on the trial is admissible. *Sims v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 256.

**Signed Statement Admissible.** — A witness being impeached on cross-examination, his statement signed shortly after the occurrence testified to by him may be admitted in corroboration. *Rittenhouse v. Wilmington St. R. Co.*, (N. Car. 1897) 26 S. E. Rep. 922.

1. Bull. N. P. 294.

2. *Rex v. Parker*, 3 Doug. 242, 26 E. C. L. 95; *Berkeley Peerage Case*, cited in 2 Phil. Ev. 974, note 3. See also 2 Tayl. Ev., § 1476; *Brazier's Case*, 1 East P. C. 443.

3. *Alabama*. — *Nichols v. Stewart*, 20 Ala. 358; *Adams v. Thornton*, 82 Ala. 260; *Fallin v. State*, 83 Ala. 7; *McKellon v. State*, 86 Ala. 594, overruling *Sonneborn v. Bernstein*, 49 Ala. 168.

*California*. — *People v. Doyell*, 48 Cal. 85.

*Colorado*. — *Davis v. Graham*, 2 Colo. App. 210; *Connor v. People*, 18 Colo. 373.

*Connecticut*. — *Builders' Supply Co. v. Cox*, 68 Conn. 380.

*Georgia*. — *Fussell v. State*, 93 Ga. 450.

*Illinois*. — *Stolp v. Blair*, 68 Ill. 541.

*Iowa*. — *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753.

*Maine*. — *Ware v. Ware*, 8 Me. 42.

*Maryland*. — *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77.

*Massachusetts*. — *Com. v. Jenkins*, 10 Gray (Mass.) 485; *Com. v. James*, 99 Mass. 438; *Loomis v. New York, etc., R. Co.*, 159 Mass. 39.

*Missouri*. — *Riney v. Vanlandingham*, 9 Mo. 816.

*New Hampshire*. — *Reed v. Spaulding*, 42 N. H. 114.

*New York*. — *Herrick v. Smith*, 13 Hun (N. Y.) 448; *Smith v. Stickney*, 17 Barb. (N. Y.) 489; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 147.

*South Carolina*. — *Davis v. Kirksey*, 2 Rich. L. (S. Car.) 176; *State v. Thomas*, 3 Strobb. L. (S. Car.) 269.

*Wisconsin*. — *Dufresne v. Weise*, 46 Wis. 298.

*United States*. — *U. S. v. Holmes*, 1 Cliff. (U. S.) 98; *Conrad v. Griffey*, 11 How. (U. S.) 480.

In *Utah* the rule is that prior consistent statements are not admissible to corroborate a party who is a witness in his own behalf, when such statements were made in his own interest. *Silva v. Pickard*, 10 Utah 78.

In *New York* the early cases followed the rule laid down in *Lutterell v. Reynell*, 1 Mod. 282. See *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *People v. Vane*, 12 Wend. (N. Y.) 80; *People v. Moore*, 15 Wend. (N. Y.) 419; *People v. Rector*, 19 Wend. (N. Y.) 569. But these cases have been overruled on this point, and the later cases follow the rule of the later English cases excluding such corroborating statements. *Robb v. Hackley*, 23 Wend. (N. Y.) 50; *Dudley v. Bolles*, 24 Wend. (N. Y.) 465; *Butler v. Truslow*, 55 Barb. (N. Y.) 293; *Smith*

tion,<sup>1</sup> or that the witness has some motive for testifying falsely, which motive may be shown not to have existed at the time of making the statement which it is proposed to prove in corroboration of his testimony.<sup>2</sup>

**Rape Cases.** — It may be added that in prosecutions for rape, the fact that the prosecuting witness complained of the outrage soon after its perpetration may be proved for the purpose of corroborating her testimony, though the particulars of such complaint are not admissible to prove the commission of the crime.<sup>3</sup>

**5. Requisite Knowledge of Sustaining Witness** — *a.* IN GENERAL. — A witness called to sustain another whose general character or reputation for truth and veracity has been assailed must first state that he knows the general moral character of the witness thus impeached, or his general reputation for truth and veracity, according to the rule of the jurisdiction; otherwise, he cannot be further examined on that point.<sup>4</sup> If he answers that he is acquainted with the general reputation of the witness whom he is called to sustain, the court will not, by preliminary inquiry,

*v. Stickney*, 17 Barb. (N. Y.) 489; *People v. Finnegan*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 147; *Herrick v. Smith*, 13 Hun (N. Y.) 448.

1. *California*. — *People v. Doyell*, 48 Cal. 85.

*Illinois*. — *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 541.

*Kansas*. — *State v. Petty*, 21 Kan. 54.

*New Hampshire*. — *French v. Merrill*, 6 N. H. 465.

*New York*. — *McLain v. British*, etc., Ins. Co., 16 Misc. Rep. (N. Y. Supreme Ct.) 336; *Bafer v. Broadway*, etc., R. Co., 9 Misc. Rep. (N. Y. C. Pl.) 20.

*Tennessee*. — *Hayes v. Cheatham*, 6 Lea (Tenn.) 10.

*Texas*. — *English v. State*, 34 Tex. Crim. Rep. 190.

*Vermont*. — *State v. Flint*, 60 Vt. 304.

**Time of Making Such Statements.** — The prior statements in harmony with the testimony of the witness must have been made by him before he made the contradictory statements put in evidence for the purpose of impeaching him. Otherwise they are not admissible, because, if they were made afterwards, they may have been made for the very purpose of neutralizing the contradictory statements. *Conrad v. Griffey*, 11 How. (U. S.) 491; *Ellicott v. Pearl*, 10 Pet. (U. S.) 438; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123. See also *State v. Fontenot*, 48 La. Ann. 283.

2. *Illinois*. — *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 541.

*Maryland*. — *Baltimore City Pass. R. Co. v. Knee*, 83 Md. 77.

*New Hampshire*. — *Reed v. Spaulding*, 42 N. H. 114.

*New York*. — *Robb v. Hackley*, 23 Wend. (N. Y.) 54; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 95; *Herrick v. Smith*, 13 Hun (N. Y.) 448; *Railway Pass. Assur. Co. v. Warner*, 62 N. Y. 651.

*Vermont*. — *State v. Flint*, 60 Vt. 304.

3. *Alabama*. — *Scott v. State*, 48 Ala. 420; *Griffin v. State*, 76 Ala. 32.

*Connecticut*. — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436.

*Indiana*. — *Thompson v. State*, 38 Ind. 39.

*New York*. — *Baccio v. People*, 41 N. Y. 265.

*Texas*. — *Sentell v. State*, 34 Tex. Crim. Rep. 260. See article RAPE, vol. 19, p. 959.

*England*. — *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Reg. v. Osborne*, C. & M. 622, 41 E. C. L. 338; *Reg. v. Walker*, 2 M. & Rob. 446.

4. *Cook v. Hunt*, 24 Ill. 536; *Magee v. People*, 139 Ill. 138; *Gifford v. People*, 148 Ill. 173; *Haley v. State*, 63 Ala. 83; *Clay v. Robinson*, 7 W. Va. 363; *Lyman v. Philadelphia*, 56 Pa. St. 488.

**Individual Knowledge Insufficient.** — The sustaining witness should not speak from his individual knowledge

determine whether he has sufficient knowledge to testify, this being a matter to be attended to on cross-examination, after which the value of the testimony is for the jury.<sup>1</sup>

*b. VALUE OF NEGATIVE EVIDENCE.* — The best characters being generally those which are least talked about,<sup>2</sup> the testimony of one who is well acquainted with a witness, and with his neighbors, and who would be likely to hear what is said of him, that he has never heard his character called in question, is admissible to show that the general character of the witness is good.<sup>3</sup> The fact that a witness has known a person for a long time and has never heard any one speak disparagingly of him seems to be a sufficient qualification for him to swear that he would believe such person upon oath,<sup>4</sup> though it is not error to refuse to permit him to do so.<sup>5</sup>

*6. Explanation by Impeached Witness Himself.* — It is always proper to give a witness who has been impeached, either upon cross-examination or by independent evidence, an opportunity to make any explanation he can to sustain his own credibility.<sup>6</sup>

of the impeached witness. *Jackson v. State*, 106 Ala. 12.

1. *State v. Fairlamb*, 121 Mo. 137; *State v. Pettit*, 119 Mo. 410.

2. 1 Tayl. Ev., § 350; *State v. Lee*, 22 Minn. 409.

3. *Alabama*. — *Prater v. State*, 107 Ala. 26.

*Arkansas*. — *Cole v. State*, 59 Ark. 50.

*Georgia*. — *Taylor v. Smith*, 16 Ga. 7; *Artope v. Goodall*, 53 Ga. 318.

*Iowa*. — *State v. Nelson*, 58 Iowa 208.

*Ohio*. — *Bucklin v. State*, 20 Ohio 18; *Gandolfo v. State*, 11 Ohio St. 114.

*Pennsylvania*. — *Morss v. Palmer*, 15 Pa. St. 51.

*Virginia*. — *Davis v. Franke*, 33 Gratt. (Va.) 413.

*West Virginia*. — *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293; *Clay v. Robinson*, 7 W. Va. 363.

In *Morss v. Palmer*, 15 Pa. St. 51, *Rogers, J.*, said: "It is also said the testimony ought to have been excluded because the witnesses examined for the defendant had no knowledge of his character. But surely it is evidence in support of character that a witness acquainted with the person assailed, living in his neighborhood, has never heard any ill of him. It is certainly some proof that a person against whom the tongue of slander has never been heard to wag is not so destitute of truth and sincerity as that he ought not to be believed on his oath. The evidence is not easily reconcilable with the charge

that he is totally unworthy of credit. The presumption is, if the charge be true, it must have been heard by those who lived near and were in daily intercourse with him."

*Contra.* — In *Illinois* it has been held that the fact that witnesses called to sustain another witness's reputation for truth and veracity do not know his reputation, and state that they have never heard his reputation in that respect called in question, is not proper to be considered by the jury in determining whether or not the witness proposed to be impeached is entitled to belief. *Magee v. People*, 139 Ill. 138.

4. *Hodgkins v. State*, 89 Ga. 761; *People v. Davis*, 21 Wend. (N. Y.) 309.

5. *Clay v. Robinson*, 7 W. Va. 363.

6. *Alabama*. — *Henderson v. State*, 70 Ala. 29, 45 Am. Rep. 72; *Yarbrough v. State*, 71 Ala. 376; *Burke v. State*, 71 Ala. 377; *Haralson v. State*, 82 Ala. 47; *Thomas v. State*, 103 Ala. 18; *Johnson v. State*, 102 Ala. 1; *Anderson v. State*, 104 Ala. 83; *Henry v. State*, 107 Ala. 22.

*California*. — *People v. Wessel*, 98 Cal. 352.

*Idaho*. — *Douglas v. Douglas*, (Idaho 1895) 38 Pac. Rep. 934.

*Illinois*. — *Bressler v. People*, 117 Ill. 422.

*Iowa*. — *Hoover v. Cary*, 86 Iowa 494.

*Kentucky*. — *Roberts v. Com.*, 94 Ky. 499.



Thus where evidence is introduced of the statements of a witness out of court, which he had denied making, such witness may be recalled to give his version of the alleged conversation.<sup>1</sup>

*Louisiana*.<sup>1</sup> — *State v. Claire*, 41 La. Ann. 1067.

*Michigan*. — *Jourdan v. Patterson*, 102 Mich. 602.

*Mississippi*. — *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604.

*Missouri*. — *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1.

*Montana*. — *Kennelly v. Savage*, 18 Mont. 119.

*New York*. — *Ferris v. Hard*, 135 N. Y. 354.

*Texas*. — *Ball v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 448.

*Vermont*. — *State v. Bedard*, 65 Vt. 278.

*Wisconsin*. — *Dufresne v. Weise*, 46 Wis. 298.

*England*. — *Rex v. Woods*, 1 Cawf. & D. C. C. 439.

1. *Hoover v. Cary*, 86 Iowa 494.

## IMPERTINENCE.

See article *SCANDAL AND IMPERTINENCE*.

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## IMPLIED CONTRACTS.

*Declaring on Implied Contracts*, see article *CONTRACTS*, vol. 4, p. 922.

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## IMPORTANCE.

*Certifying Important Questions to Higher Courts*, see article *CERTIFIED CASES*, vol. 3, p. 943.

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## IMPRISONMENT FOR DEBT.

See article *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8, p. 584.

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## INCEST.

### I. THE INDICTMENT, 334.

1. *In General*, 334.
2. *Charging Continuous Offense*, 335.
3. *Charging Incestuous Adultery*, 336.
4. *Denying Lawful Marriage Between the Parties*, 336.
5. *Averring Relationship*, 336.
6. *Averring Knowledge of Relationship*, 337.

### II. PROSECUTION OF ONE PARTY ONLY, 337.

### III. JOINDER OF COUNTS, 338.

**I. THE INDICTMENT—1. In General.** — The crime of incest being purely statutory, and having no existence at common law,<sup>1</sup> the indictment must follow the statute and allege a crime under its terms.<sup>2</sup>

1. *State v. Keesler*, 78 N. Car. 469.  
See *State v. Slaughter*, 70 Mo. 484.

2. *State v. Bullinger*, 54 Mo. 142;  
*Baumer v. State*, 49 Ind. 544.

**Failure to Charge a Felony.** — An indictment charging that the defendants, being uncle and niece, "did cohabit together, and were guilty of adultery

A Substantial Compliance, however, seems to be all that is necessary,<sup>1</sup> and the indictment will not be rendered defective by immaterial variances or omissions.<sup>2</sup>

**2. Charging Continuous Offense.**—Where, by the terms of the statute, it is not necessary to aver or prove more than a single sexual act,<sup>3</sup> an indictment for incest which charges a continuous commission of the criminal acts during a period of several years is defective in that it charges several offenses in the same count.<sup>4</sup>

and fornication, he, the said J., being a married man, and she, the said H., being an unmarried woman," is not good as an indictment under the *Mississippi* Code, § 2701, because incest is a felony, and the indictment fails to aver that the criminal act was feloniously done. *Newman v. State*, 69 Miss. 393.

**1. Sufficient Indictment.**—An indictment charging that the prisoner, "being then and there the father of one Elizabeth B., and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said Elizabeth B. to be his daughter, did then and there live with the said Elizabeth B. in a state of adultery," is sufficient under the *Alabama* Code. *Baker v. State*, 30 Ala. 521.

An information charging that at a certain time and place "O. H. did have incestuous connection with P. H., daughter of said O. H. and his wife A. H., contrary to the statute," etc., was held sufficient, after verdict, to warrant the punishment for incest prescribed by *Wisconsin* Rev. Stat., § 4582. *Hintz v. State*, 58 Wis. 493.

**Sufficient Allegation of Carnal Knowledge.**—Under *Vermont* R. L., § 4246, an indictment which charges that the respondent "did commit fornication with" the said *particeps* sufficiently alleges that he had carnal knowledge of her. *State v. Dana*, 59 Vt. 614.

**Sufficient Conclusion.**—An indictment for incest was objected to on the ground that the allegation as to prohibition of marriage between the parties was insufficient, in that the marriage was not alleged to be prohibited "by the laws of Vermont." It was held sufficient to allege that the marriage was forbidden, without adding the words "by the laws of the state of Vermont," the conclusion *contra formam statuti* sufficiently showing that the offense charged in the indictment

is an offense under a statute law of the state of Vermont. *State v. Dana*, 59 Vt. 614.

**Need Not Allege that Defendant Committed Adultery.**—An information for incest which charges the respondent, a married man, with having had sexual intercourse with his daughter need not allege that he committed the crime of adultery; nor is it defective because he is charged with having committed the crime of fornication in so doing. *People v. Cease*, 80 Mich. 576.

**2. "Incestuous" spelled "Incestous."**—Where, in an indictment for incest, the word "incestuous" was spelled "incestous," the omission of the missing letter was held not to be fatal. *State v. Carville*, (Me. 1887) 11 Atl. Rep. 601.

**Omission of Female's Middle Name.**—Where, in an indictment for incest by a father upon his daughter, the woman's middle name is omitted, it is not a material variance if there is no question as to her identity. *People v. Lake*, 110 N. Y. 61. See in general upon this subject, article INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

**Female's Name Not Material.**—In an indictment against a defendant for incest committed with his daughter, it is not material by what name the daughter is called if her identity is established beyond dispute. *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360.

**Failure to Name Female's Father.**—An indictment for incest charging the woman named with being the daughter of the defendant's brother is not bad because it does not give the name of that brother. *State v. Pennington*, (W. Va. 1896) 23 S. E. Rep. 918.

**3.** In *State v. Brown*, 47 Ohio St. 102, it was held that in a prosecution for incest, instituted and conducted under Ohio Rev. Stat., § 7019, it is not necessary to aver or prove more than a single sexual act.

**4.** *Barnhouse v. State*, 31 Ohio St. 39.

**3. Charging Incestuous Adultery.** — Where the indictment charges the defendant with incestuous adultery, there must be an allegation that he was at that time a married man.<sup>1</sup>

**4. Denying Lawful Marriage Between the Parties.** — When there is a possibility that a lawful marriage may have been contracted between the parties — as in the case of first cousins, who are prohibited from marrying in some states but not in others, or where a relationship not formerly included within the prohibited degrees of consanguinity has been added by statute — an indictment against them should allege that they are not lawfully man and wife.<sup>2</sup>

**5. Averring Relationship.** — An indictment for incest should clearly allege the relationship existing between the parties, so that it may appear whether or not they are related within the prohibited degrees of consanguinity or affinity; but a mere allegation of the relationship is sufficient, without alleging that it is one of the degrees prohibited by the statute.<sup>3</sup>

1. *Martin v. State*, 58 Ark. 3.

**Sufficient Averment of Marriage.** — It was objected to an indictment for incestuous adultery that it did not appear that the defendant was a married man at the time the offense was committed. It was held that allegations that the defendant, knowing himself to be the father of B., and forbidden to marry her, did have carnal knowledge of her incestuously and adulterously, he being a married man, were a sufficient charge that the defendant was a married man at the time that the offense was committed. *State v. Ratcliffe*, 61 Ark. 62.

2. *State v. Fritts*, 48 Ark. 66, wherein it was held that an indictment against cousins for incest, under §§ 1578 and 4592 Mansf. Dig., should allege that they had not been legally married. For, if married in the state of Arkansas before the passage of section 4592, or in another state in which such marriages were lawful, their cohabitation would not be incestuous. But see *State v. Brown*, 47 Ohio St. 102.

**Sufficient Averment of Unlawful Marriage.** — On an objection to the sufficiency of an indictment for incest, on the ground that it was "fatally defective in alleging that defendant did unlawfully intermarry C. B., because it thereby failed to charge affirmatively that there was a marriage," the indictment was held sufficient, as it charged a marriage, and that it was an unlawful one. *Simon v. State*, 31 Tex. Crim. Rep. 186.

**Charges Both Parties.** — An indictment under the Virginia Act against incestuous marriages which charges that W. F. (the man) did incestuously intermarry with N. H. (the woman) is sufficiently certain to charge her as well as him, without requiring the converse to be charged; for he could not intermarry with her without her intermarrying with him also. *Hutchins v. Com.*, 2 Va. Cas. 331.

3. *Hicks v. People*, 10 Mich. 395, in which case it was held that an information for incest which charged the crime to have been committed with one H., "she, the said H., being then and there the daughter" of the accused, was sufficient without also averring that the parties were within the degrees of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void.

**Parent and Child.** — An averment in an indictment for incest that the incestuous acts were committed "upon the person of A B, the said A B then and there being the daughter of him, the said C D," etc., alleges with sufficient certainty that the relationship of parent and child existed between the parties. *Bergen v. People*, 17 Ill. 426.

An indictment charging the defendant with having carnal knowledge of F. W., and alleging that the defendant was father of F. W., need not allege that F. W. was a female, nor that she was the defendant's daughter. *Wagoner v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 896.

**Illegitimate Daughter Comprehended by Word "Daughter."** — An indictment which charges that the defendant committed incest with his daughter is not defective because it appears that the female was an illegitimate daughter.<sup>1</sup>

**6. Averring Knowledge of Relationship.** — It depends upon the wording of the statute whether or not the indictment must allege that the defendant knew of the relationship existing between him and the other party to the crime. If the statute uses the word "knowingly," or words of similar meaning, the indictment must allege knowledge in the defendant;<sup>2</sup> but where the statute does not use such language, no averment of knowledge is necessary.<sup>3</sup>

## II. PROSECUTION OF ONE PARTY ONLY. — Although the crime of

**Uncle and Niece.** — The kinship of the parties sufficiently appears by an averment that the sexual act was committed by persons who bore the relation of uncle and niece to each other; that kinship being, by law, nearer than that between cousins, it is unnecessary expressly to allege that it is so. *State v. Brown*, 47 Ohio St. 102.

**Stepfather and Stepdaughter.** — An indictment against a stepfather for incest with his stepdaughter sufficiently describes the relationship of the parties by alleging it to be that of stepfather and stepdaughter, without averring the marriage of the defendant, or the subsistence of the marriage relation at the time of committing the crime. *Noble v. State*, 22 Ohio St. 541.

1. *Baker v. State*, 30 Ala. 521; *State v. Laurence*, 95 N. Car. 659.

In *Cook v. State*, 11 Ga. 53, an indictment for incestuous adultery by a father with his daughter was objected to upon the ground that it did not aver that the female was the legitimate daughter, of the whole blood, of the defendant by the mother, to whom he was legally married. It was held that such averment was not necessary; and that if the indictment charged the offense in the language of the code creating it, or so plainly and distinctly that the jury could clearly understand its nature, it was sufficient.

2. **Indiana.** — Rev. Stat., § 42, enacts that "if any father shall have sexual intercourse with his daughter, knowing her to be such," he "shall be guilty of incest," etc. An indictment under the statute which fails to allege that the defendant knew the woman to be his

daughter is defective. *Williams v. State*, 2 Ind. 439.

And so where a stepson is indicted for incest with his stepmother, the Indiana statute requires an allegation that the defendant had knowledge of the relationship. *Baumer v. State*, 49 Ind. 544.

**Need Not Allege Knowledge in Other Party.** — If an indictment for incest charges that the defendant knew of the relationship existing between him and the female, it is not necessary to allege that the female also knew of it. *Morgan v. State*, 11 Ala. 289.

3. **Missouri.** — Under the Missouri statute, it is not necessary, in an indictment against the defendant for incest with his daughter, to allege that he knew her to be his daughter. *State v. Bullinger*, 54 Mo. 142.

**Texas.** — The Texas Penal Code, art. 329, does not use the word "knowingly" in defining incest. Therefore an indictment for incest is not defective for failure to allege that the defendant knowingly contracted the unlawful marriage. *Simon v. State*, 31 Tex. Crim. Rep. 186.

**Vermont.** — In an indictment charging incest under the Vermont statute, it is not necessary to allege that the respondent had knowledge of the relationship existing between himself and the other party, the statute requiring no *scienter*. *State v. Wyman*, 59 Vt. 527; *State v. Dana*, 59 Vt. 614.

**West Virginia.** — An indictment for incest, under West Virginia Code 1891, c. 149, § 22, is not bad because it does not state that the man charged knew the relationship of the woman to him. *State v. Pennington*, (W. Va. 1896) 23 S. E. Rep. 918.

incest requires two parties for its commission, still one party alone may be indicted and convicted therefor.<sup>1</sup>

**III. JOINDER OF COUNTS.** — It is held that counts for rape and incest may be joined in the same indictment, where both counts are founded on the same transaction.<sup>2</sup>

1. *People v. Patterson*, 102 Cal. 239; *Yeoman v. State*, 21 Neb. 171; *Lowther v. State*, 4 Ohio Cir. Ct. Rep. 522. And see *State v. Ellis*, 74 Mo. 385.

**Joint Crime — Former Acquittal of Other Party.** — Where, by the wording of the statute, the crime is made a joint one, so that if one party is acquitted the other cannot be convicted, the acquittal of one party may afterwards be pleaded in bar by the other. *Baumer v. State*, 49 Ind. 544.

2. *Owens v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 875; *Porath v. State*, 90 Wis. 527, in which it was held that where the complaint under which the preliminary examination was held charged incest, and the testimony on the examination indicated rape, the two counts were correctly joined. But see *State v. Thomas*, 53 Iowa 214, in which it was held that counts for rape and for incest could not be joined. *Beck and Day, JJ.*, dissenting.

## INCONSISTENCY.

See generally article *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 246.

As to *Inconsistent or Repugnant Amendments*, see article *AMENDMENTS*, vol. 1, p. 476.

*Inconsistent Answers in Equity*, see article *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 942.

*Inconsistent Counts*, see article *ACTIONS*, vol. 1, p. 166.

*Inconsistent Defenses*, see article *ANSWERS IN CODE PLEADING*, vol. 1, p. 855.

*Inconsistent Remedies*, see article *ELECTION OF REMEDIES*, vol. 7, p. 360.

*Inconsistent Position on Appeal*, see article *APPEALS*, vol. 2, p. 179.

*Inconsistency in Bills in Equity*, see article *BILLS IN EQUITY*, vol. 3, p. 366.

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## INDEBITATUS ASSUMPSIT.

See article *ASSUMPSIT*, vol. 2, p. 987.

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## INDEBTEDNESS.

As to *Denial of Indebtedness Raising a Mere Conclusion of Law*, see article *ANSWERS IN CODE PLEADING*, vol. 1, p. 805; and see in general article *LEGAL CONCLUSIONS*.

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## INDECENT ASSAULT.

See article *ASSAULT AND BATTERY*, vol. 2, p. 835.

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## INDECENT EXPOSURE.

**I. THE INDICTMENT**, 339.

**II. JOINDER OF DEFENDANTS**, 340.

**I. THE INDICTMENT** — *Following Statute.* — As in the case of other offenses created by statute, an indictment for indecent exposure is generally sufficient if it charges the offense in the words of the

statute;<sup>1</sup> and although the indictment be not good under the statute, it may nevertheless be good as an indictment for a misdemeanor at common law.<sup>2</sup>

Publicity is a necessary ingredient of the offense, and should therefore be charged in the indictment,<sup>3</sup> but it is held that the publicity contemplated by the law has reference rather to the persons who may witness the act than to the locality in which it is committed.<sup>4</sup>

**Conclusion.** — It is held that the indictment need not conclude "to the common nuisance of all the citizens," etc.<sup>5</sup>

**II. JOINDER OF DEFENDANTS.** — Where several persons participate in the act of indecent exposure, they may be jointly prosecuted and convicted.<sup>6</sup>

1. *State v. Hazle*, 20 Ark. 156; *Moffit v. State*, 43 Tex. 346; *State v. Griffin*, 43 Tex. 538; *State v. Gardner*, 28 Mo. 90, in which case an indictment founded on Missouri Rev. Code of 1855, p. 625, § 8, which charged the defendant with being "guilty of an open and notorious act of public indecency, grossly scandalous, by then and there exhibiting and exposing his private parts in presence of a male and female," etc., was held sufficient as charging the offense in the words of the statute.

**Sufficient Indictment.** — An indictment charging that the defendant, at a certain time and place, "did then and there, in a public place, make an indecent exposure of his person, by then and there making an uncovered exhibition of his privates, in presence of divers persons then and there assembled," is a sufficient charge of indecent exposure. *Ardry v. State*, 56 Ind. 328.

**Sufficient Allegation of Intent.** — An indictment for indecent exposure which alleges that the defendant, "devising and intending the morals of the people of this commonwealth to debauch and corrupt," at a time and place named, in a certain public building there situate, in the presence of divers citizens, etc., "unlawfully, scandalously, and wantonly did expose to the view of said persons present," etc., his body, etc., sufficiently alleges the intent with which the act was committed. *Com. v. Haynes*, 2 Gray (Mass.) 72.

**Variance — Indecent Writing.** — Where an indictment charged that the defendant "did unlawfully and designedly, in public, make an obscene and indecent exhibition of the persons of others," it was not sustained by proof

that the defendant placed obscene and indecent writing upon the clothes of such persons. *Tucker v. State*, 28 Tex. App. 541.

2. *State v. Rose*, 32 Mo. 560, in which case the indictment charged the defendant with an indecent exposure of his person on a public road, but omitted to charge that the act was open and notorious, and was therefore defective under Missouri Rev. Code of 1855, p. 624.

3. In *Lorimer v. State*, 76 Ind. 495, an allegation that an act of indecent exposure was done "in a public place, to wit, at the blacksmith shop occupied by \* \* \*; then and there a public place," was held sufficient under 2 Ind. Rev. Stat. 1876, p. 466, § 22.

4. *Moffit v. State*, 43 Tex. 346. In this case it was held that an allegation that the act was done "in a public place, to wit, on a public road," was not tantamount to an allegation that it was done "in public." See also *Reg. v. Watson*, 2 Cox C. C. 376; *Reg. v. Webb*, 2 C. & K. 933, 61 E. C. L. 933.

**In North Carolina** there is an old decision holding an indictment sufficient which charged an indecent and scandalous exposure of the person to public view in a public place, without charging the act to have been committed in the presence of one or more of the citizens of the state. *State v. Roper*, 1 Dev. & B. L. (N. Car.) 208. But see *State v. Pepper*, 68 N. Car. 259, in which the above case is virtually overruled.

5. *Com. v. Haynes*, 2 Gray (Mass.) 72.

6. *People v. Bixby*, 67 Barb. (N. Y.) 221, in which case six women made an indecent exposure of their persons to several men, who paid to witness the spectacle.



## INDEFINITENESS.

See article *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 246.

## INDEMNITY.

See article *BONDS*, vol. 3, p. 635, and cross-references thereunder. And see article *FORTHCOMING AND DELIVERY BONDS*, vol. 9, p. 647.

## INDIANS.

- I. JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST, 341.
- II. THE INDICTMENT, 342.

### CROSS-REFERENCE.

As to *Indians' Recovery of Land by Ejectment*, see article *EJECTMENT*, vol. 7, p. 278.

### I. JURISDICTION OVER CRIMES COMMITTED BY OR AGAINST. —

Where crimes are committed by whites against Indians or by Indians against whites, within the limits of a reservation, the jurisdiction to try such offenses is in the federal courts.<sup>1</sup> Prior to the passage of the Act of Congress of March 3, 1885, Indians preserving their tribal relations were permitted by the government to regulate and govern their own internal relations, and neither federal nor state courts had jurisdiction over offenses committed by one Indian against the person or property of another, when committed upon an Indian reservation.<sup>2</sup> Since

1. U. S. v. Barnhart, 22 Fed. Rep. 285; U. S. v. Yellow Sun, 1 Dill. (U. S.) 271; U. S. v. Bridleman, 7 Fed. Rep. 894; U. S. v. Holliday, 3 Wall. (U. S.) 407; *Ex p.* Crow Dog, 109 U. S. 556.

**State Jurisdiction Expressly Excluded.**—In U. S. v. McBratney, 104 U. S. 621, it was held that when a state was admitted into the Union and the enabling Act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than

Indians, or against Indians, the state courts were vested with jurisdiction to try and to punish such crimes, and that whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. See also Draper v. U. S., 164 U. S. 240.

2. U. S. v. Whaley, 37 Fed. Rep. 145; State v. McKenney, 18 Nev. 182. In

the passage of this Act, however, tribal Indians are not subject to the criminal laws of the state in which the reservation is situated, for acts committed within the limits of the reservation, but the federal courts have sole jurisdiction.<sup>1</sup>

Where, by Treaty Stipulations, the exclusive jurisdiction over offenses committed by one Indian against another Indian is secured to the tribe of which they are members, this right is not affected by the provisions of the United States statutes extending the general laws of the United States over the Indian country.<sup>2</sup>

**II. THE INDICTMENT.** — In order to bring the defendant within the provisions of the Act of 1885, giving the federal courts jurisdiction over crimes committed by one Indian against another

the latter case it was held that the courts of Nevada had no jurisdiction to try an Indian belonging to a tribe which is recognized and treated with as such by the government of the United States, and has its chief and tribal laws, for killing another Indian belonging to the same tribe; but the authorities of the tribe alone had the right to take cognizance of the crime.

The Act of 1885 referred to in the text is to the following effect:

"§ 9. That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 U. S. Stat. at L., c. 341, p. 385, § 9.

1. *State v. Campbell*, 53 Minn. 354; *People v. Ketchum*, 73 Cal. 635; *State v. Williams*, 13 Wash. 335; *U. S. v. Ward*, 42 Fed. Rep. 320; *Draper v. U. S.*, 164 U. S. 240; *U. S. v. Kagama*, 118 U. S. 375; *Gon Shayee*, Petitioner, 130 U. S. 343; *Captain Jack*, Petitioner, 130 U. S. 353.

"Indian Offenses." — In *U. S. v. Clapox*, 35 Fed. Rep. 575, it was held that the Interior Department has authority to define "Indian offenses," and to establish courts for the punishment of Indian offenders, as set forth in said rules. Among other things these rules prescribe the punishment for certain acts called therein "Indian offenses," such as the "sun," the "scalp," and the "war" dance, polygamy, "the usual practices of so-called 'medicine men,'" the destruction or theft of Indian property, and buying or selling Indian women for the purpose of cohabitation. In addition to these, rule 9 provides that said court shall have "jurisdiction of misdemeanors committed by Indians belonging to the reservation."

2. *In re Mayfield*, Petitioner, 141 U. S. 107; *Talton v. Mayes*, 163 U. S. 376.

In the latter case it was held that the crime of murder committed by one Cherokee Indian upon the person of another, within the jurisdiction of the Cherokee nation, is not an offense against the United States but against the local laws of the Cherokee nation, and that the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application.

**Jurisdiction Not Divested by Defendant's Naturalization.** — In *Ex p. Kyle*, 67

on a reservation, the indictment must allege that he is an Indian.<sup>1</sup> Such averment is material and must be proved as laid.<sup>2</sup> Where jurisdiction over offenses of one member of a tribe against another is reserved to the tribe by stipulation, United States statutes as to indictments do not, of course, apply.<sup>3</sup>

Fed. Rep. 306, it is held that where a citizen of the Cherokee nation has committed an offense against another citizen, the courts of that nation acquire jurisdiction which is not divested by the subsequent naturalization of the defendant.

1. U. S. v. Ward, 42 Fed. Rep. 320.

2. U. S. v. Ward, 42 Fed. Rep. 320.

3. Talton v. Mayes, 163 U. S. 376.

# INDICTMENTS, INFORMATIONS, AND COMPLAINTS.

BY JOHN LEHMAN.

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## CROSS-REFERENCES.

*As to Amendments in Criminal Proceedings*, see article *AMENDMENTS*, vol. 1, p. 688.

*Furnishing List of Witnesses Generally*, see article *WITNESSES*.

*Furnishing Bills of Particulars in Criminal Proceedings*, see article *BILLS OF PARTICULARS*, vol. 3, p. 554.

*Charging Accessories*, see article *ACCESSORIES AND THE LIKE*, vol. 1, p. 66.

*Severance and Separate Trials*, see article *SEPARATE TRIALS*.

*Arraignment and Plea*, see article *ARRAIGNMENT AND PLEA*, vol. 1, p. 760.

*Arrest of Judgment*, see article *ARREST OF JUDGMENT*, vol. 1, p. 793.

*Reference should also be had to the specific titles in this work for the treatment of the particular criminal subject under investigation. Thus for Burglary*, see article *BURGLARY*, vol. 3, p. 736; *Embezzlement*, see article *EMBEZZLEMENT*, vol. 7, p. 410; *Homicide*, see article *HOMICIDE*, ante, p. 106; and so on throughout the work.

**I. SUBJECTS OF TREATMENT DEFINED — 1. Indictment.** — An indictment is a written accusation of crime preferred by a grand jury upon oath.<sup>1</sup>

1. *State v. Middleton*, 5 Port. (Ala.) 489; *State v. Cox*, 8 Ark. 436; *People v. Gates*, 13 Wend. (N. Y.) 317; *Wolf v. State*, 19 Ohio St. 255; *Lougee v. State*, 11 Ohio 72; 4 Black. Com. 302.

Lord Coke says: "Indictment cometh of the French word *enditer*, and signifieth in law an accusation found upon an inquest of twelve or more upon their oath." 3 Coke Litt., bk. 3, c. xiii, p. 553, quoted in *Mose v. State*, 35 Ala. 425.

Lord Hale defines an indictment as follows: "An indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." 2 Hale P. C. 169, quoted in *Thompson v. State*, 26 Ark. 330.

Mr. Justice Field, in charging the grand jury in 2 Sawy. (U. S.) 677, described an indictment as "a formal accusation made by the grand jury, charging a party with the commission of a public offense."

**An Indictment is Defined by Statute** in many of the states. Thus, in *New York* "an indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime." N. Y. Code Crim. Pro., § 254.

**A Presentment** is the notice taken of an offense by the grand jury from its own knowledge or observation, without any bill of indictment laid before it by the prosecuting officer of the government; upon such presentment, when proper, the officer employed to prosecute frames a bill of indictment, which is sent to the grand jury, and the latter finds it a true bill. *State v. Cox*, 8 Ark. 436, citing 4 Black. Com. 301; Bouv. Law Dict., tit. *Presentment*.

**"Present" in an Indictment.** — "Every indictment begins with the words, 'The jurors on their oath present.' \* \* \* It is perfectly clear that the word 'present' means nothing more than that the jury 'represent' or 'show' to the court that a certain person has committed a certain offense. The jury present what they find to be the facts in a particular case, and they find what they present. There is no difference, therefore, between the legal meaning

of a finding and a presentment" in such an indictment. *Per Metcalf, J.*, in *Com. v. Keefe*, 9 Gray (Mass.) 292.

**Distinction Between Presentment and Indictment.** — "The chief distinction between an indictment and a presentment at common law was that the former was made at the suggestion of the crown, while the latter was made upon the knowledge of one or more of the jurors, and instead of being indorsed 'a true bill' by the foreman alone, was signed by all of the jurors." *In re Grosbois*, 109 Cal. 448. And, in *State v. Security Bank*, 2 S. Dak. 542, the court said: "If the grand jury find only that a public offense has been committed, and that there is reasonable ground for believing that a particular individual or a particular corporation has committed it, they should return a presentment; but if they find, and are willing to specifically charge, that any particular individual or any particular corporation has committed a public offense, they should return an indictment."

**Effect of Presentment.** — The usage in this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings. *Per Marshall, C. J.*, in *U. S. v. Hill*, 1 Brock. (U. S.) 157. But they are sometimes defined by statutes which also regulate proceedings to be had thereon. See *State v. Security Bank*, 2 S. Dak. 541.

In *California*, since the constitution of 1879, "there is no function for a presentment by a grand jury, and no authority for the arrest of a person charged in that form with the commission of a public offense." *In re Grosbois*, 109 Cal. 450.

**Statutory Offenses or Penalties — Concurrent and Exclusive Remedies.** — Where an act not indictable at common law is declared penal, or subject to any specific penalty or forfeiture, by statute, and a mode pointed out by which it shall be prosecuted, that mode alone can be pursued, and an indictment will not lie. *State v. Bishop*, 7 Conn. 185; *Journey v. State*, 1 Mo. 428; *State v. Stewart*, 47 Mo. 384; *State v. Bittinger*, 55 Mo. 599; *State v. Corwin*, 4 Mo. 609; *People v. Hislop*, 77 N. Y. 331; *Phillips*

**2. Information** — *a. GENERAL NATURE.* — An information is a written statement filed and presented on behalf of the state by the prosecuting attorney, accusing the defendant of an offense which is by law subject to prosecution in that way,<sup>1</sup> and as a general rule it must contain all the substantial requisites of an indictment.<sup>2</sup>

*b. TO WHAT OFFENSES APPLICABLE* — *At Common Law.* — Prosecutions by information were permissible at the common law,<sup>3</sup> but were confined to misdemeanors.<sup>4</sup>

In the United States the practice in respect to the use of informations is not uniform, depending as it does upon the various constitutional and statutory provisions existing in the respective states; and while, as at common law, it is said to be a general rule that for all public misdemeanors which might be prosecuted by indictment an information will lie unless this mode of prosecution is restrained by statute,<sup>5</sup> in the absence of constitutional or

*v. State*, 19 Tex. 159; *State v. Meyer*, 1 Spears L. (S. Car.) 305; *State v. Helgen*, 1 Spears L. (S. Car.) 310; *Rex v. Robinson*, 2 Burr. 805; *Rex v. Buck*, 1 Stra. 679. Unless indictment be the very mode prescribed, in which case no other proceeding can be used. *Com. v. Howes*, 15 Pick. (Mass.) 231. See also *State v. Stewart*, 47 Mo. 384. And an indictment will lie where the mode of procedure is not prescribed. *Keller v. State*, 11 Md. 525; *State v. Meyer*, 1 Spears L. (S. Car.) 305; *People v. Stevens*, 13 Wend. (N. Y.) 341; *People v. Brown*, 16 Wend. (N. Y.) 561. Or where a different procedure is designated in a clause of the statute subsequent to that prohibiting the act, or in a subsequent statute. *Phillips v. State*, 19 Tex. 159; *State v. Bishop*, 7 Conn. 185. See also articles DEATH BY WRONGFUL ACT, vol. 5, p. 891; FINES AND COSTS IN CRIMINAL CASES, vol. 8, p. 953.

1. *Donnelly v. People*, 11 Ill. 552; *State v. Corbit*, 42 Tex. 88. It takes the place of an indictment. *Avery v. People*, 11 Ill. App. 332.

**Information in Nature of Quo Warranto.** — See article QUO WARRANTO.

2. See *infra*, X. 1. *a. Application of Same Rules to Both.*

For difference in form between indictments and informations, see *infra*, VI. 1. *By Whom Filed.*

3. *Rex v. Berchet*, 1 Show. 118; *Rex v. Opie*, 1 Saund. 301; *Prynn's Case*, 5 Mod. 463.

**Statutory Offense.** — Whenever a statute makes an act criminal an informa-

tion will lie though not given by express words. *Troy's Case*, 1 Mod. 5.

4. 4 Black. Com. 309; *Ex p. Wilson*, 114 U. S. 423.

**Misprision of Treason** was an exception to the rule that misdemeanors might be prosecuted by information. 2 Hawk. P. C., c. 26, § 3.

5. *Com. v. Waterborough*, 5 Mass. 259; *State v. Dyer*, 67 Vt. 690; *State v. Stewart*, 47 La. Ann. 410.

**Trial on Accusation.** — In *Georgia* the defendant may waive an indictment for misdemeanor and go to trial on the accusation without an indictment or presentment by the grand jury; and after such waiver is a matter of record and he has appeared for trial and a motion on his part for continuance has failed, he cannot recall the waiver. *McConnell v. State*, 67 Ga. 634; *Butler v. State*, 97 Ga. 404.

**Construction of Conflicting Statutes.** — In *Illinois* it was provided by general statutes that misdemeanors in the county courts might be prosecuted by information. The defendant was charged with a misdemeanor cognizable in the county court, but the act creating the misdemeanor also provided that persons guilty of the same should be indicted and tried. It was held that as there was nothing in the nature of the offense which showed that the legislature intended to impose any restriction on its prosecution or to confer an exemption from the general law upon that class of offenders, an information would lie under the general law. *Cornshock v. People*, 56 Ill. App.

statutory provision the information is restricted to offenses not felonies.<sup>1</sup> In some states, however, under statutes consistent with constitutional authority, the information has become due process, even for the graver offenses, but is sometimes restricted in felony cases to offenses of designated degrees,<sup>2</sup> or subject to other conditions,<sup>3</sup> though in others such restraints have at one time or another been removed by constitutional provisions under which the procedure by information may be concurrent with that by indictment,<sup>4</sup> unless by statute executing the constitutional

471. To the same effect, see *Miller v. State*, 144 Ind. 401.

**Transfer of Jurisdiction.**—Where offenses of a certain degree may be prosecuted by information in one court, the abolition of that court and the substitution of other courts therefor does not abolish the prosecution by information for the offenses which could have been so prosecuted in the original court. *State v. McLane*, 4 La. Ann. 435; *State v. Eochart*, 7 La. Ann. 224.

1. *Jones v. Com.*, 19 Gratt. (Va.) 481; *Matthews v. Com.*, 18 Gratt. (Va.) 989; *Com. v. Barrett*, 9 Leigh (Va.) 665; *State v. Ingalls*, 59 N. H. 89; *State v. Dover*, 9 N. H. 468; *Jones v. Robbins*, 8 Gray (Mass.) 342; *Saco v. Wentworth*, 37 Me. 172.

**The Constitution of the United States** provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except," etc. Fifth Amendment. See *U. S. v. Smith*, 40 Fed. Rep. 755; *U. S. v. Cobb*, 43 Fed. Rep. 570; *U. S. v. Johannesen*, 35 Fed. Rep. 411; *Territory v. Blomberg*, (Arizona 1886) 11 Pac. Rep. 671, wherein a legislative Act of the territory of Arizona was held to be unconstitutional as repugnant to this article. But the provision has reference only to offenses which are cognizable in the United States courts. *McNulty v. California*, 149 U. S. 645; *Vincent v. California*, 149 U. S. 648; *Hurtado v. California*, 110 U. S. 516; *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Fox v. Ohio*, 5 How. (U. S.) 410; *State v. Boswell*, 104 Ind. 542; *State v. Barnett*, 3 Kan. 250; *State v. Keyes*, 8 Vt. 62; *State v. Baldwin*, 15 Wash. 15; *State v. Nordstrom*, 7 Wash. 506.

2. Thus an information may lie under such provisions where the penalty is not death or life imprisonment, *Romero v. State*, 60 Conn. 92; *State v. Keena*, 64 Conn. 215; or where the

punishment is not capital or imprisonment for more than seven years, *State v. Dyer*, 67 Vt. 690; or for all offenses where the punishment is not capital, *State v. Newton*, 30 La. Ann. 1253; *State v. Woods*, 31 La. Ann. 267; *State v. Cole*, 38 La. Ann. 843; or for all offenses except murder and treason, *Kennegar v. State*, 120 Ind. 176.

3. See *infra*, VI. 4. c. *Relation to Sitting or Action of Grand Jury*.

4. *People v. Giancoli*, 74 Cal. 642; *Kalloch v. Superior Ct.*, 56 Cal. 229; *People v. Campbell*, 59 Cal. 243; *Hurtado v. California*, 110 U. S. 516; *McNulty v. California*, 149 U. S. 645; *Vincent v. California*, 149 U. S. 648; *Miller v. State*, 29 Neb. 437; *State v. Miller*, 43 Neb. 860; *State v. Ayers*, (S. Dak. 1896) 67 N. W. Rep. 611; *State v. Nordstrom*, 7 Wash. 506; *State v. Baldwin*, 15 Wash. 15; *State v. Sloan*, 65 Wis. 647; *Rowan v. State*, 30 Wis. 129; *In re Boulter*, (Wyoming 1895) 40 Pac. Rep. 520.

**Information Due Process of Law.**—In *Wisconsin* the constitution provided for prosecution by indictment, and by an amendment thereto, instead of designating the procedure by indictment the words "due process of law" were used, and it was held that by a use of these words the intention was clearly to grant authority to provide by legislative enactment for prosecutions by information. *Rowan v. State*, 30 Wis. 129. See also *Bird v. State*, 77 Wis. 276.

**Constitution Not Self-executing.**—In *Montana* it was held that a provision of the constitution granting authority to prosecute by information did not execute itself, and that all the details affecting the exercise, jurisdiction, and limitations of the procedure and the rights and pleadings of the state and accused must be defined by the legislative department. *State v. Ah Jim*, 9 Mont. 170.

**Ex Post Facto Provisions.**—It has

provision the right to prosecute by information is restricted to certain offenses.<sup>1</sup>

**3. Complaints.** — Informations or complaints, or affidavits in the nature of informations or complaints, are used in criminal procedure before justices of the peace and other inferior courts exercising like jurisdiction, both where the justice of the peace acts as a conservator of the peace in the examination and commitment of persons charged with crime, and where he, or such court as exercises the same jurisdiction, acts upon the affidavit, information, or complaint in the trial and punishment of the person charged.<sup>2</sup>

**II. FINDING OF INDICTMENT — 1. Necessity of Grand Jury.** — Every indictment must be found by a grand jury legally selected, duly constituted, and competent for the purpose.<sup>3</sup>

been held that under a constitutional provision permitting prosecution by information, a person may be so charged for an offense which by a prior constitution in force when it was committed could have been prosecuted only by indictment. *People v. Campbell*, 59 Cal. 243 (by a divided court). To the same effect see *State v. Hoyt*, 4 Wash. 818; *Lybarger v. State*, 2 Wash. 552. *Contra*, *State v. Kingsley*, 10 Mont. 537.

1. *State v. Stewart*, 47 La. Ann. 410.

**2. Scope of Treatment in This Article.** — The practice in the various states in this regard is regulated by statute. The information, affidavit, or complaint treated in this article has reference only to prosecutions for trial and punishment. Wherever the rules of pleading or practice appertaining to indictments and informations are applied to these affidavits, informations, or complaints, attention will be called thereto under the general titles throughout this article. Informations, affidavits, and complaints for the purposes of arrest and preliminary examination will be treated in the article PRELIMINARY HEARING. See also *infra*, VIII. *Complaint — Presentment and Incidents*.

3. *State v. Symonds*, 36 Me. 130; *Levy v. Wilson*, 69 Cal. 105; *Eason v. State*, 11 Ark. 483; *Straughan v. State*, 16 Ark. 43.

**Importance of the Institution.** — "The importance of the part played by the grand jury in England cannot be better illustrated than by the language of Justice Field in a charge to a grand jury reported in 2 Sawy. (U. S.) 667: 'The institution of the grand jury,' he says, 'is of very ancient origin in the

history of England. It goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity." *Ex p. Bain*, 121 U. S. 10. But in some of the United States

**2. Qualifications of Grand Jurors — a. GENERALLY.** — A grand jury should be composed of persons qualified to serve in that capacity under the law,<sup>1</sup> such qualifications being generally regulated by statutes in this country,<sup>2</sup> which are sometimes so framed

the grand jury has lost its importance, inasmuch as offenses which formerly must have been prosecuted by indictment may, in the states referred to, be prosecuted by information. See *supra*, I. 2. *b. To What Offenses Applicable.*

**1. Qualified as of What Time.** — If a grand juror is qualified at the time he serves as such, he is competent notwithstanding he might not have been qualified when drawn and summoned. *Collins v. State*, 31 Fla. 574. And *converso* it has been held that if a juror is qualified when returned, a subsequent disqualification is immaterial. *State v. Middleton*, 5 Port. (Ala.) 484; *State v. Ligon*, 7 Port. (Ala.) 168. In these cases, however, the objections were what might be termed personal causes of challenge, as that the grand juror was not a freeholder, though not expressly confined to such causes by the court; and in fact, later decisions in *Alabama*, as well as in other states, hold, under statutory provisions controlling, that no objection can be made for incompetency of a grand juror after a certain stage of the proceedings. See *infra*, II. 10. *c. Qualifications of Grand Jurors.*

**Nonresidence After Drawing.** — If a grand juror removes from the county after he is drawn, he cannot serve. *State v. Wilcox*, 104 N. Car. 847.

**Incompetency of Persons Not Sworn on Jury.** — The design of the statute in requiring courts to select from qualified voters a certain number of persons who shall be grand jurors for a certain period thereafter is to secure a sufficient number of qualified grand jurors for that period; and when a qualified grand juror is obtained from those selected, it is no valid objection to such grand juror that others on the list of the venire may perchance be disqualified. In other words, if any one of the fixed number from whom the grand jury is to be selected is not competent to serve, that will not vitiate an indictment, those actually serving on the grand jury being qualified. *State v. Brodden*, 47 La. Ann. 375; *Shinn v. Com.*, 32 Gratt. (Va.) 907; *U. S. v. Rondeau*, 16 Fed. Rep. 110.

**2. Qualification as Elector.** — *State v.*

*Elson*, 45 Ohio St. 648; *Shoemaker v. State*, 12 Ohio 43; *State v. Cole*, 17 Wis. 674; *Adams v. State*, 28 Fla. 511.

**Sufficiency of Registration.** — A plea in abatement alleged that members of the grand jury were not legally registered voters, the illegality of their registration consisting in the fact that they were not registered within the time prescribed by the general election law, but were registered, or their names placed upon the registration books, within the time prescribed by an Act to provide for the election of delegates to a constitutional convention; and it was held that persons duly registered under that Act were as duly registered voters of the county as those who registered under the general election laws. *Adams v. State*, 28 Fla. 512.

**Married Women.** — In *Washington Territory* it was held that a married woman was a householder and therefore a competent grand juror, under the statute then in force. *Rosencrantz v. Territory*, 2 Wash. Ter. 267 (Turner, J., dissenting). Afterwards, the personnel of the court having changed, that case was overruled, Turner, J., delivering the opinion of the court, and it was further held that under the statute a woman could not be an elector. *Harland v. Territory*, 3 Wash. Ter. 136.

**Rules Applied to Grand and Petit Juries Alike.** — It often occurs that the law makes no distinction in respect to competency between grand and traverse jurors, as where they are drawn indiscriminately from the same list; and where a statutory exemption has been held to create no disqualification for service as a traverse juror, there is no reason for holding that it creates a disqualification for service as a grand juror. *State v. Quimby*, 51 Me. 397. See also *State v. Williams*, 35 S. Car. 344.

**Exclusion of Negroes.** — A statute excluding negroes from jury service is repugnant to the Constitution of the United States, and a jury organized under such a statute is an illegal body. *Bush v. Kentucky*, 107 U. S. 110; *Neal v. Delaware*, 103 U. S. 370; *Com. v. Johnson*, 78 Ky. 509. And in the absence of any evidence that the selec-

or construed as to exclude, all questions of competency except those provided for.<sup>1</sup> They should be selected with a single eye to the qualifications pointed out by statute, without inquiry whether the individuals selected do or do not belong to any particular sect or denomination, social, benevolent, political, or religious.<sup>2</sup>

**The Incompetency of One Grand Juror** is sufficient to render the body illegal and findings by it void.<sup>3</sup> This rule is subject, however, to the requirements in the various states in respect of the time and manner of raising such an objection.<sup>4</sup>

**Residence in County.**—At common law the sheriff selected some of the persons returned by him from every hundred in the county,<sup>5</sup> and in the United States the jurors are taken from the county wherein the offense is committed,<sup>6</sup> though sometimes provision is made for apportionment among certain divisions or districts of the county, in analogy to the old practice.<sup>7</sup>

tion of grand jurors was in fact made without discrimination against colored citizens because of their race, it should be assumed that the jury commissioners followed the statutes of the state so far as they restricted the selection of grand jurors to citizens of the white race. *Bush v. Kentucky*, 107 U. S. 110.

1. *State v. Millain*, 3 Nev. 409, holding that nothing will operate to disqualify a grand juror except those things designated in the statute, and, therefore, that objection on the ground of bias was not available. *State v. Easter*, 30 Ohio St. 542.

2. *Per Savage, J.*, in *People v. Jewett*, 3 Wend. (N. Y.) 320; U. S. v. Eagan, 30 Fed. Rep. 609; *State v. Willson*, 2 McCord L. (S. Car.) 393.

**Quakers** are competent jurors. *Com. v. Smith*, 9 Mass. 107.

**Mormons—Construction of Act of Congress.**—The Act of Congress of March 22, 1882 (U. S. Stat. at L. 30, § 5), which provides that it shall be a good ground of challenge in any prosecution for bigamy, polygamy, or unlawful cohabitation, that any person drawn or summoned as a juror or talesman believes it right for a man to have more than one living and undivorced wife at the same time, applies to grand as well as petit jurors. *Clawson v. U. S.*, 114 U. S. 477.

3. *State v. Griffin*, 38 La. Ann. 503; *State v. Thibodeaux*, 48 La. Ann. 600; *State v. Rowland*, 36 La. Ann. 193; *State v. Parks*, 21 La. Ann. 251; *State v. Nolan*, 8 Rob. (La.) 513; *Barney v. State*, 12 Smed. & M. (Miss.) 68; *State v. Rock-*

*afellow*, 6 N. J. L. 332; *State v. Duncan*, 7 Yerg. (Tenn.) 271; *State v. Foster*, 9 Tex. 65; *Lask v. U. S.*, 1 Pin. (Wis.) 77.

There seems to have been, at an early stage of the history of proceedings by indictment, some doubt as to whether an indictment was void on account of incompetency of one of the grand jury, but the statute 2 Henry IV., c. 9, enacted "that any indictment taken by a jury one of whom is unqualified shall be altogether void and of no effect." So in *Tennessee*, an indictment found by a grand jury no person of which was qualified, or one person of which was incompetent, was held wholly void when the fact was made legally to appear. *State v. Duncan*, 7 Yerg. (Tenn.) 271.

4. See *infra*, II. 10. *Objections*, and the subsections.

5. 1 Chitty Crim. Law (5th Am. ed.) 308; 4 Black. Com. 302; 2 Hawk. P. C. 25, § 16; *Thayer v. People*, 2 Dougl. (Mich.) 417.

6. *State v. Wilcox*, 104 N. Car. 847; *Spito v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 97; *Lask v. U. S.*, 1 Pin. (Wis.) 77.

7. Statutes requiring the names of jurors to be drawn from a list of names previously returned to the office of the clerk by certain officers of each town in the county are said to be in imitation of the ancient practice of selecting from each hundred. *Thayer v. People*, 2 Dougl. (Mich.) 417.

**Equality of Apportionment.**—The record need not show that the grand jurors were taken equally from each

*b. CONSIDERATION OF VARIOUS QUALIFICATIONS AND D QUALIFICATIONS* — *Householder or Freeholder.* — It is generally required often by express statute, that jurors, to be competent as such shall be either householders or freeholders.<sup>1</sup>

police district in the county. *Weeks v. State*, 31 Miss. 490.

A statute providing that the grand jury lists for Ramsey county shall be selected "from the qualified electors of the several wards in the city of St. Paul and towns of said county" does not require that the names selected shall be apportioned among the different wards and towns, but only means that those making the list, having in mind the whole body of the county, shall make the selection with special regard to fitness regardless of ward or town lines. *State v. Hawks*, 56 Minn. 129.

But, although the division of a county into jury districts may not mean that the jury is to be selected from such district for the court held there, yet where such has been the practice for a great number of years, it is a contemporaneous construction of the law which should be followed unless the law is so plain and imperative as absolutely to require a different practice. *People v. Sebring*, 14 Misc. Rep. (N. Y. Supreme Ct.) 31.

*Mandatory Statute.* — In Iowa a statute requiring grand jurors to be apportioned among the election precincts in certain numbers, and providing that not more than such number shall be so drawn, is mandatory. *State v. Russell*, 90 Iowa 569; *State v. Beckey*, 79 Iowa 368. But a substantial compliance with the statute is sufficient. *State v. Edgerton*, (Iowa 1896) 69 N. W. Rep. 280. See also *State v. DeBord*, 88 Iowa 103; and as to the effect of change of boundaries since the last election, see *State v. Pierce*, 90 Iowa 506.

*Unorganized Counties.* — Where unorganized counties are attached to organized counties for judicial purposes, the grand jury is drawn from all the counties. This was held where the offense was committed in the organized county. *State v. Stokely*, 16 Minn. 282. See also *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332.

*Division of Federal District.* — Under the Act of Congress subdividing the district of Washington for the purpose of holding terms of court, it was held

that the jurisdiction of the courts in district is limited so that offenses committed in the district are cognizable only in the courts for the respective divisions which include the places of their commission, and jurors must be drawn from the counties constituting the division for which the term is held. *U. S. v. Wan Lee*, 44 Fed. Rep. 7 reviewing *U. S. v. Berry*, 24 Fed. R. 780, and *U. S. v. Chaires*, 40 Fed. R. 820, and expressly *disapproving U. v. Dixon*, 44 Fed. Rep. 401, which held that an indictment found by a grand jury "of the United States of America for the northern division of the district of Washington, sworn and charged to inquire of all offenses against the laws of the United States committed within the northern division of the district of Washington," was void, under the Constitution of the United States. See also generally *Peters v. U. S.*, 2 Ok. 138; Mr. Justice Field's charge to a grand jury in 2 Sawy. (U. S.) 667.

1. *State v. Middleton*, 5 Port. (Ala.) 484; *State v. Herndon*, 5 Blackf. (Ind.) 75; *Barney v. State*, 12 Smed. & (Miss.) 68; *State v. Rockafellow*, 6 J. L. 332; *Shoemaker v. State*, 12 Ol. 43; *State v. Duncan*, 7 Yerg. (Tenn.) 271; *Stanley v. State*, 16 Tex. 5; *Jackson v. State*, 11 Tex. 261; *Harlan v. Territory*, 3 Wash. Ter. 131.

See further in this connection the statutes of the several states.

*At Common Law*, Blackstone says that grand jurors "ought to be freeholders, but to what amount is uncertain." 4 Black. Com. 302. *Cont. Anonymous*, R. & R. 177.

*One Who Has Purchased Land by Payment of Price and Has Taken Possession of It.* — A freeholder and qualified in that regard is a grand juror, notwithstanding an action for the recovery of the land by another party is pending. *Com. v. Cunningham*, 6 Gratt. (Va.) 695.

*Equitable Interest in Land.* — Entitles the owner to call for the legal title sufficient to qualify him as a freeholder. *Com. v. Helmondollar*, Gratt. (Va.) 536, citing *Co. Litt.* 27 wherein it is laid down that *cestui que use* of freehold estates are qualified



**Alienage.** — Generally speaking, a person is disqualified to act as a grand juror who is not a citizen of the United States.<sup>1</sup>

**Former Service as Juror.** — It is sometimes provided by statute that persons shall not be drawn as jurors who have served on any regular panel within a certain prescribed period, but such statutes have been held not to disqualify persons coming within their provisions so far as to invalidate indictments found by them as grand jurors.<sup>2</sup>

**Relationship, Interest, or Prejudice.** — Relationship existing between the accused or prosecutor and a member of the grand jury who found the indictment,<sup>3</sup> or the fact that a member of the grand jury is financially interested in the subject-matter of the prosecution,<sup>4</sup> or otherwise remotely connected there-

serve as jurors in *England*. Bac. Abr., tit. Juries.

**Householders "or" Freeholders.** — Where a statute provides as a qualification that grand jurors shall be householders or freeholders, they are not required to be both; and where, upon a deficiency in the number present, the court, under the statute, orders the summoning of others from whom to complete the panel, it is fatal error to require that they shall be both householders and freeholders. *Fowler v. State*, 100 Ala. 96.

**Statutory Qualifications Exclusive.** — Where the statute expressly prescribes all that shall be necessary to qualify persons to act as grand jurors, it is not essential that they shall be freeholders or householders if those qualifications are not required by the statute. *State v. Williams*, 35 S. Car. 344. To the same effect see *Palmore v. State*, 29 Ark. 251.

1. *State v. Gibbs*, 39 Iowa 318; *State v. Haynes*, 54 Iowa 109; *State v. Foster*, 9 Tex. 65; *Com. v. Cherry*, 2 Va. Cas. 20; *State v. Cole*, 17 Wis. 674; *State v. Vogel*, 22 Wis. 471.

As to presumption and proof of citizenship, see *State v. Guillory*, 44 La. Ann. 317; *People v. Roberts*, 6 Cal. 215; *People v. Freeland*, 6 Cal. 98.

In *Montana* one section of the statute provided that declaration of intention should be a sufficient qualification as a citizen. Another section enumerating causes for challenge specified, among others, "that he is an alien." In *Territory v. Harding*, 6 Mont. 325, it was intimated, if not directly decided, that declaration of intention was sufficient. And in *Territory v. Clayton*, 8 Mont. 1, an indictment was sustained,

where a challenge to a grand juror was overruled because he had taken out his first though not his last papers, but before the indictment was found he had been admitted to full citizenship. See also *Territory v. Hart*, 7 Mont. 489.

2. *State v. Elson*, 45 Ohio St. 649; *People v. Jewett*, 6 Wend. (N. Y.) 386; *State v. Cox*, 52 Vt. 471; *Bloodworth v. State*, 6 Baxt. (Tenn.) 615; *People v. Jewett*, 6 Wend. (N. Y.) 386. See also *State v. Ward*, 60 Vt. 142.

**Computation of Time.** — Where a statute disqualifies persons for jury service for a certain period after they are once drawn, the time is estimated from the drawing and not from the date of actual service. *State v. Ward*, 60 Vt. 142.

**Statute Disqualifying Petit Jurors.** — It has been held that a general statute disqualifying persons who have served on a regular panel as jurors did not apply to grand jurors. *State v. Brown*, 28 Oregon 147; *U. S. v. Clark*, 46 Fed. Rep. 633.

3. *State v. Easter*, 30 Ohio St. 549; *State v. Maddox*, 1 Lea (Tenn.) 671, holding that the provision of the code that if any member of the grand jury is connected by blood or marriage with the person charged he shall not be present at or take any part in the consideration of the charge, is merely directory, and that if through inadvertence a relation of the person charged does actually participate in the finding, such relationship is not sufficient to support a plea in abatement to the indictment.

**The Son of a Prosecutor** may be a grand juror. *State v. Sharp*, 110 N. Car. 604.

4. **Stockholder of Burglarized Bank.** — It is no ground for quashing an indict-

with, will not disqualify such a person to serve as a grand juror.<sup>1</sup>

**Prior Opinion of Guilt.** — An opinion formed or expressed of the guilt of a party accused does not generally disqualify a juror<sup>2</sup> in

ment for burglary in breaking into a bank that two of the grand jurors were stockholders in the bank. *Rolland v. Com.*, 82 Pa. St. 306. See to the same effect, *State v. Rickey*, 10 N. J. L. 83, wherein the court says: "The idea that a private person may be interested in a public prosecution seems to be utterly discarded in law. There is not a case, with the single exception of forgery, in which the idea has been countenanced in a court of law, and even there it rests on such doubtful grounds that no judge has assigned a satisfactory reason for it, except that it has been for a long time so adjudged."

**Interest in Defendant's Favor.** — It is not an exception to an indictment that the foreman of the grand jury is a taxable inhabitant of the town for the use of which the fine is recoverable. *Com. v. Ryan*, 5 Mass. 90; *State v. Newfane*, 12 Vt. 424, holding that if the interest of the grand juror operated upon his mind, it is to be presumed that its operation was altogether favorable to the town.

**1. Former Prosecutor.** — The court will not exclude from the grand jury a person who has been the prosecutor of one accused of a capital crime, whose case may probably be brought before the grand jury. *Tucker's Case*, 8 Mass. 286. Though it may be a ground of challenge for one held to answer at the time the grand jury is organized. *Baker v. State*, 58 Ark. 513.

**Distinction Between Witness and Prosecutor.** — A party who may be a mere witness in a prosecution is not a prosecutor and may be a grand juror, even though the statute provides as one of the disqualifications that a prosecutor cannot be a grand juror. *State v. Millain*, 3 Nev. 409; *State v. Cohn*, 9 Nev. 179.

**Public Officer under Inquisitorial Power of Grand Jury.** — A public officer whose official conduct is to be a subject of investigation by the grand jury is not qualified to act as a member of that body, where the statute provides that a juror shall not be "charged with any crime or offense." *State v. Thibodeaux*, 48 La. Ann. 600.

**2. State v. Hamlin**, 47 Conn. 95; *Lee v. State*, 69 Ga. 705; *Musick v. People*, 40 Ill. 268; *Tucker's Case*, 8 Mass. 286; *Com. v. Woodward*, 157 Mass. 516; *State v. Millain*, 3 Nev. 409; *State v. Easter*, 30 Ohio St. 549; *State v. Chairs*, 9 Baxt. (Tenn.) 196; *U. S. v. Belvin*, 46 Fed. Rep. 381.

In *State v. Hughes*, 1 Ala. 658, the court said: "Without attempting to consider at length under what circumstances and for what causes challenges to grand jurors are allowable, we think the Circuit Court rightfully refused to permit them to be asked, before they were sworn, whether they had formed and expressed an opinion as to the guilt or innocence of the prisoner. Our grand juries are impaneled for the entire term, to inquire of all offenses committed within the body of the county. \* \* \* Now if objections to individual jurors were allowed before they were sworn on the panel, which went to disqualify them in particular cases, it would be difficult generally and often impracticable to select an unexceptionable grand jury. One man would object to one, another to a second, and so continue it until those attending on the venire were reduced below the number required by law to constitute a grand jury. But if challenges for causes not operating a universal disqualification should be postponed until after the jury is elected and sworn, no inconvenience will be experienced. Then a juror may be excluded in the particular case in which he is objectionable, and deliberate and act with the grand jury in the performance of the other duties devolving upon them. But no challenge to a grand juror can impose on him the necessity of making a disclosure of the matters to which his oath refers. We make this remark because there may be reason to apprehend that challenges are not always intended to subserve the ends of justice." See also *infra*, II. 10. *d. Right to Challenge, and When to Exercise It.*

**Member of Petit Jury on Former Conviction.** — An indictment will not be quashed because a member of the grand jury which found the indictment

the absence of a statute providing for such cases.<sup>1</sup>

c. **DISTINCTION BETWEEN DISQUALIFICATION AND EXEMPTION.** — A man is not disqualified because he may be exempt from service. An exemption is a personal privilege which concerns only himself, and no one can complain if he sees fit not to ask the benefit of it.<sup>2</sup>

**3. Selecting, Summoning, and Impaneling** — a. **IN GENERAL.** — At Common Law the sheriff, without the nomination of any other person,<sup>3</sup> returned to every session of the peace and every commission of oyer and terminer and of general jail delivery twenty-four

had also served upon a petit jury which had convicted the defendant, at a previous term of the court, of the offense charged in the indictment. *State v. Cole*, 19 Wis. 129. *Contra*, *U. S. v. Jones*, 31 Fed. Rep. 725.

**Objection — When to Be Made.** — If such an objection is permissible, it must be made before indictment found. *Williams v. State*, 69 Ga. 11; *Lee v. State*, 69 Ga. 705. Or, as in the case of a petit juror, before the jury are sworn. *Musick v. People*, 40 Ill. 268; *State v. Rickey*, 10 N. J. L. 83; *State v. Rand*, 33 N. H. 216.

1. Such statutes have been enacted in some jurisdictions. See *State v. Billings*, 77 Iowa 417; *State v. Osborne*, 61 Iowa 330; *State v. Shelton*, 64 Iowa 335; *U. S. v. Clune*, (Cal.) 62 Fed. Rep. 798; *People v. Manahan*, 32 Cal. 68. But these provisions are designed to protect persons accused from such bias as would render a fair investigation impossible, and this freedom from bias has been required even in the absence of a statute in at least one case. In *Jones v. State*, 2 Blackf. (Ind.) 475, the attorney prosecuting was permitted to ask a juror "if he could in his conscience find any man guilty of an offense which would subject him to the punishment of death," and upon his answer that he could not, the court set him aside. The Supreme Court held that there was no error, saying: "A grand jury is the great inquest between the government and the citizen; an institution that should be preserved in its purity; and no person should ever be permitted to take a seat as a member thereof, except such good and lawful men as will impartially and faithfully carry the true objects of the institution into effect."

**Foundation of Opinion.** — The disqualification of a grand juror by reason of a

previous opinion as to the guilt or innocence of the accused is not affected by reason of the formation of such an opinion from the testimony of the accused while testifying under oath upon a similar charge against another person, but only from an opinion formed from mere hearsay evidence without the sanction of an oath. *People v. Northey*, 77 Cal. 618; *U. S. v. Clune*, 62 Fed. Rep. 798.

But in *Iowa* it was held that after an indictment is dismissed the defendant may challenge the jurors because they have formed and expressed an opinion as to his guilt, when the matter is sent back to the same jury. *State v. Osborne*, 61 Iowa 330.

2. *Georgia.* — *Carter v. State*, 75 Ga. 747; *Loeb v. State*, 75 Ga. 269; *Jackson v. State*, 76 Ga. 564, citing *Danforth v. State*, 75 Ga. 614.

*Iowa.* — *State v. Adams*, 20 Iowa 486; *State v. Edgerton*, (Iowa 1896) 69 N. W. Rep. 280.

*Kansas.* — *State v. Stunkle*, 41 Kan. 456.

*Maine.* — *State v. Wright* 53 Me. 328; *State v. Quimby*, 51 Me. 395; *Fellows's Case*, 5 Me. 333.

*Massachusetts.* — *Com. v. Hayden*, 163 Mass. 453.

*Michigan.* — *People v. Lauder*, 82 Mich. 109.

*Minnesota.* — *State v. Brown*, 12 Minn. 538.

*Mississippi.* — *Weeks v. State*, 31 Miss. 490.

*New Hampshire.* — *State v. Forshner*, 43 N. H. 89.

*Ohio.* — *Glassinger v. State*, 24 Ohio St. 206.

*Texas.* — *Owens v. State*, 25 Tex. App. 552.

*Vermont.* — *State v. Cox*, 52 Vt. 473.

3. 2 Hawk. P. C., c. 25, § 15.

competent men, of whom not more than twenty-three and not less than twelve were sworn as the grand jury.<sup>1</sup>

In the United States, though the general doctrine of the common law requiring a legally constituted grand jury has been adopted, the mode of selecting the jury and other matters of procedure in connection therewith are regulated by legislation.<sup>2</sup>

**b. PRECEPT — VENIRE FACIAS.** — While at common law the sheriff selected the names from which the grand jury was chosen without the nomination of any other person, he acted under a precept issued to him<sup>3</sup> which was indispensable to a legal exercise of his authority.<sup>4</sup> Where the venire facias has taken the place of a precept<sup>5</sup> strictness has been observed in requiring its issuance.<sup>6</sup> On the other hand, where the jury is chosen by the

1. 2 Hale P. C. 154; 4 Black. Com. 302.

The impaneling is the final formation by the court of the grand jury. It is the act immediately preceding the swearing of the jury and which ascertains who are to be sworn. *State v. Ostrander*, 18 Iowa 446.

2. See *People v. Crowey*, 56 Cal. 37; *State v. Symonds*, 36 Me. 130.

This will be more fully seen under the sections following in this title touching various constructions of American statutes, but for the peculiar practice in each state the statutes should be consulted.

In the United States Courts the statutes requiring the impaneling of grand juries (Rev. Stat. U. S., § 808 *et seq.*) refer only to the Circuit and District Courts. *Reynolds v. U. S.*, 98 U. S. 145.

An Act creating a court other than a District or Circuit Court being silent as to its power to impanel a grand jury, it was held that a grand jury impaneled by such a court was not a legal body. *Ex p. Farley*, 40 Fed. Rep. 66.

**By Whom Summoned.** — The grand jury may be summoned by the sheriff through his deputy. *Com. v. Salter*, 2 Pearson (Pa.) 462.

**Sheriff Sworn After Jury Impaneled.** — In *Kendall v. Com.*, (Ky. 1892) 19 S. W. Rep. 174, a motion was made to quash the indictment because it was not found by a legal grand jury. It appeared that the sheriff who summoned them was not sworn before they were impaneled, sworn, and charged. This being at once discovered, the sheriff was then sworn, and he resummoned the same persons, after which the court admonished them to remember the

charge which had already been given; and it was held that this cured the previous omission if it were conceded that the question could be raised upon appeal.

3. Bac. Abr., tit. Juries.

4. *Nicholls v. State*, 5 N. J. L. 621.

**Supplying Lost Precept.** — In *Guykowski v. People*, 2 Ill. 476, it was held that if a precept was lost it might be supplied by filing a new one *nunc pro tunc*.

**5. A Venire Facias Is a Judicial Writ** awarded to the sheriff to cause a jury in the neighborhood to appear to try the cause, and under a statute requiring the grand and petit jurors to be uniformly selected, grand jurors are drawn and summoned by the authority of writs of venire facias. *State v. Lightbody*, 38 Me. 201.

6. *U. S. v. Antz*, 16 Fed. Rep. 119; *U. S. v. Reed*, 2 Blatchf. (U. S.) 435; *People v. M'Kay*, 18 Johns. (N. Y.) 212; *State v. Dozier*, 2 Spears L. (S. Car.) 211; *State v. Hunter*, Peck (Tenn.) 166.

**Contra.** — *Bird v. State*, 14 Ga. 43, wherein it is said that the holding in *Georgia* is in conflict with American authority; *State v. Folke*, 2 La. Ann. 744; *Bennett v. State*, Mart. & Y (Tenn.) 134, *distinguishing* *People v. M'Kay*, 18 Johns. (N. Y.) 212, above cited, in that the practice in summoning grand juries in *Tennessee* was predicated upon the statute of that state under which nothing was required but the order of the County Court to the sheriff to summon the persons therein nominated by the said court as jurors to serve at the Superior Courts; *Robinson v. Com.*, 88 Va. 900, indicating that until a short time before that case

regularly appointed officers in due course according to the methods prescribed by statute, it is said that no precept is necessary.<sup>1</sup> And informality in the venire facias will not invalidate an indictment found by the grand jury.<sup>2</sup>

no process issued to the sheriff was necessary for summoning grand juries, as appeared from *Curtis v. Com.*, 87 Va. 589.

**Seal.**—Being a judicial writ, it has been held that a seal is necessary to the sufficiency of a venire facias, and, consequently, to the validity of an indictment found by a grand jury organized thereunder. *State v. Lightbody*, 38 Me. 200; *State v. Flemming*, 66 Me. 142; *People v. M'Kay*, 18 Johns. (N. Y.) 212.

**Contra.**—*State v. Bradford*, 57 N. H. 198, wherein it is said that the venire, although technically called a writ, is rather an order of the court issued to the several town clerks, directing and empowering them to select the requisite number of persons to serve as jurors; *Maher v. State*, 1 Port. (Ala.) 265; *Bennett v. State, Mart. & Y. (Tenn.)* 133. And in *State v. Marshall*, 36 Mo. 400, it was held that an order of court for the summoning of a grand jury need not be under seal.

**Designation of Qualifications.**—It is not necessary that the venire facias directing the sheriff to summon grand jurors should specify the particular qualifications necessary to constitute them "good and lawful men." *State v. Alderson*, 10 Yerg. (Tenn.) 523.

**Notice to Town.**—Where notice is required of the meetings in the respective towns for the drawing of grand jurors, the venires need not direct the constables in what manner they shall notify the meetings in their respective towns. *State v. Clough*, 49 Me. 575.

**Record Entry.**—In *Curtis v. Com.*, 87 Va. 591, it was held that there was no legal requirement that the record should affirmatively show the issuance of a venire facias to the sheriff, and that such a requirement applied only to the summoning of petit jurors. On the other hand, it has been held that the record must show the fact. *State v. Davidson*, 2 Coldw. (Tenn.) 197; *Cornell v. State, Mart. & Y. (Tenn.)* 147; *M'Clure v. State*, 1 Yerg. (Tenn.) 206. But it is not necessary that the venire facias should be spread upon the minutes of the court, and it is suffi-

cient if the record shows a return of the venire and a selection of a grand jury of good and lawful men from among the number summoned. *Conner v. State*, 4 Yerg. (Tenn.) 137; *Organ v. State*, 26 Miss. 78; *Byrd v. State*, 1 How. (Miss.) 253; *Brantley v. State*, 13 Smed. & M. (Miss.) 468.

**Amendment of Return.**—The return to a venire facias may be amended. *Ramsey v. State*, 83 Ala. 31; *Com. v. Parker*, 2 Pick. (Mass.) 550; *Com. v. Chauncey*, 2 Ashm. (Pa.) 101.

1. *McCann v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 272; *People v. Robinson*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 235; *People v. Cummings*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 343; *State v. Brown*, (Del. 1896) 36 Atl. Rep. 467. See also *Williams v. State*, 69 Ga. 27; *Sylvester v. State*, 72 Ala. 201, wherein the voluntary appearance of a person drawn was held good.

**Statutory Order of Court Directory.**—Under a statute providing that it shall be the duty of the court to make an order requiring the issuance of a venire facias when he deems it necessary that the grand jury shall sit in any county of his circuit, the issuance of the venire without such an order is nothing but an irregularity, because whether issued with or without the order of the judge it must have been for the same men who were summoned, and where the court recognizes and adopts the act of the clerk after the appearance of those summoned, there can be no objection to the grand jury. *Hess v. State*, 73 Ind. 541.

2. *Pierce v. State*, 12 Tex. 217, holding that if the venire facias is so defective as not to give notice, that might be an excuse for failure to attend, but no more. See also *Com. v. Windish*, 176 Pa. St. 167; *Com. v. Salter*, 2 Pearson (Pa.) 462.

**Venire in Form for Traverse Jurors.**—In *Com. v. Salter*, 2 Pearson (Pa.) 462, the venire commanded the jury to be summoned to try issues as in the form for selecting traverse jurors; in other words, the writ was made on a wrong printed blank. But the panel was headed "List of grand jurors," was

*c. PROCEEDINGS UNDER STATUTES*—(1) *Effect of Statutes Generally.*—While the statutes relating to the organization of grand juries should be complied with,<sup>1</sup> yet the courts have generally held that objections which go to mere irregularities in the

composed of the correct number, was signed by the proper officers and so entered on the docket, and the grand jury was regularly sworn and acted as such. It was held that if the defendant wished to object to the grand jury acting as such he should have raised the objection at the time, and if he wished to quash the array he should have done so while the jury was arrayed and not three months after the members had dispersed.

**Signature—Official Character of Clerk.**

—Where the County Court appointed jurors for the Circuit Court, and through its clerk ordered a sheriff to summon them, the signature of the clerk to the venire, without designating his official character, was held sufficient, because the court will judicially know that the person whose name is signed to the venire facias was the clerk of the court. *State v. Cole*, 9 Humph. (Tenn.) 626.

*Signature by Judge.*—In *Lewis v. State*, 3 Heisk. (Tenn.) 335, it is said that a venire facias signed by the judge is sufficient. The court said: "It would seem to be rather sticking in the bark to hold that the judge may cause that to be done through the clerk, who in this respect is a mere ministerial officer, which he could not directly do himself."

**Deputy Clerk—U. S. Statute.**

—A paper tested in the name of the deputy clerk is not a venire facias nor any process in the nature of such a writ, under the Act of May, 1792 (Rev. Stat. U. S., § 911), requiring all writs and processes issued from the Circuit Court to bear teste of the chief justice of the United States. *U. S. v. Antz*, 16 Fed. Rep. 121.

**Inconsistency in Order of Court.**—If the order of the court designates that the grand jury shall be summoned for one week, these words are inconsistent with and contradictory of the terms of the writ required by law to be issued, and the jury being actually drawn and summoned for the term as the law required, they may be treated as surplusage. *Hawes v. State*, 88 Ala. 37.

**Service of Venire Facias on Jury Commissioners.**—Where a writ of venire

facias is issued requiring the sheriff to serve the jury commissioners, it need not show that the writ was issued, that the jury commissioners acted in obedience thereto in drawing the required number of names and announcing them to the panel, and that the sheriff summoned the names so drawn who acted as the grand jury. *State v. Derrick*, 44 S. Car. 344; *State v. Toland*, 36 S. Car. 522, holding that when the jury commissioners accept service on the back of the writ and make out their return that in obedience to the writ they have drawn the number required, this is sufficient.

**Venire Incorrectly Dated.**—Upon a plea in abatement to the constitution and construction of the grand jury, upon the ground that the venire facias was dated October instead of September, it was held that, the mistake being corrected in accordance with the fact, there was no injury to the accused. *Davis v. Com.*, 89 Va. 132.

1. *Cross v. State*, 63 Ala. 40; *State v. Williams*, 5 Port. (Ala.) 130; *Battle v. State*, 54 Ala. 93; *Finley v. State*, 61 Ala. 201; *Edmonds v. State*, 34 Ark. 720; *Wilburn v. State*, 21 Ark. 198; *Gladden v. State*, 13 Fla. 625; *Empson v. People*, 78 Ill. 248; *Williams v. State*, 86 Ind. 400; *State v. Brandt*, 41 Iowa 593; *State v. Lawrence*, 12 Oregon 297.

**A Grand Jury Selected by Persons Unauthorized** to act has been held to be an illegal body. *State v. McNamara*, 3 Nev. 70.

**Participation by Unauthorized Person.**—Where a person not a commissioner intrudes himself upon the deliberations of the commissioners and does acts which it is their duty to perform, such acts are not those of the commissioners, but of one who has no authority to perform them, and are absolutely null and void; and for this reason an indictment was quashed. *State v. Taylor*, 43 La. Ann. 1132; *State v. Clavery*, 43 La. Ann. 1133, where the statute providing that no defect or irregularity in drawing the jury, etc., shall be sufficient to set aside the venire unless fraud has been practiced or some great wrong committed, etc.,

proceedings of the officers authorized to act in the organization of the grand jury are not sufficient to make the body an illegal one or to affect an indictment found by it<sup>1</sup> where the jurors are

was construed to refer to the conduct of the jury commissioners and not of outsiders.

But in *Georgia* it was held that where the grand jury was drawn by three of the jury commissioners, the ordinary and clerk of the Superior Court, it was unnecessary to decide whether or not the clerk was a member of the board, because if he was a member then five out of eight of those authorized to draw the jury were present, and if not, then four out of seven were present, and in either event the drawing was proper under the statute which provided that "a joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared." *Stevenson v. State*, 69 Ga. 73.

**Jury Selected from Unauthorized List.**—The jury must be drawn from the list prescribed by law, and if drawn from any other list an indictment found by such a grand jury will be quashed. *State v. Morgan*, 20 La. Ann. 442; *State v. Da Rocha*, 20 La. Ann. 356, holding that this would be the result even if those selected were in fact competent grand jurors.

**Repeal of Statute after Drawing of Jury.**—The repeal of a statute which regulates the selection and impaneling of jurors after a jury is formed under it does not affect the jury already impaneled, nor does the existence of such a jury cease upon the repeal of the statute under which it was constituted. *State v. Graff*, (Iowa 1896) 66 N. W. Rep. 779; *Anderson v. State*, 42 Ga. 9; *In re Tillery*, 43 Kan. 188, in which case the jury had been drawn before the repeal of the statute but was not impaneled until afterwards.

**Jury Commissioners Holding Over.**—When jury commissioners have been regularly appointed and the term for which they were appointed expires, they hold over until their successors are appointed, under a general statute providing for the holding over of public officers after the expiration of their terms, and an indictment found by a jury drawn by such commissioners is valid. *Roby v. State*, 74 Ga. 812.

**Excess of Authority by Sheriff.**—Where the County Court names the persons to

be summoned as grand jurors, the sheriff cannot summon any others. *State v. Cantrell*, 21 Ark. 127. But where the offense was a misdemeanor, the substitution by the sheriff of another name for one in the venire facias was held to be available only by challenge to the polls. *McElhanon v. People*, 92 Ill. 369.

1. *Georgia*.—*Smith v. State*, 90 Ga. 133; *Roby v. State*, 74 Ga. 812.

*Illinois*.—*McElhanon v. People*, 92 Ill. 369.

*Indiana*.—*Sage v. State*, 127 Ind. 17; *Cooper v. State*, 120 Ind. 377.

*Iowa*.—*State v. Carney*, 20 Iowa 82; *State v. Brandt*, 41 Iowa 593.

*Kansas*.—*State v. Marsh*, 13 Kan. 596.

*Massachusetts*.—*Com. v. Brown*, 121 Mass. 78.

*New York*.—*People v. Hooghkerk*, 96 N. Y. 149; *People v. Sebring*, 14 Misc. Rep. (N. Y. Supreme Ct.) 31; *People v. Petrea*, 92 N. Y. 128.

*North Carolina*.—*State v. Hensley*, 94 N. Car. 1021.

*Ohio*.—*Huling v. State*, 17 Ohio St. 588.

*Rhode Island*.—*State v. Mellor*, 13 R. I. 666.

See also, generally, *infra*, II. 10. *Objections*.

**The Failure to Revise the Jury List** as required by the statute will not furnish ground for quashing an indictment where the persons selected are qualified jurors whose names should have been on the list. *State v. Collyer*, 17 Nev. 275; *U. S. v. Benson*, 31 Fed. Rep. 896.

**Jury Commissioners on Jury List.**—In *Williams v. State*, (Ark. 1891) 16 S. W. Rep. 816, a motion was made to set aside an indictment for murder on the ground that the jury commissioners who selected the grand jurors selected themselves as alternative jurors, and two of them actually became members of the jury by which the defendant was indicted. The motion was overruled in the trial court, and this action of the court was not disturbed in the Supreme Court, because the record was silent as to the truth of the facts stated in the motion, and as to the ground upon which the ruling was based, but the court said: "But it does not appear

in fact competent; and objections to the organization of grand juries have been obviated in many cases by holding that the stat-

that the matter complained of could have been prejudicial to the defendant. The persons composing the grand jury by which he was indicted were placed upon the jury lists, as the record shows, before the death of Hayes [the victim], and none of them could therefore have been selected with the view of accusing any person of his murder. And, nothing appearing to the contrary, it must be presumed that E. S. Lee and John J. Bowles, who are shown to have been members of the grand jury, possessed all the intellectual, legal, and moral qualifications which the statute mentions as necessary to fit them for performing the duties incumbent upon that body. But in this connection we think it ought to be said that if they are the same persons who acted as jury commissioners at the term of the court next before that at which this indictment was found, then it was an improper act on their part to place their names or permit them to be placed on either of the jury lists. The statute does not intend that jurors shall pass upon their own characters."

**Return of List.** — Where the list is required by statute to be returned in a certain way, it is said that although the board of county commissioners may select the proper number of names and write them down on paper, the list cannot be deemed to be complete until it is certified, signed, and attested as required by the statute. *State v. Greenman*, 23 Minn. 209.

But it is held that where the names in the jury box from which the grand jurors were drawn have been duly and properly placed therein, any irregularity in preparing and certifying the lists, or in the book which the statute requires a clerk to make out and keep, is no cause for quashing or abating a special presentment or bill of indictment. *Crawford v. State*, 81 Ga. 708.

Where the statute prescribes no form nor requires the return to be authenticated, the fact that the list is not formally authenticated is not sufficient ground for setting aside an indictment. *State v. Ansaleme*, 15 Iowa 44.

Where the list of grand jurors returned by the commissioners was headed "List of grand jurors," etc.,

followed by the names of persons selected, and signed by the jury commissioners, it was held that this was sufficient to show that the persons whose names appeared in the list were those selected by the commissioners, and that this was the only office the certificate of the commissioners was designed to fulfil. *Brassfield v. State*, 55 Ark. 560.

**Verification.** — Where an affidavit is not prescribed by statute the return of the commissioners need not be verified, and if such an affidavit were necessary it could be made *nunc pro tunc*. *Com. v. Salter*, 2 Pearson (Pa.) 462.

**Selection for One Term — Return to Another.** — Under statutes requiring the Circuit Court to appoint commissioners at every term to select grand jurors to serve at the next succeeding term, and making it their duty to enclose and seal a list of the jurors so selected and indorse it "List of grand jurors," designating for what term of the court they are to serve, etc., when commissioners were appointed at the August term to select grand jurors to serve at the succeeding January term, the jury selected by them and summoned to attend at the January term was held to constitute a good jury, notwithstanding they indorsed the list as selected for the February term, there being no such term, and the jury being in fact and unquestionably selected to serve at the term succeeding its election. *Carpenter v. State*, 62 Ark. 286.

**It Is Not Competent to Impeach the Certificate of the Officer** whose duty it is under the statute to select grand jurors. *State v. Clarkson*, 3 Ala. 382 [citing *State v. Allen*, 1 Ala. 442; *State v. Greenwood*, 5 Port. (Ala.) 474; *State v. Matthews*, 9 Port. (Ala.) 370].

**Recording the Certificate or List.** — In *Keech v. State*, 15 Fla. 599, the court said: "It can scarcely be said that the omission of the clerk to record the certificate, or even the list [of the grand jury], is an irregularity in respect to the selection, summoning, or impaneling of jurors. If the clerk neglects to perform such duty as directed by the statute, the court may require and compel him to do it at any time, and thus the omission is cured.



utes regulating the subject are merely directory.<sup>1</sup> In some cases, on the other hand, a strict compliance with the statutes prescribing the method of procedure has been required.<sup>2</sup>

(2) *Drawing or Selecting.*—The jurors are either selected or are drawn by lot from what is called a jury box,<sup>3</sup> or

\* \* \* If the list is in fact certified to the clerk, he is required to write the names on separate slips of paper and deposit them in a box from which the juries are drawn, and it can make no difference to the accused that the list or certificate is not recorded until after the ballots are thus prepared or the jury drawn."

So, where the list of persons selected by judges of elections is not recorded in the election book, it is no objection to an indictment. *State v. Knight*, 19 Iowa 95.

**Signature of Ordinary to Minutes.**—In *Georgia* the presence of the ordinary at the drawing of the grand jury is not essential to the validity of the constitution of the grand jury where a majority of the commissioners attend. *Roby v. State*, 74 Ga. 812. And, therefore, the failure of the ordinary to sign the minutes after the clerk has made the proper entry thereon is a mere irregularity and will not vitiate the drawing or render the jury drawn illegal. *Smith v. State*, 90 Ga. 133.

1. *State v. Griffin*, 87 Mo. 612; *State v. Pitts*, 58 Mo. 556; *State v. Knight*, 61 Mo. 373; *U. S. v. Eagan*, 30 Fed. Rep. 608; *Head v. State*, 44 Miss. 731; *State v. Durham Fertilizer Co.*, 111 N. Car. 658; *State v. Watson*, 104 N. Car. 736.

2. *Thorp v. People*, 3 Utah 442; *Gladden v. State*, 13 Fla. 626.

In *Maryland* the statute requiring the judge to prepare a list of a certain number of names from which a jury is to be drawn at an appointed time, such list to be prepared from the tax list and poll books, is mandatory, and a grand jury taken from a list prepared without reference to the tax list and poll books, or furnished by others, is an illegal body. "The names thus furnished him [the judge] may be names upon the poll books or the tax lists, but they are not names selected by him therefrom." *Avirett v. State*, 76 Md. 510, citing *Green v. State*, 59 Md. 123, in which it was held that the method prescribed for drawing members is mandatory and a substantial compliance therewith is necessary.

But the registries of voters and the poll books, so far as the names are concerned, being identical, except that the former show who are qualified voters while the latter not only contain the same names but also indicate who have actually voted, the requirement of the code that the names to be used by the judge in the selection of the juries shall be taken from the tax list and poll books is sufficiently complied with if the names are taken either from the poll books or the registry of voters. *Downs v. State*, 78 Md. 128, *distinguishing* *Avirett v. State*, 76 Md. 510, in that the list in the latter case was taken from neither.

3. **The Jury Box** is the box in which are placed the names, on separate pieces of paper, of the persons named in a properly selected and returned list. *State v. Greenman*, 23 Minn. 211.

**By Whom Drawn—Deputy Clerk.**—When the duty of drawing the names is imposed upon the clerk his deputy may perform it for him. *Willingham v. State*, 21 Fla. 769.

**Appointment by Judge.**—In *Turner v. State*, 89 Tenn. 547, the judge selected the venire and the grand jury was drawn from it as provided in section 4791 of the code. It was insisted that he should have appointed the grand jury in accordance with section 4253 of the old code, but the court held that the object was to have the judge himself select "good and lawful men," and that as he duly appointed and designated each and every one of the thirty-seven (the venire) as "good and lawful men," then the thirteen drawn by lot had all and singular been appointed by him, and after such selection their acceptance by him was a sufficient approbation and met all the purposes of the statute.

**Notice of Drawing.**—In *Woodward v. State*, 33 Fla. 508, it was held that the notice of the drawing of the jury required by law must be given, and a drawing without such notice would be irregular and should not be accepted by the court.

Notice of a meeting to draw grand jurors is good though one of the inter-

wheel,<sup>1</sup> according to the usual statutory provisions, and if qualified when drawn or chosen they may serve, notwithstanding mere irregularities in the drawing or selection.<sup>2</sup>

(3) *Time for Selecting and Impaneling.* — It has been held that a provision requiring the grand jury to be summoned a certain number of days before the term of court is directory to the sheriff and does not affect the legality of the grand jury.<sup>3</sup> And

vening days is Sunday. *State v. Wheeler*, 64 Me. 532.

**Impaneling in Order of Return.** — In *Mississippi*, under a statute abrogating the old mode of drawing grand jurors by lot and substituting a new mode of summoning and impaneling them, it was held that the manner of selecting the persons returned by the sheriff was within the discretion of the judge, and there was no reason why he should not cause the jurors to be sworn and impaneled in the order in which their names were returned by the sheriff until a sufficient number were sworn to constitute a legal grand jury. *Box v. State*, 34 Miss. 615.

1. *McHugh v. State*, 38 Ohio St. 155; *Com. v. Salter*, 2 Pearson (Pa.) 461; *U. S. v. Eagan*, 30 Fed. Rep. 608.

2. *Wilkinson v. State*, 106 Ala. 23; *Fincher v. State*, 106 Ala. 667; 18 So. Rep. 694; *Williams v. State*, 72 Ga. 180; *State v. Davis*, 14 La. Ann. 689; *Com. v. Brown*, 147 Mass. 585; *State v. Wilcox*, 104 N. Car. 847.

**Breaking Open Jury Box.** — The jury commissioners may break open the jury box, the key being lost. *Long v. State*, 103 Ala. 55.

**Drawing Grand and Petit Jurors in Order.** — In *Alabama*, under a statute requiring the grand and petit jurors to be selected in order, first the grand jury from persons drawn first to serve as grand jurors and next the petit jurors from persons drawn so to serve, it was held that a petit jury could not be selected first from a whole panel of persons drawn to serve as grand and petit jurors, and before the grand jury had been selected. *Wells v. State*, 94 Ala. 1. But such a selection of a grand jury would not invalidate it, as the only objection permitted by statute to prevail against the formation of the grand jury is that the jurors were not drawn in the presence of the officers designated by law. *Murphy v. State*, 86 Ala. 46; *Forney v. State*, 98 Ala. 19; *Long v. State*, 103 Ala. 55.

**Laying Aside Qualified Names by Mistake.** — Laying aside the names of qualified persons drawn by the commissioners, under the mistaken impression that such persons were not in the county, would not incapacitate the jury actually composed of good and lawful men. *State v. Wilcox*, 104 N. Car. 847.

**Necessity of Drawing from Box Obviated.** — Under an act requiring the drawing of the names of the venire out of a box or hat, by a boy under ten years of age, if only a number of the venire sufficient to constitute the grand jury appear the court may impanel them as a jury without the useless formality of putting their names in a box and drawing them out again. *Workman v. State*, 4 Sneed (Tenn.) 426; *State v. Standley*, 76 Iowa 215.

**Conclusiveness of Minutes of Court.** — The fact that a grand juror's name is in the minutes of the court as properly drawn is a sufficient reply to an exception to the indictment that his name was not in the jury box. *Cross v. State*, 64 Ga. 443.

3. *Reeves v. State*, 29 Fla. 527; *Johnson v. State*, 33 Miss. 363; *Weeks v. State*, 31 Miss. 490; *State v. Jeffcoat*, 26 S. Car. 114.

**Venire to Sheriff.** — *State v. Smith*, 67 Me. 328; *State v. Smith*, 38 S. Car. 270. *Contra*, *Thorp v. People*, 3 Utah 441. See also *State v. Lauer*, 41 Neb. 226.

**Construction of Statute.** — Under a statute requiring the clerk of the county commissioners to file with the clerk of the Circuit Court, not less than twenty days before the beginning of the second regular term of said court after each and every general election, a fair and complete list, etc., it was held that a nonjury term is a regular term, and an election for representatives of the state in the Congress of the United States, and for president and vice-president of the United States, is a general election. *Downs v. State*, 78 Md. 128.

the organization need not be on the first day of the term.<sup>1</sup>

*d. NUMBER FROM WHICH JURY CHOSEN.* — At common law twenty-four persons were summoned, from which number the jury was formed;<sup>2</sup> but in this country the number is generally fixed by statute, though strict compliance with the provisions in this regard has not always been required.<sup>3</sup>

*e. PRESUMPTION OR RECORD EVIDENCE OF LEGAL ORGANIZATION.* — As a general rule, in the absence of an affirmative showing to the contrary, the presumption is that the officers charged with the duty of organizing a grand jury performed that duty, and that the jury is duly and legally constituted;<sup>4</sup> and

**Drawing at Illegal Term of Court.** — The term of court, to be such a legal term as to authorize the judge to draw the grand jury, must be legal in every respect; and where a judgment was arrested because the indictment had been drawn and the defendant tried and convicted at an adjourned term of court, pursuant to an order made by the judge in vacation at chambers, at which term the presiding judge drew another grand jury to serve at the next regular term, it was held that as the adjourned term was illegal for the purpose of trying the defendant on the first indictment it was illegal for the purpose of authorizing the judge to draw the grand jury to serve for the next regular term, which grand jury again indicted the defendant. *Finnegan v. State*, 57 Ga. 428.

**Drawing in Vacation.** — In *Oregon* it was held that an Act providing for the drawing of a grand jury before the term was repugnant to the Constitution of that state. *State v. Lawrence*, 12 Oregon 297.

1. *Jackson v. State*, 102 Ala. 167; *Perkins v. State*, 92 Ala. 66; *State v. Davis*, 14 La. Ann. 689; *State v. Lauer*, 41 Neb. 226; *Kelley v. State*, 53 Ind. 311.

**In Contemplation of the Right to Adjourn the term to any day preceding the next regular session, by a written order to the sheriff, the first day of the actual session becomes the first day of the regular term for the drawing of juries, under the statute requiring the grand jury to be drawn on the first day of the regular term.** *State v. Pate*, 40 La. Ann. 748.

**Reorganization at Successive Terms.** — Where persons are drawn for a year, it is proper practice to reorganize the grand jury at each term after the first from those summoned to the first term.

*State v. Standley*, 76 Iowa 215; *State v. Brasskamp*, 87 Iowa 588.

2. *Wilson v. People*, 3 Colo. 327; *Black. Com.* 302.

3. *Stevenson v. State*, 69 Ga. 68; *Turner v. State*, 78 Ga. 177 [*distinguishing* *Berry v. State*, 63 Ala. 126, in that the statute in Alabama expressly prohibited the court from drawing more than a fixed number; and *disapproving* *Leathers v. State*, 26 Miss. 73, which placed a more rigid construction upon a statute similar to that in Georgia]; *Green v. State*, 28 Miss. 687, holding that as the venire does not constitute a part of the record it is no reason for arresting judgment on an indictment that a greater or less number than those required to be returned were in fact returned, so long as a grand jury of the legal number is drawn from the number actually returned. *People v. Harriot*, 3 Park. Cr. Rep. (Chenango Oyer & T. Ct.) 112; *State v. Watson*, 104 N. Car. 735; *Lowrance v. State*, 4 Verg. (Tenn.) 147.

**In Florida** it was held that a special venire calling for more than a number sufficient to make a grand jury of fifteen persons should be quashed. *Keech v. State*, 15 Fla. 603.

**Excess of Names Stricken from List.** — The judges of election having returned eighty-five instead of seventy-five names from which to select the fifteen grand jurors required by law, the extra names were stricken from the list before the drawing, and it was held that in this there was no error. *State v. Knight*, 19 Iowa 95.

4. *Colorado.* — *Parker v. People*, 13 Colo. 155; *Wilson v. People*, 3 Colo. 328.

*Florida.* — *English v. State*, 31 Fla. 340.

*Georgia.* — *Hayes v. State*, 58 Ga. 35. *Illinois* — *Fletcher v. People*, 81 Ill.

where the record shows that the grand jury returned the indictment into court, and the indictment itself states that the grand jury was duly impaneled, sworn, and charged, it sufficiently appears that the indictment was found by a regularly impaneled grand jury,<sup>1</sup> if the records of the court do not elsewhere show the contrary.<sup>2</sup>

116; *Williams v. People*, 54 Ill. 422; *Barron v. People*, 73 Ill. 256; *Lambert v. People*, 34 Ill. App. 637.

*Iowa*. — *State v. Van Auken*, (Iowa 1896) 68 N. W. Rep. 454; *State v. De Bord*, 88 Iowa 103; *Dutell v. State*, 4 Greene (Iowa) 125.

*Louisiana*. — *State v. Giroux*, 26 La. Ann. 582; *State v. Coleman*, 27 La. Ann. 693; *State v. George*, 34 La. Ann. 261; *State v. Tazwell*, 30 La. Ann. 884; *State v. Dilworth*, 34 La. Ann. 216.

*Mississippi*. — *Chase v. State*, 46 Miss. 697; *Dowling v. State*, 5 Smed. & M. (Miss.) 664.

*North Carolina*. — *State v. Seaborn*, 4 Dev. L. (N. Car.) 305.

*Ohio*. — *Williams v. State*, Wright (Ohio) 42.

*Oregon*. — *O'Kelly v. Territory*, 1 Oregon 51; *State v. Anderson*, 10 Oregon 448.

*Pennsylvania*. — *Rolland v. Com.*, 82 Pa. St. 306.

*Tennessee*. — *State v. Cole*, 9 Humph. (Tenn.) 626; *Lowrance v. State*, 4 Yerg. (Tenn.) 147; *State v. Alderson*, 10 Yerg. (Tenn.) 523.

1. *Alabama*. — *Floyd v. State*, 30 Ala. 511.

*Indiana*. — *Henning v. State*, 106 Ind. 388; *Stout v. State*, 93 Ind. 152; *Powers v. State*, 87 Ind. 146; *Mathis v. State*, 94 Ind. 564.

*Iowa*. — *Dutell v. State*, 4 Greene (Iowa) 125; *Harriman v. State*, 2 Greene (Iowa) 270.

*Kansas*. — *Lawrent v. State*, 1 Kan. 313.

*Louisiana*. — *State v. Stuart*, 35 La. Ann. 1015; *State v. Price*, 37 La. Ann. 215.

*Montana*. — *Territory v. Hart*, 7 Mont. 42.

*North Carolina*. — *State v. McNeill*, 93 N. Car. 552.

*Ohio*. — *Young v. State*, 23 Ohio St. 578.

*Texas*. — *State v. Vahl*, 20 Tex. 779.

*Utah*. — *Thorp v. People*, 3 Utah 442.

*Virginia*. — *Burgess v. Com.*, 2 Va. Cas. 483.

**On Change of Venue** such a record will

be sufficient for the court to which the case is removed. *O'Brien v. State*, 125 Ind. 38.

**Certiorari to Supply Omission.** — The writ of certiorari is sometimes used by the court to which a case is removed, on change of venue, to have the record sent from the court in which the matter originated, for the purpose of showing the constitution and action of the grand jury. *Stewart v. State*, 13 Ark. 721.

**General Language Importing Legal Selection.** — In *Collier v. State*, 2 Stew. (Ala.) 392, it was held that it need not appear from any part of the record that the grand jury was chosen from the panel "by lot," and that any words of an equivalent import are equally as good as those employed by the statute, and that where it appeared from the record that the grand jury was "selected as the statutes in that case provide," it was held sufficient.

**Impaneling for Successive Terms.** — Where a grand jury is by the law impaneled at one term to serve for a year during which there are several terms, the record showing the impaneling of the grand jury at the proper term is sufficient, and a record at another term during the year need not set forth the impaneling and swearing of the grand jury. *Turns v. Com.*, 6 Met. (Mass.) 225.

**Record of Term Sufficient.** — The record of each case need not show the impaneling of the grand jury. *Parker v. People*, 13 Colo. 155. See also *infra*, V. 2. b. (4) *Selection and Impaneling*.

2. *Thorp v. People*, 3 Utah 441; *Dutell v. State*, 4 Greene (Iowa) 125; *State v. Price*, 37 La. Ann. 215.

**Clerk's Certificate.** — No specific statement of the impaneling is necessary in the clerk's certificate when the record shows the fact. *App v. State*, 90 Ind. 74.

**Certiorari to Supply Omission.** — Where the record on appeal does not show the impanelment of the grand jury, the court will issue a writ of certiorari to the trial court for a transcript of the

**Identity of Jurors.** — Mistakes in writing the names of grand jurors, either by the clerk of the jury in the body of the indictment or by the clerk of the court upon the record, may always be corrected,<sup>1</sup> the real question being the identity of the person.<sup>2</sup>

**f. NUMBER NECESSARY TO BE SWORN.** — At Common Law a grand jury could be composed of no greater number than twenty-three good and lawful men, and while it is certain that an indictment could be found by the concurrence of twelve of the number sworn,<sup>3</sup> there is, strangely enough, upon a question which must have been clear to the early writers, some confusion in the statements of the minimum number which might be sworn to constitute such a body,<sup>4</sup> though the courts generally agree that the

record showing the fact. *Miller v. State*, 40 Ark. 492; *Green v. State*, 19 Ark. 178. So also on change of venue. *Binns v. State*, 35 Ark. 120.

1. *Rampey v. State*, 83 Ala. 31; *Germolgez v. State*, 99 Ala. 216; *Chapman v. State*, 18 Ga. 737; *Reich v. State*, 63 Ga. 616; *Turner v. State*, 78 Ga. 174; *State v. Norton*, 23 N. J. L. 33; *State v. Mahan*, 12 Tex. 283.

**Presumption.** — The grand jury will be presumed to be legally constituted when the names of the grand jurors designated by the commissioners and those on the jury list substantially correspond, and where there is no decisive evidence that the persons who actually served were not the individuals designated. *Hayes v. State*, 58 Ga. 35; *State v. Van Auken*, (Iowa 1896) 68 N. W. Rep. 544.

**The Venire Does Not Constitute a Part of the Record** unless objection was taken to it in the court below and it is introduced into the record by a bill of exceptions. *Organ v. State*, 26 Miss. 78; *Byrd v. State*, 1 How. (Miss.) 253; *Brantley v. State*, 13 Smed. & M. (Miss.) 468. See also *supra*, II. 3. *b. Precept — Venire Facias.*

2. *Chapman v. State*, 18 Ga. 737.

**Christian Names Designated by Initials.** — It is no objection to an indictment that the Christian names of the grand jurors are designated by initials. *Minor v. State*, 63 Ga. 320.

So where the venire shows the names of the persons from whom the grand jury was selected, and the names of those who were selected therefrom correspond except that the initials of the Christian names are written instead of the full names, this is no objection. *Cotton v. State*, 31 Miss. 504.

**Upon Transfer to Inferior Court.** — Where an indictment is transferred

from the Superior Court to the City Court, the latter cannot hear parol evidence to alter, explain, or correct the minutes of the Superior Court as to who were the grand jurors sworn at any particular term of that court, and the proper course to pursue when a plea in abatement is filed upon such grounds is to examine the minutes of the Superior Court, and if it appears therefrom that the indictment has not been found by the grand jurors whose names appear thereon, to suspend the hearing of the case until the minutes of the Superior Court can be corrected, if this can lawfully be done, and if not, to have the indictment quashed by the court in which it was found. *Kneeland v. State*, 63 Ga. 643; *People v. Swift*, 59 Mich. 542.

3. *Clyncard's Case*, Cro. Eliz. 654. See also *infra*, II. 9. *d. Concurrence in Finding.*

**4. Twelve or Thirteen.** — Turning to the authorities upon the early English procedure to which it is natural to look for the solution of such questions, it is said on the one hand that twelve might be sworn to constitute the grand jury, 4 Black. Com. 302; 1 Chitty's Crim. Law 306; and this statement is found supported in the United States. *Wilson v. People*, 3 Colo. 327; *Pybos v. State*, 3 Humph. (Tenn.) 50. On the other hand, Bacon at one place says: "Every indictment is to be found by twelve lawful liege freemen of the county wherein the crime was committed," etc. Bac. Abr., tit. Indictment, C. And in another place: "The grand jury may consist of thirteen or any greater number (not exceeding twenty-three); for these being the grand inquisitors of the county, every indictment and presentment by them must be found by twelve at least," etc. Bac. Abr., tit.

minimum number was twelve.<sup>1</sup>

In the United States the number of persons required to constitute a jury is fixed by statutes or constitutional provisions,<sup>2</sup> and where the number is fixed by statute between a minimum and

juries, A. This last statement is found indorsed by at least one eminent American jurist. In *Com. v. Wood*, 2 Cush. (Mass.) 150, Shaw, C. J., says: "It is conceded that by the common law a grand jury may consist of thirteen, or of any greater number not exceeding twenty-three." In the annotations to all the early writers above referred to, *Clyncard's Case*, Cro. Eliz. 654, is cited as authority for the respective propositions laid down. That case, however, simply requires that an indictment should be presented by at least twelve good and lawful men, and does not consider how many must be sworn to constitute the grand jury. Upon the question of concurrence there is no doubt of the number required at common law, and hence it probably came to be regarded that twelve, being sufficient to find an indictment, were sufficient to constitute the grand jury in the first instance. This seems to be the reasonable inference, too, from the fact that all the writers above reviewed are sometimes indiscriminately cited as authority for the general proposition that at common law the grand jury is sufficiently constituted by the swearing of twelve men. *Pybos v. State*, 3 Humph. (Tenn.) 50.

1. See the cases cited in the preceding note and those in the succeeding notes in this subdivision.

2. **Construction of Statutes.** — The legislature, by an Act requiring the sheriff to summon a certain number of men, did not intend to fix that number as the number of which the grand jury should be composed, but only to provide a panel from which to select the legal number under the pre-existing law. *Weeks v. State*, 31 Miss. 490; *Miller v. State*, 33 Miss. 357; *Com. v. Wood*, 2 Cush. (Mass.) 150; *Com. v. Salter*, 2 Pearson (Pa.) 462. And statutes fixing the number of grand jurors have been held to be intended simply to remedy the indefinite provision of the old law fixing the number at not less than twelve nor more than twenty-three. *State v. Brainerd*, 56 Vt. 532; *State v. Swift*, 14 La. Ann. 839; *Pybos v. State*, 3 Humph. (Tenn.) 50.

In *Utah*, by construction of the statute, which provides that twenty-four shall be served and shall constitute the grand jury, the whole number summoned must constitute the jury. *Brannigan v. People*, 3 Utah 488.

But, in *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66, it was held to be no ground to quash an indictment after a defendant had removed it by certiorari, and gone to trial and conviction, that more than twenty-three were sworn on the grand jury, the caption showing that the indictment was found by twelve and more, without naming them or stating the number, though it seems that the objection might have been reached by a plea in abatement showing the fact.

In *New York* it was held that if the question is not raised in the court below, the fact that the indictment purports to be found by twenty-four grand jurors will not furnish ground for reversal. *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

**Constitutional Inhibition.** — *The Constitution of the United States* does not stand in the way of a provision in the state constitution permitting an indictment to be found by a smaller number of jurors than was required at common law. *Parker v. People*, 13 Colo. 155.

**Provision for Grand Jury Means Common-law Grand Jury.** — Where the constitution provides for prosecution by indictment or presentment of a grand jury without more, it has been held that such a provision has in view the common-law grand jury, and that therefore a statute providing that ten persons shall constitute a grand jury, of whom eight may find an indictment, is repugnant to such constitutional provision. *State v. Hartley*, 22 Nev. 342. See also *State v. Barker*, 107 N. Car. 913.

**Constitutional Provisions Self-executing.** — Where a provision of the constitution limits the number of the grand jury to twelve, such a provision is self-executing and mandatory. *Wells v. Com.*, (Ky. 1893) 22 S. W. Rep. 552 [citing *Downs v. Com.*, 92 Ky. 605]; *State v. Ah Jim*, 9 Mont. 167.

maximum limit, a grand jury composed of a greater number than the maximum is an illegal body.<sup>1</sup>

There is strong authority for the proposition that a court has no jurisdiction to try a person upon an indictment found and returned by a grand jury consisting of fewer members than the minimum number required by statute,<sup>2</sup> and that objection upon that ground may be raised at any time and in any manner, and cannot be waived by any act or failure to act on the part of the defendant.<sup>3</sup> On the other hand, it has been held that the objection is waived by failure to take advantage of the defect before pleading to the indictment,<sup>4</sup> and that even if it be a doubtful

1. *Keech v. State*, 15 Fla. 603; *Downs v. Com.*, 92 Ky. 605; *Miller v. State*, 33 Miss. 357; *Harrell v. State*, 22 Tex. App. 692; *Wells v. State*, 21 Tex. App. 594; *Ex p. Reynolds*, (Tex. Crim. App. 1896) 34 S. W. Rep. 120.

**Obviating Effect of Excess — Discharge.**

— Where the grand jury consists of two more persons than the number allowed by law, the court may, before any action by the grand jury, discharge the last two persons sworn. *State v. Fee*, 19 Wis. 562.

But when jurors were absent and their places were filled by summoning and impaneling talesmen, and no order discharging the absent jurors was made, it was held that their presence and participation thereafter in the deliberations of the grand jury vitiated its findings. *Ramsey v. State*, (Ala. 1897) 21 So. Rep. 209. See also *infra*, II. 9. c. (7) *Presence of or Interference by Others than Grand Jurors*.

**Name Stricken from List.** — Where the grand jury is called and it is found to consist of twenty-four men instead of twenty-three, the court may, before the organization of the jury, strike off the last man on the list; and if instead of this course the court instructs the jurors to go to their room and if upon a count they find twenty-four persons present to reduce the number to twenty-three by striking out the last name on the list, and then to choose a foreman and return and be qualified, there is no error. *Ridling v. State*, 56 Ga. 602.

**Statute Not Abrogating Common Law.** — The common-law rule that not more than twenty-three grand jurors can make a legal grand jury will prevail, notwithstanding a statute requires twenty-four to be summoned, where no statute fixes the number of those to be sworn as grand jurors. *Com. v. Salter*, 2 Pearson (Pa.) 462. And an indictment

is worthless if found by a grand jury composed of twenty-four persons. *People v. Thurston*, 5 Cal. 69; *People v. King*, 2 Cal. (N. Y.) 98.

2. *Doyle v. State*, 17 Ohio 222; *Fitzgerald v. State*, 4 Wis. 395; *Gladden v. State*, 12 Fla. 566; *Brannigan v. People*, 3 Utah 489; *Finley v. State*, 61 Ala. 205; *Lott v. State*, 18 Tex. App. 627. The four cases last cited are more particularly noticed in the next note but one. See also *Norris' House v. State*, 3 Greene (Iowa) 513, where the court said: "If the indictment is not found by a legal grand jury, it is not found by a grand jury at all." *Straughan v. State*, 16 Ark. 44, where the court said: "If there were, in fact, but thirteen persons impaneled as a grand jury, the law requiring sixteen, no indictment found by them would be valid."

**Recurrence of Same Name in Indictment.**

— There is no presumption that the same names appearing in an indictment refer to the same person. *Hamilton v. State*, 97 Ga. 216.

**Presumption of Legality.** — Where it appears that an indictment was returned on the same day when one of the grand jurors was excused for the balance of the term, there is no presumption that the bill was found after the juror was excused. *Thompson v. State*, 9 Ga. 210.

3. *Doyle v. State*, 17 Ohio 222, where the court said: "No man can by his consent or will constitute a grand jury. \* \* \* It is not the accused that makes a grand jury, but the statute," *Gladden v. State*, 12 Fla. 566; *Brannigan v. People*, 3 Utah 489; *Finley v. State*, 61 Ala. 205; *Lott v. State*, 18 Tex. App. 627; dissenting opinion of Kinne, J., in *State v. Belvel*, 89 Iowa 405, quoted in the next note.

4. *State v. Belvel*, 89 Iowa 405, where there was a judgment of conviction

question whether the defendant can, after trial and verdict, take advantage of such a defect by direct challenge, it is clear that the

upon an indictment found by a grand jury composed of but five jurors, when the statute provided that "the grand jury shall be composed of seven members." It appears that all of the five concurred in finding the indictment, and a statute required the concurrence of not less than four when the grand jury should be composed of five. The defendant filed a paper entitled a "motion and petition to vacate judgment," in which he asked that the judgment rendered be vacated, and that he have leave to withdraw his plea of guilty, and that the indictment be quashed. One of the grounds of the application was that the grand jury was composed of only five members.

Upon an appeal from a dismissal of the petition and an appeal from the original judgment of conviction, which were heard together, it was held by a divided court that inasmuch as the defendant could have interposed the objection before pleading to the indictment, and as no reason for his failure to do so was shown, the defect complained of must be regarded as waived. Robinson, C. J., in delivering the opinion of the majority of the court, said: "It was held by a majority of this court in *State v. Carman*, 63 Iowa 130, that a defendant in a criminal action triable on indictment cannot waive a trial by jury; and that decision was followed in *State v. Larrigan*, 66 Iowa 426. But in *State v. Kaufman*, 51 Iowa 578, it was said to be the settled doctrine of this state that a defendant in a criminal action may waive a statute enacted for his benefit, and it was held to be competent for him to consent to a trial by eleven jurors. The case of *State v. Ostrander*, 18 Iowa 438, was decided under a statute which fixed the number of persons required to constitute a grand jury at fifteen, and required the concurrence of twelve to find an indictment. The defendant, before pleading, had filed a motion to quash the indictment, because found by a grand jury consisting of only fourteen members. It appears that a challenge to one member of the panel had been sustained, and that but fourteen members had acted upon the indictment. It was held that the indictment was good. The court made

prominent the fact that although more than twelve persons were required to constitute a grand jury, yet from the earliest authorities down it is shown that a presentment by twelve is good, although no more than twelve be impaneled; or, if more are impaneled, although all the other jurors dissent. \* \* \* In this case the indictment was presented by five jurors acting as the grand jury, or by as many members as would have been required in any event to concur in the finding of the indictment."

*Dissenting Opinion.* — Kinne, J., in a dissenting opinion, said: "If the doctrine of the majority opinion is to prevail, what is to prevent the finding of an indictment under color of law by any body of men greater or less than is provided for by our constitution and laws, and the trial of a defendant thereon in case he fails to make timely objection thereto? \* \* \* Such a doctrine carries the law of waiver, as applied to persons on trial for a crime, to an unwarranted extent. The statutes of Florida require that fifteen persons shall be drawn to serve as grand jurors. In *Gladden v. State*, 12 Fla. 566, it appeared that only fourteen persons were thus drawn. No error was assigned by the plaintiff. The court said: 'From a careful inspection of the first page of the record we find only fourteen persons were drawn to serve as grand jurors during the term at which the indictment was found. The statute regulating the organization of grand juries cannot, by any known rule of construction, be held to authorize this; and while no such error is assigned by the plaintiff, yet it is apparent upon the record, and this being a capital crime, the court cannot pass it by without notice. No man should be tried for a capital crime upon an indictment of this character.' It was held that there must be fifteen grand jurors on the panel as originally drawn, and that the error vitiated all the subsequent proceedings in the case. In *Brannigan v. People*, 3 Utah 489, it was held that where a grand jury of seventeen men was impaneled, and the statute required that the grand jury should consist of 'twenty-four eligible men to serve as grand jurors,' and that 'said



defect does not go to the jurisdiction, and cannot be taken advantage of by a collateral attack in habeas corpus.<sup>1</sup> Where

twenty-four men shall constitute a grand jury,' an indictment returned by a grand jury organized with seventeen members was void. It was also held that it was not too late after the verdict to look into the record when the indictment by which the prisoner was charged was found by an unlawful grand jury. In *Finley v. State*, 61 Ala. 205, it is said: 'But if its records affirmatively disclose that a body of men has been organized as a grand jury, in violation of the statutes which prescribe the mode of organizing such a jury, clothed with the powers of making presentments which operate as criminal accusations against the citizen, all the acts of that body must be pronounced void; no solicitation or laches on the part of the accused can cure the illegality. It would be ground of motion in arrest of judgment, and, if no such motion is made, of assignment of error in an appellate tribunal; and, if not assigned, it is of that class of errors this court must notice in obedience to the statute, and render such judgment on the record as the law demands.' As the indictment proceeded from, and was the act of, a body of men organized as a grand jury in violation of law, the judgment of conviction was reversed. In *Lott v. State*, 18 Tex. App. 627, an indictment for burglary found by a grand jury composed of thirteen instead of twelve persons was held by the lower court not such an error as could be taken advantage of by a motion in arrest of judgment. The court of appeals, while holding that the ground of the motion was not one provided by the statute, said: 'This exclusion of other grounds could not, however, extend to the extent of depriving the defendant of a constitutional right, nor to the extent of conferring jurisdiction inhibited by the constitution. \* \* \* If he is tried in a court having no jurisdiction, he may interpose this objection to the proceeding at any stage thereof, and in any form. \* \* \* Our conclusion is that the matter presented by the motion in arrest of judgment is fundamental, and reaches to the very foundation of the prosecution. It shows that the court in which this trial and conviction were had was without any jurisdiction of the case. \* \* \* Such being the

case, it matters not in what manner, or at what stage of the proceedings, this want of jurisdiction is presented. If presented for the first time on this appeal it would be held fatal to the conviction; or if it affirmatively appeared from the record that the defendant had been convicted of a felony without being indicted therefor by a grand jury, we would set aside the conviction and dismiss the prosecution for want of jurisdiction in the trial court, although the defendant had not in any manner made the objection.'"

1. *In re Wilson*, 140 U. S. 575, where Brewer, J., said: "Assuming that this Act of 1889 was legally passed, and was a law of the territory, let us see what changes were accomplished by it. Prior thereto, as we have noticed, grand juries were to be composed of not less than thirteen nor more than fifteen members. The amendment made by this act provided that they should be composed of not less than seventeen nor more than twenty-three members. The record discloses that there were but fifteen members. Prior to 1889, the territorial law authorized the finding of an indictment on the concurrence of twelve grand jurors. (Rev. Stat. Arizona, 778, § 1430.) A similar provision is found in the federal statutes. (Rev. Stat., § 1021.) The Act of 1889 made no change in this respect; so, whether the grand jury was composed of thirteen—the lowest number sufficient under the prior law—or twenty-three, the highest number named in the Act of 1889, the concurrence of twelve would have required the finding of an indictment. By petitioner's argument, if there had been two more grand jurors, it would have been a legal body. If the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor. It would seem, therefore, as though the error was not prejudicial to the substantial rights of the petitioner. \* \* \* As the question whether the grand jury should be constituted of fifteen or seventeen members was a matter which must necessarily be considered and determined by the trial court, its ruling thereon, however erroneous, would

the jury has once been organized with the full number required, only so many of them need be present as are required to form a quorum or to concur in the finding.<sup>1</sup>

*g.* **EXCUSING JURORS.** — The court may excuse grand jurors for sufficient cause,<sup>2</sup> and the legality of such excuse will be presumed.<sup>3</sup>

seem \* \* \* to present simply a matter of error, and not be sufficient to oust the jurisdiction. Indeed, it may be considered doubtful, at least, whether such a defect is not waived if not taken advantage of before trial and judgment. \* \* \*. The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation and demand the judgment of his peers on the merits of the charge. If he omits the former and chooses the latter he ought not, when defeated on the latter, when found guilty of the crime charged, to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented."

**Harmless Error.** — In the foregoing quotation from the opinion of Mr. Justice Brewer he remarks that since the "opposing votes" of those necessary to make the legal number "would not have prevented" the finding of the indictment, "it would seem, therefore, as though the error was not prejudicial." Compare the following language of the court in *State v. Ward*, 60 Vt. 142, wherein the court said: "If the number of the grand jury should be reduced to twelve, and the twelve should find or fail to find an indictment, it does not follow that the action of the twelve would be the same if aided by the counsels and deliberations of the other six required by the statute."

1. *People v. Roberts*, 6 Cal. 214; *People v. Butler*, 8 Cal. 439; *State v. Shelton*, 64 Iowa 333; *State v. Ostrander*, 18 Iowa 435; *State v. Billings*, 77 Iowa 417; *State v. Copp*, 34 Kan. 522; *State v. Williams*, 35 S. Car. 345;

*Drake v. State*, 25 Tex. App. 293; *Watts v. State*, 22 Tex. App. 572; *Smith v. State*, 19 Tex. App. 95.

**After Discharge of One Juror.** — Where, after the organization of a jury, one of the members thereof was removed for disqualification, it was held that the remaining fifteen jurors, of whom twelve constituted a quorum, might find valid indictments, notwithstanding that a statute required the grand jury to consist of sixteen members. *State v. Causey*, 43 La. Ann. 897; *State v. Woodson*, 43 La. Ann. 905.

2. *Denning v. State*, 22 Ark. 131; *People v. Leonard*, 106 Cal. 302; *State v. Schieler*, (Idaho 1894) 37 Pac. Rep. 272; *State v. Hunter*, 43 La. Ann. 157; *State v. Brooks*, 48 La. Ann. 1519; *Mills v. State*, 76 Md. 274; *State v. Wilson*, 85 Mo. 139; *State v. Ward*, 60 Vt. 142; *U. S. v. Belvin*, 46 Fed. Rep. 383; *U. S. v. Jones*, 69 Fed. Rep. 973.

"The court has so long exercised the power of excusing jurors for reasons that have been deemed satisfactory without its power to do so being questioned, that it must be regarded as firmly settled that the court has such power, and that the exercise of it in the discretion of the court will not ordinarily be revised." *State v. Bradford*, 57 N. H. 198.

"Whether it comes to us, as a part of the common law, from 3 Hen. VI, c. 12, as might appear, and as contended by the attorney for the prosecution (Bac. Abr., title Juries, A), need not be determined. It has been the recognized right of the court, as practiced, so far as revealed by the reported decisions, and so far as the memory of the oldest practitioners can inform us, for nearly a century." *State v. Ward* 60 Vt. 142.

**Recalling Excused Juror.** — Where a grand juror is excused by the judge through inadvertence, but before entering an order excusing him the mistake is corrected and he is recalled, no exception can be taken to the action of the court in this regard. *State v. Cohn*, 9 Nev. 179.

3. *Territory v. Barth*, (Arizona 1887)

*h. SUPPLYING DEFICIENCY* — (1) *Generally*. — When any of the number of grand jurors in the venire issued to the sheriff, or set apart for such service under the particular practice in vogue, have not been summoned or fail to appear, the court may supply the deficiency by ordering a sufficient number to be summoned forthwith;<sup>1</sup> and the power exists where the deficiency occurs by reason of the excusing or discharge of persons for sufficient reason,<sup>2</sup> or where the officers whose duty it is to return or

15 Pac. Rep. 673; *Wallis v. State*, 54 Ark. 611; *Williams v. State*, 69 Ga. 12; *Burrell v. State*, 129 Ind. 290; *State v. Brown*, 12 Minn. 538; *Cotton v. State*, 31 Miss. 504; *Epperson v. State*, 5 Lea (Tenn.) 293.

**Excuse in Open Court.** — The statute not requiring it, there is no error in excusing a grand juror without taking his excuse in open court and under oath, although such may be the practice. *People v. Hidden*, 32 Cal. 445.

1. *Alabama*. — *Boyd v. State*, 98 Ala. 33; *Stewart v. State*, 98 Ala. 70; *Welsh v. State*, 96 Ala. 92; *Germolgez v. State*, 99 Ala. 216; *Finley v. State*, 61 Ala. 201; *Berry v. State*, 63 Ala. 126; *Yancy v. State*, 63 Ala. 142.

*Arkansas*. — *State v. Swim*, 60 Ark. 587.

*California*. — *Levy v. Wilson*, 69 Cal. 105; *Bruner v. Superior Ct.*, 92 Cal. 239.

*Florida*. — *Tervin v. State*, 37 Fla. 396; *Shepherd v. State*, 36 Fla. 374; *Jones v. State*, 18 Fla. 890; *Jenkins v. State*, 35 Fla. 737; *Dukes v. State*, 14 Fla. 515.

*Georgia*. — *Sims v. State*, 51 Ga. 496.

*Illinois*. — *Nealon v. People*, 39 Ill. App. 481.

*Indiana*. — *Gage v. State*, 127 Ind. 15; *Dorman v. State*, 56 Ind. 454.

*Iowa*. — *Norris' House v. State*, 3 Greene (Iowa) 515; *State v. Reid*, 20 Iowa 413; *State v. Miller*, 53 Iowa 84, 154.

*Kansas*. — *Montgomery v. State*, 3 Kan. 264.

*Massachusetts*. — *Crimm v. Com.*, 119 Mass. 331.

*Minnesota*. — *State v. McCartney*, 17 Minn. 76.

*Mississippi*. — *Dowling v. State*, 5 Smed. & M. (Miss.) 683.

*Ohio*. — *Julian v. State*, 46 Ohio St. 511.

*Tennessee*. — *Boyd v. State*, 6 Coldw. (Tenn.) 1.

*Utah*. — *Brannigan v. People*, 3 Utah 488.

*Virginia*. — *Richardson v. Com.*, 76 Va. 1007.

*United States*. — *U. S. v. Eagan*, 30 Fed. Rep. 608.

In *Maine* it was held that deficiencies could not be filled in the absence of a statute authorizing it. *State v. Symonds*, 36 Me. 128.

**The Court Cannot Name the Jurors** to be summoned. *Preuit v. State*, 5 Neb. 377. But in *Runnels v. State*, 28 Ark. 121, such a course was held to be merely an irregularity not invalidating the jury.

**Supplying from Petit Jurors.** — In *Burley v. State*, 1 Neb. 396, it was held error to transfer names from the petit jury list, even if the defendant is not injured thereby.

In *Kansas* such a course was held to be erroneous, but not subject to objection for the first time on appeal. *Montgomery v. State*, 3 Kan. 264.

In *Georgia*, however, it was held that the Constitution broke up all distinction between classes as eligible for service as grand jurors, that all jurors were drawn from the same box, and if any one could complain it should be the juryman himself, as he may prefer to serve as he was drawn to serve, and the objection was held to be untenable.

**Sufficiency of Order.** — The law requiring only citizens of the county to be summoned, the order need not in terms direct the summoning of such persons. *Stewart v. State*, 98 Ala. 70; *Yancy v. State*, 63 Ala. 142; *Welsh v. State*, 96 Ala. 92.

**Failure to Order Discharge.** — The court need not order the discharge of those not appearing. *Germolgez v. State*, 99 Ala. 216.

2. *Arkansas*. — *Dening v. State*, 22 Ark. 131.

*Indiana*. — *Burrell v. State*, 129 Ind. 290.

*Iowa*. — *State v. Garhart*, 35 Iowa 315; *State v. Gurlagh*, 76 Iowa 141; *State v. Silvers*, 82 Iowa 714; *State v.*

furnish a panel have not done so.<sup>1</sup>

**From Bystanders.** — Where there is merely a deficiency in the number appearing, the court may order the sheriff to supply them from the bystanders,<sup>2</sup> and where the sheriff summons from the bystanders, it does not matter that he selects one of the regular panel who had not been drawn.<sup>3</sup>

Mooney, 10 Iowa 506; *State v. Smith*, 88 Iowa 178.

*Louisiana.* — *State v. Reiz*, 48 La. Ann. 1446.

*Maryland.* — *Mills v. State*, 76 Md. 274.

*Massachusetts.* — *Crimm v. Com.*, 119 Mass. 326.

*Missouri.* — *State v. Wilson*, 85 Mo. 139.

*Tennessee.* — *Epperson v. State*, 5 Lea (Tenn.) 293; *Jetton v. State*, Meigs (Tenn.) 192.

*Texas.* — *State v. Jacobs*, 6 Tex. 99.

*Vermont.* — *State v. Ward*, 60 Vt. 142.

*United States.* — *U. S. v. Jones*, 69 Fed. Rep. 973.

**Power to Supply Implied from Power to Excuse.** — When the power is given to excuse, the power to fill the vacancy is implied. *Burrell v. State*, 129 Ind. 290. "The one right involves the other, unless otherwise provided for." *State v. Ward*, 60 Vt. 142.

**Order of Discharge.** — An order discharging jurors who are incapacitated by illness from serving must be entered before making substitution if it will otherwise appear that the jury will consist of more than the legal number, *Peters v. State*, 98 Ala. 38; though there is no such necessity where the jurors are discharged before the jury is impaneled. *Germolgez v. State*, 99 Ala. 216.

1. *Daughdrill v. State*, (Ala. 1897) 21 So. Rep. 378; *Hester v. State*, 103 Ala. 83; *Kemp v. State*, 89 Ala. 52; *Straughan v. State*, 16 Ark. 37; *People v. Kelly*, 46 Cal. 355; *Newton v. State*, 21 Fla. 53; *State v. Beste*, 91 Iowa 565; *State v. King*, 9 Mont. 445; *State v. McNamara*, 3 Nev. 73; *Cyphers v. People*, 31 N. Y. 373; *Lowrance v. State*, 4 Yerg. (Tenn.) 147; *State v. Krug*, 12 Wash. 288.

**Jury Ordered Not to Attend.** — In *State v. Bowman*, 73 Iowa 110, the court notified the jurors that they need not appear at the following term unless notified, and it was held that a jury could not be impaneled in the absence

of the regular panel, the court saying: "The law does not authorize the judge to control in this way the impaneling of the jury, and exclude persons therefrom chosen in the manner prescribed by law." *Contra*, *State v. King*, 9 Mont. 445.

2. *Nealon v. People*, 39 Ill. App. 481; *Dorman v. State*, 56 Ind. 454; *State v. Miller*, 53 Iowa 84, 154; *Dowling v. State*, 5 Smed. & M. (Miss.) 664; *Johnston v. State*, 7 Smed. & M. (Miss.) 62.

**Default of Sheriff.** — The failure of the sheriff to summon all of the grand jurors on the list made and furnished by the jury commissioners, whereby the court must order a bystander summoned to complete the jury, will not affect the validity of the panel. *State v. Swim*, 60 Ark. 587.

**Failure to Examine Talesman.** — Under a statute requiring that "before any talesman is accepted and sworn the court must inquire of him, under oath, as to his qualifications," it was held that the failure of the court to perform this duty did not prejudice the accused, and would not invalidate an indictment found by such grand juror. *Sage v. State*, 127 Ind. 17.

**Oral Order.** — No precept is necessary. *State v. Miller*, 53 Iowa 84, 154; *Nealon v. People*, 39 Ill. App. 481, and a statute requiring it was held to apply only when all the jurors fail to appear, and not when there is a mere deficiency. *State v. Pierce*, 8 Iowa 231.

**Bystanders or County at Large.** — It is sometimes expressly provided that the court shall cause a sufficient number to be returned from bystanders, or from the county or corporation at large, if a sufficient number of the jurors summoned to constitute the grand jury are not in attendance. *Richardson v. Com.*, 76 Va. 1007. See also, under similar statutes, *Jones v. State*, 18 Fla. 890; *Jenkins v. State*, 35 Fla. 737; *Dukes v. State*, 14 Fla. 515; *Newton v. State*, 21 Fla. 53.

3. *State v. Gurlagh*, 76 Iowa 141; *State v. Silvers*, 82 Iowa 714.

**Special Venire.** — On the other hand, it is sometimes the practice to issue a special venire, as in the case of an entire failure of the original panel.<sup>1</sup>

(2) *After Quashal of Venire or Discharge of Jury.* — Under statutes touching the organization of grand juries, where the whole venire is set aside or the whole jury discharged for illegality in its organization, the court may order a special venire.<sup>2</sup> So where the regular jury is discharged during the term after it has completed its business, and thereafter the presence and service of a grand jury are necessary, a special venire may issue,<sup>3</sup> or

1, *Levy v. Wilson*, 69 Cal. 111; *State v. McCarty*, 17 Minn. 76; *Julian v. State*, 46 Ohio St. 511; *Dukes v. State*, 14 Fla. 515; *Brannigan v. People*, 3 Utah 488. See further, *infra*, II. 3. h. (2) *After Quashal of Venire or Discharge of Jury.*

2, *Edmonds v. State*, 34 Ark. 720; *Meiers v. State*, 56 Ind. 341; *State v. Hart*, 67 Iowa 142; *State v. Bunker*, 14 La. Ann. 465; *State v. Grimes*, 50 Minn. 123; *Yelm Jim v. Territory*, 1 Wash. Ter. 63.

**Presumption of Good Cause.** — In the absence of any showing in the record as to the cause for setting aside a regular panel of grand jurors, it will be presumed that it was done for a good and sufficient cause. *Dixon v. State*, 29 Ark. 167; *State v. Hughes*, 58 Iowa 165.

**This Right to Set Aside a Panel is Sometimes Restricted** by statute, and in such a case the court cannot set aside the panel and issue a special venire except in those cases in which the statute authorizes it. *Baker v. State*, 23 Miss. 243.

In *Alabama* the court has no power to originate a grand jury unless the officers charged with the duty of selecting, drawing, and summoning have neglected to perform their duty and no grand jury is returned to serve at the term, or if, after the discharge of the grand jury during the session of the court, an offense has been committed, where in its discretion it may cause the summoning of a grand jury for such offense. *O'Byrnes v. State*, 51 Ala. 25.

**Discharge of Jury for Objection to One Juror.** — The court has no authority to discharge a whole jury for objections to one juror. *State v. Jacobs*, 6 Tex. 99. But see *People v. Manahan*, 32 Cal. 68, wherein it appears that under the practice then prevailing the court could summon a special grand jury to

investigate one case, pending the existence of the regular jury containing one member to whom a good cause of challenge existed in favor of a particular person accused.

**From Bystanders.** — In *Washington Territory* it was held that where the court is authorized to discharge the grand jury it may order the sheriff to summon qualified grand jurors from the bystanders. *Yelm Jim v. Territory*, 1 Wash. Ter. 63.

But it is said to be the proper practice, where there is no panel present, to issue a special venire. *Dowling v. State*, 5 Smed. & M. (Miss.) 683. See also *State v. Pierce*, 8 Iowa 231; sometimes provided by statute, *State v. Krug*, 12 Wash. 288; *State v. McNamara*, 3 Nev. 73; *State v. Beste*, 91 Iowa 565; *Newton v. State*, 21 Fla. 53; though it is not always necessary even in the case of a total deficiency. *Boyd v. State*, 6 Coldw. (Tenn.) 1. See also *Tervin v. State*, 37 Fla. 396.

**Venire Facias for Special Jury.** — The code being silent as to a venire facias, a special jury may be summoned without it. *Robinson v. Com.*, 88 Va. 900.

3, *Chartz v. Territory*, (Arizona 1893) 32 Pac. Rep. 166; *White v. People*, 81 Ill. 333; *State v. Myers*, 51 Ind. 145; *State v. Harris*, 73 Mo. 288; *State v. Connell*, 49 Mo. 286; *State v. Brown*, 64 Mo. 370.

**Presumption — Discharge of Regular Panel.** — Where an indictment is found by a special grand jury at an adjourned date, the discharge of the regular panel will be presumed. *State v. Dusenberry*, 112 Mo. 277; *State v. Overstreet*, 128 Mo. 470.

**Legality of Discharge.** — The presumption is that the jury was legally discharged. *White v. People*, 81 Ill. 333.

**Common Law — Not Abrogated by Statute.** — It is said that at common law

the regular grand jury may be resummoned.<sup>1</sup>

**4. Appointment of Foreman — In General.** — When the jury has been chosen, a foreman is appointed by the court,<sup>2</sup> or elected by the jurors themselves from their own number,<sup>3</sup> according to the practice or statute in each state.<sup>4</sup>

**Record of Appointment.** — It is often the practice to make such appointment a matter of record.<sup>5</sup> On the other hand, it has

the right to issue a special venire for a grand jury, after the discharge of the regular jury during the session, existed in certain cases, as where a fresh offense was committed, or to inquire into concealments of the regular jury, 2 Hale P. C. 156; and that state statutes prescribing the method of selecting, drawing, and summoning do not take away the common-law right of the court to issue a special venire during the term after the discharge of the regular jury. *Stone v. People*, 3 Ill. 331; *Mackey v. People*, 2 Colo. 13; *Chartz v. Territory*, (Arizona 1893) 32 Pac. Rep. 166.

**Jurisdiction of Special Grand Jury.** — A special grand jury will not be restricted in its jurisdiction to offenses committed since the discharge of the original jury. *State v. Overstreet*, 128 Mo. 470.

1. *Clem v. State*, 33 Ind. 418; *State v. Reid*, 20 Iowa 413; *Findley v. People*, 1 Mich. 234; *Trevinio v. State*, 27 Tex. App. 372; *Newman v. State*, 43 Tex. 528; *Wilson v. State*, 32 Tex. 112; *Watts v. Territory*, 1 Wash. Ter. 409.

**A Talesman Who Served on the First Jury** should be resummoned with the others. *State v. Reid*, 20 Iowa 413.

**Deficiency on Resummoning.** — Where there is a deficiency by reason of the failure of one or more of the number to reassemble the court may complete the panel from bystanders, *Watts v. Territory*, 1 Wash. Ter. 409; or if any one of the panel is excused another of the panel who did not serve may be substituted. *Trevinio v. State*, 27 Tex. App. 372.

2. *State v. Brown*, 31 Vt. 603; *Com. v. Pullen*, 3 Bush (Ky.) 47; *People v. Rose*, 52 Hun (N. Y.) 33; *State v. Collins*, 6 Baxt. (Tenn.) 153.

**Ratification by Court of Jury's Selection.** — When it appears that the court permitted the grand jury to retire and select its foreman and report its action to the court, and the court directed the member selected to be sworn as foreman, and then swore the remainder of

the jury, and thereupon instructed the jury as to its duties, the court in effect did its duty under the requirement that the foreman be appointed by the court. *Blackmore v. State*, (Ark. 1888) 8 S. W. Rep. 940.

**In Mississippi** the administration of the oath required by the statute to be taken by the foreman of the grand jury is in effect the appointment, and in fact the only appointment ever made by a court of the foreman of a grand jury, assuming the necessity of any appointment. *Woodside v. State*, 2 How. (Miss.) 657; *Byrd v. State*, 1 How. (Miss.) 254.

**The Court May Appoint a Talesman** properly selected from the bystanders for the foreman of the grand jury. *State v. Brandt*, 41 Iowa 593.

**Supplying Place of Excused Foreman.** — After the impaneling of a grand jury and the appointment of a foreman, the excusing of the foreman from the jury and the appointment of another of the jury as foreman will not affect the validity of indictments returned by such jury. *U. S. v. Belvin*, 46 Fed. Rep. 383.

3. *Lung's Case*, 1 Conn. 428; *Woodward v. State*, 33 Fla. 520; *Bird v. State*, 53 Ga. 602.

4. **The Court May Appoint a Foreman Pro Hac Vice** if the regular foreman should decline to act or should be absent at the time, upon the principle that the machinery of public justice during the term is under the control of the court. *State v. Collins*, 6 Baxt. (Tenn.) 152.

**An Objection First Raised on Appeal** that one who signed the finding on a bill as foreman was not selected and sworn as such foreman as required by law is not tenable. Such an objection must be taken advantage of by plea in abatement. *Taylor v. Com.*, 90 Va. 109.

5. **Signature without Official Character.** — Thus when an indictment is signed by one of the grand jurors without adding his official capacity of "foreman,"

been held that there need be no appointment of a foreman, it being sufficient if the indictment is found and returned by the whole grand jury.<sup>1</sup> The record of the appointment of a foreman is sufficient which shows the return of the indictment into court indorsed "a true bill" and signed by one of the panel as foreman,<sup>2</sup> and the appointment of the person signing the indictment as such will be presumed.<sup>3</sup>

**5. The Oath—Necessity of Oath.**—It is necessary to the valid constitution of a grand jury that the whole body should be sworn.<sup>4</sup>

it has been held immaterial, because the court can know from the record who is foreman, though it does not appear that the omission of the record to show the fact would be fatal. *Whiting v. State*, 48 Ohio St. 220; *Com. v. Read*, Thach. Cr. Cas. (Mass.) 180; *State v. Brown*, 31 Vt. 603, cited upon the same point in *State v. Sopher*, 35 La. Ann. 976.

**Issue Determined by Record.**—The issue presented by a plea in abatement setting up the nonappointment of a foreman is to be determined by the court from the record. *Woodward v. State*, 33 Fla. 508; *Chase v. State*, 46 Miss. 683.

1. *Peter v. State*, 3 How. (Miss.) 433; *Friar v. State*, 3 How. (Miss.) 422. This proposition may be considered in connection with the doctrine as to the necessity of the indorsement of the finding of the grand jury. See *infra*, V. 3. *c. Indorsement of Finding and Signature of Foreman.*

2. *People v. Roberts*, 6 Cal. 214; *Yates v. People*, 38 Ill. 527; *Com. v. Pullan*, 3 Bush (Ky.) 47; *Easterling v. State*, 35 Miss. 212; *State v. Gouge*, 12 Lea (Tenn.) 132. See, also, *supra*, II. 3. *c. Presumption or Record Evidence of Legal Organization*; and *infra*, V. 3. *c. Indorsement of Finding and Signature of Foreman.*

3. *Com. v. Pullan*, 3 Bush (Ky.) 47; *Easterling v. State*, 35 Miss. 212; *Grinad v. State*, 34 Ga. 270; *White v. State*, 93 Ga. 47.

**Variance in Record and Indictment.**—So, without considering the necessity of a record of appointment, a variance between the name on the indictment and that in the record has not been regarded as material, but the presumption is that the persons are the same, *State v. Orrick*, 106 Mo. 111; *Deitz v. State*, 123 Ind. 86; *State v. Stedman*, 7 Port. (Ala.) 496; *State v. Calhoon*, 1 Dev. & B. L. (N. Car.) 374; *State v. Granville*, 34 La. Ann. 1088; or that the

one had been discharged and the other appointed. *Mohler v. People*, 24 Ill. 26.

**Foreman Pro Tem.**—If it appears on the face of an indictment that one of the panel of grand jurors served as "foreman *pro tem.*," and the finding of "true bill" was signed by him as such, the presumption is that the juror was properly serving as foreman in that case. *White v. State*, 93 Ga. 47.

**Necessity of Appointment.**—While proper and regular, it is not necessary that the record should show the necessity of a foreman *pro hac vice*. *State v. Collins*, 6 Baxt. (Tenn.) 152.

4. *State v. Baker*, 4 Humph. (Tenn.) 12; *Roe v. State*, (Ala. 1887) 2 So. Rep. 459; *Ridling v. State*, 56 Ga. 601; *People v. Rose*, 52 Hun (N. Y.) 33.

**Under a General Statute Permitting an Affirmation** instead of an oath prescribed to be taken before entering on the discharge of any office, place, or business, Quakers conscientiously scrupulous of taking an oath (but only such) may affirm in the words of the oath at large. *Com. v. Smith*, 9 Mass. 111; *State v. Adams*, 78 Me. 486; *Anonymous*, 9 C. & P. 78, 38 E. C. L. 42. See also *infra*, V. 2. a. (2) *The Commencement*; and article AFFIRMATION, vol. I, p. 377.

**By Whom Sworn.**—Any officer who by law is competent to administer an oath may, under the court's direction, swear the grand jury, where no particular officer is designated by statute for that purpose. *Allen v. People*, 77 Ill. 484.

**De Facto Clerk.**—It is sufficient if the oath is administered by a person who is the clerk *de facto* of the court. *Hord v. Com.*, 4 Leigh (Va.) 674.

**Discretion in Swearing Tardy Juror.**—If a juror comes into court after the jury has been sworn, the court may or may not, in its discretion, swear him, where there is a sufficient number of jurors present without him. *Findley v. People*, 1 Mich. 234.

The Form of the Oath is of ancient origin, and, it has been said, should be observed at least in substance,<sup>1</sup> but it is now more accurate to say that regard should be had to the statutes of each state, as the matter is very generally so regulated.

The Mode or Order of Administering the Oath is a matter of practice.<sup>2</sup>

The Record Sufficiently Shows full compliance with the law when it substantially appears that the jury was sworn, without detailing the oath or the manner of administering it.<sup>3</sup>

6. The Charge. — It is the general duty of the court to instruct the grand jury as to its powers and duties,<sup>4</sup> the matters to be given in charge being generally designated by statute. But the court has a wide discretion in directing attention to particular matters of inquiry,<sup>5</sup> and may recharge the jury, when the necessity arises, as to matters overlooked or occurring after the first charge was given.<sup>6</sup> Mistakes in a charge will not affect an indict-

1. *Brown v. State*, 10 Ark. 613.

2. Formerly the foreman was sworn first, and then the rest three at a time. 1 Chitt. Crim. Law 312; *Brown v. State*, 10 Ark. 613. But it is certainly a matter of practice as to how many shall be sworn at a time, *Brown v. State*, 10 Ark. 613; *People v. Rose*, 52 Hun (N. Y.) 33; and this is sometimes fixed by statute.

Presumption. — The court will presume that the foreman was first sworn, where it is the duty of the court so to administer the oath. *State v. Weaver*, 104 N. Car. 762.

3. *State v. Lassley*, 7 Port. (Ala.) 528; *Potsdamer v. State*, 17 Fla. 895; *Chase v. State*, 46 Miss. 697 [citing *Dyson v. State*, 26 Miss. 362]; *People v. Rose*, 52 Hun (N. Y.) 33; *State v. Loving*, 16 Tex. 558; *Pierce v. State*, 12 Tex. 217; *West v. State*, 6 Tex. App. 493.

But it has been held that whether the proper oath was in fact administered or not, or administered in the proper manner, can never be made the subject of a plea in abatement, but the fact must be ascertained by an inspection of the record. *Smith v. State*, 28 Miss. 729.

Record Showing Improper Oath. — In *Territory v. Woolsey*, 3 Utah 470, an indictment purporting to state the extent of the oath administered, which was not the oath prescribed by statute, was held bad.

Offenses Committed in Unorganized County. — Where one county is attached to another for judicial purposes, the jury need not be specially sworn to inquire of offenses committed in the former, to give it jurisdiction therein,

any more than it need be so specially sworn for the separate townships or districts of the principal county. *Waukon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332.

4. *McQuillen v. State*, 8 Smed. & M. (Miss.) 594; *Stewart v. State*, 24 Ind. 145, where the court said: "It was the duty of the court below to instruct them; but the omission to do so does not affect the validity of their presentments or indictments." See also *Com. v. Sanborn*, 116 Mass. 63.

Charge on Particular Case of Accused. — The court will not, at the instance of the accused, instruct the grand jury as to the propriety of its receiving evidence in certain cases, having reference to the case against the accused. If anything improper shall be given in evidence before the grand jury the error may be corrected subsequently upon the trial before the petit jury. *Com. v. Knapp*, 9 Pick. (Mass.) 496.

5. *Clair v. State*, 40 Neb. 534; *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313; *Com. v. Sanborn*, 116 Mass. 63, holding further that the jury is not limited to the subjects of inquiry to which its attention has been directed.

6. *Clair v. State*, 40 Neb. 534; *Cherry v. State*, 6 Fla. 685, holding that the grand jury has at all times free access to the presiding judges for the solution of all legal questions.

In *U. S. v. Burr*, 25 Fed. Cas. No. 14,693, 1 Burr's Trial 172, Marshall, C. J., prepared a supplemental charge touching particular matters in connection with the consideration by the grand jury of the specific accusation against Aaron Burr, but this charge



ment which the jury is authorized to find,<sup>1</sup> and, indeed, courts seem to favor the opinion that the jury is legally charged with the performance of its duty as soon as it is sworn,<sup>2</sup> and that the validity of its presentments or indictments is not affected by the failure of the court to charge as provided by statute.<sup>3</sup>

**7. Officer in Attendance.** — It is not necessary to the legal constitution of the grand jury that any officer should be appointed to wait upon it.<sup>4</sup>

was held in abeyance pending objections, and it does not appear ever to have been given.

1. *State v. White*, 37 La. Ann. 172; *State v. Turlington*, 102 Mo. 645; *Com. v. Sanborn*, 116 Mass. 63.

**Province of Court.** — But the court must not by its charge go beyond its province so as to demand the finding of bills by the grand jury in any particular case or cases, and such conduct has been held error. *State v. Will*, (Iowa 1896) 65 N. W. Rep. 1010; *Clair v. State*, 40 Neb. 534.

2. *Com. v. Sanborn*, 116 Mass. 63.

3. *Stewart v. State*, 24, Ind. 142; *Porterfield v. Com.*, 91 Va. 801.

**Juror Sworn After Charge.** — Under a statute providing that "the grand jury shall then be sworn according to law, and if afterwards any grand juror appears, and is admitted as such, the same oath shall be administered to him," and that "the grand jury, being impaneled and sworn, shall be charged by the court," defining the character of the charge, it was held that under the latter section it appeared that the court might admit an additional juror after a sufficient number of the panel had been sworn and before the charge was given, and further that said section did not limit the court in admitting an additional juror to a time after the swearing of the grand jury and before the charge, but embraced the entire period of its session as a grand jury; that there was no limitation as to the time, and that a grand juror might be admitted after the grand jury had been charged and without repeating the charge. This conclusion was further based upon the holding that the statute did not require the charge to be given to the grand jury, and the obligation of the oath of the grand jury was not impaired by the court's omission to give the charge. *State v. Froiseth*, 16 Minn. 313. To the same effect, see *Wadlin's Case*, 11 Mass. 142; *Com. v.*

*Sanborn*, 116 Mass. 63; *People v. Launder*, 82 Mich. 109.

**Presumption of Charge.** — The charge given by the court is not placed on record, and it need not appear by the record to have been given, as the matter does not constitute a ground of error. But as it is a part of the duty of the court to give such charge, the presumption is that it was given unless it affirmatively appears to the contrary. It seems, however, that if the record should affirmatively show that the charge was not given, it would be an error, available by bill of exception. *McQuillen v. State*, 8 Smed. & M. (Miss.) 594.

When the entry on the records of the court recites, "The grand jury, elected, impaneled, sworn, and charged to inquire for the body of Cherokee county, returned into open court the following bills of indictment," etc., it sufficiently appears that the jury was sworn and charged, and it will be intended to have been done as the law requires, the reverse not being shown by plea, although the preliminary entry which recites the *venire facias* does not show that the jury was sworn and charged, the foregoing entry appearing immediately thereunder. *State v. Lassley*, 7 Port. (Ala.) 526.

**Special Instructions to Part of Jury.** — A grand jury was called to consider a particular case. Several of them went before the judge and received advice regarding the law of the case, and it was held that there was no error in the court thus advising a part of the jury in the absence of the others; though it was said to be irregular, since the statute providing that "the grand jury may at all reasonable times ask the advice of the \* \* \* court," did not contemplate that the advice should be given as in this case. *State v. Edger-ton*, (Iowa 1896) 69 N. W. Rep. 282.

4. *State v. Perry*, Busb. L. (N. Car.) 334, holding further that it is proper

**8. Powers and Duties of Grand Jury — a. IN GENERAL.** — The grand jury is impaneled to inquire into offenses committed in the county in which it is organized.<sup>1</sup> Its power is co-extensive with and is limited by the jurisdiction of the court of which it is an appendage,<sup>2</sup> and it must derive its power from and exercise its functions under the authority of a legally constituted court.<sup>3</sup>

and convenient that the grand jury should have such an officer, but that the sheriff, being the sworn officer of the court, is the proper officer to attend the grand jury, and no special oath need be administered to him; and that an act prescribing an oath to be administered to a constable when detailed to wait upon a grand jury does not apply to the sheriff.

**1. Unorganized Counties.** — Sometimes unorganized counties are attached to organized counties for judicial purposes, which case is a statutory exception to the general rule. *State v. Stokely*, 16 Minn. 282; *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332; *Dodge v. People*, 4 Neb. 225.

**Prior Unlawful Arrest.** — The validity of an indictment is to be tested by proceedings immediately connected therewith, and the wrongfulness of arrest before indictment found will not affect the validity of the indictment. *State v. Chyo Goom*, 92 Mo. 418; *State v. Brooks*, 92 Mo. 542. For necessity of preliminary hearing, see article PRELIMINARY HEARING.

**Duty to Report.** — The grand jury should report to the court its action on all cases submitted to it. *Rion v. Com.*, 1 Duv. (Ky.) 236.

**2.** *People v. Northey*, 77 Cal. 618; *Cook v. State*, 7 Blackf. (Ind.) 165; *State v. Henning*, 33 Ind. 189; *Com. v. Bannon*, 97 Mass. 214; *Heard v. Pierce*, 8 Cush. (Mass.) 345; *Territory v. Corbett*, 3 Mont. 50.

"Grand juries are accessaries to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction. Thus far the power is implied, and is as legitimate as if expressly given. To suppose the powers of a grand jury, created not by express statute, but by the necessity of their aiding the jurisdiction of a court, to transcend that jurisdiction, would be to consider grand juries, once convened, to be clothed with powers not conferred by law but originating with themselves. This has never been imagined." *Per Marshall, C. J.*, in *U. S. v. Hill*, 1

*Brock*. (U. S.) 156. See also *Com. v. Bannon*, 97 Mass. 214.

**Transfer of Jurisdiction.** — Under *Massachusetts Rev. Stat.*, c. 136, § 1, a grand jury summoned to attend at any term of the Court of Common Pleas was "held to serve at such term throughout year and until another grand jury be impaneled in their stead," and a statute of 1859, c. 196, having substituted a Superior Court for the Court of Common Pleas, and having transferred all the jurisdiction of the latter to the former, all incidents of such jurisdiction were transferred, and it became the duty of the existing grand jury, during the residue of the term for which it was originally summoned, to attend the only court which had jurisdiction over offenses of which it had been charged to inquire, that is, the Superior Court as indicated above. *Com. v. Rich*, 14 Gray (Mass.) 336.

**A Special Grand Jury** may inquire into offenses committed within the jurisdiction of the court not barred by limitations, notwithstanding they were committed before the regular jury was discharged. *State v. Overstreet*, 128 Mo. 470.

**Jury of Limited Jurisdiction.** — If a grand jury has jurisdiction to inquire only of crimes committed wholly in a certain city, conceding that its jurisdiction is not enlarged by a statute providing that if an offense is committed partly in one county and partly in another either has jurisdiction, yet the grand jury being clothed with power to determine both the law and the facts, if it does inquire into an offense, and finds that it was committed, and does find an indictment, there is no way to review its determination unless it be by motion to quash or in arrest of judgment, and such matters cannot be questioned on a plea of not guilty. *People v. Dimick*, 107 N. Y. 33.

**Pendency of Habeas Corpus Proceedings** will not affect the power of the grand jury to find an indictment. *Clark v. Com.*, 123 Pa. St. 555.

**3.** *Cook v. State*, 7 Blackf. (Ind.) 165; *Jackson v. Com.*, 13 Gratt. (Va.) 795.

It is its duty, often indicated in express terms by the oath administered, diligently to inquire into all offenses against the law in the county subject to its jurisdiction.<sup>1</sup>

*b. TERM OF COURT*—(1) *In General*.—The grand jury is impaneled for a certain term of court to which it is returned,<sup>2</sup> but the statutes frequently regulate the matter and furnish the rule as to the duration of the jury.<sup>3</sup>

(2) *Adjournments—Order of Postponement*.—The court has a right to make an order on the first day of the term detaining the grand jury for service at a later day of the term, and the grand jury convening at such postponed time may find a valid indictment.<sup>4</sup>

*Adjournment of Term*.—It is said that while the court may discharge the jury, it does not do so by simply adjourning the regular term,<sup>5</sup> but the jury continues in power to the adjourned term.

*Jury under Control of Court*.—Gwynn v. State, 64 Miss. 328; State v. Cowan, 1 Head (Tenn.) 280.

*Misconduct of Grand Jurors*.—It is said that the court has the power in its discretion to quash an indictment for misconduct of grand jurors when such a course is essential to the purity of the administration of the law. State v. Dayton, 23 N. J. L. 58.

*Intoxication*.—But in Allen v. State, 61 Miss. 629, it was held that the grand jury is not under the guidance and control of the court like a petit jury, and that it has never been held that an indictment could be abated or quashed because one or more of the grand jury were intoxicated while it was under the consideration of that body. Such conduct, however, will justify punishment and discharge of the juror. Matter of Ellis, Hempst. (U. S.) 10. In Pennsylvania one grand juror was indicted by his fellows for such misconduct. State v. Keffer, Add. (Pa.) 290.

1. See *infra*, II. 9. *b. Scope of Inquiry—Inquisitorial Powers*.

2. Com. v. Bannon, 97 Mass. 214.

*Existence Coextensive with Term*.—The existence of the jury does not cease before the termination of the term unless a statute in terms so declares. State v. Winebrenner, 67 Iowa 231.

3. Thus, under a statute in California, a grand jury was impaneled to serve for one year and until another jury should be chosen as its successor. See People v. Leonard, 106 Cal. 302; In re Gannon, 69 Cal. 541.

4. Traviss v. Com., 106 Pa. St. 597.

*Adjournment by Grand Jury*.—The grand jury, when properly organized,

meets and adjourns upon its own motion without reference to the temporary adjournment of the court, and it may lawfully proceed in the performance of its duties, whether the court is in session or not. Nealon v. People, 39 Ill. App. 481; People v. Chautauqua County, 11 Civ. Pro. Rep. (Chautauqua County Ct.) 172.

In Com. v. Bannon, 97 Mass. 214, it was held that a term of court is not discontinued because the judge leaves the court without adjournment from day to day for several days, during which time he holds a term of court in another county, and that an indictment presented after the return of the judge is not invalid because witnesses were heard during the absence of the judge. Although the grand jury is a constituent part or branch of the court, and can be organized and empowered to discharge the legal functions imposed on it only by virtue of the authority which it derives as a body of men sworn and impaneled as prescribed by law, and the exercise of its functions is limited to the time during which the term of the court continues, yet, after it is organized, the larger part of its legitimate functions are to be performed as a separate and independent body, acting apart from the court, and its deliberations are subject to no control or direction other than that which it may receive in the charge of the court before it enters on its duties, or by instructions subsequently given in open court.

5. State v. Davis, 22 Minn. 425; State v. Pate, 67 Mo. 489.

*The Grand Jury Cannot Dissolve Itself*.—In re Gannon, 69 Cal. 541; Clem v.

On the other hand, the court may impanel a jury at such adjourned term, and indictments may be found by that jury.<sup>1</sup>

(3) *Special Term.* — Indictments may be found at a special term.<sup>2</sup> The jurisdiction of courts of criminal jurisdiction being fixed by statute or constitution, whenever such court can be legally held it must be possessed of all its jurisdiction.<sup>3</sup>

(4) *Term to Which Defendant Is Held.* — When a party is held to answer at a particular term, and no indictment is found, he should be discharged,<sup>4</sup> and statutes sometimes fix the time within which an indictment shall be found or the defendant discharged.<sup>5</sup> But the failure to indict within the time prescribed

State, 33 Ind. 418; State v. Will, (Iowa 1896) 65 N. W. Rep. 1011.

1. Sims v. State, 51 Ga. 497; Holman v. State, 79 Ga. 155; Ulmer v. State, 14 Ind. 52; State v. Peterson, 61 Minn. 73; State v. Sweeney, 68 Mo. 97; State v. Barnes, 20 Mo. 413.

**Reasons for Adjournment.** — In Smith v. State, 4 Neb. 283, the indictment was found at the adjourned term. The order directing the term to be adjourned, being made in vacation, did not recite the reasons permitting such an order, and it was held that the reasons which operated upon the mind of the judge to order the adjournment could not be questioned.

2. Aaron v. State, 39 Ala. 689; People v. Carabin, 14 Cal. 438; Gardner v. People, 4 Ill. 83; People v. McKane, 80 Hun (N. Y.) 322; Oshoga v. State, 3 Pin. (Wis.) 56.

3. Young v. State, 2 How. (Miss.) 865.

**Court Specially Convened.** — Under a statute authorizing special sessions of the Circuit Court, a grand jury is not warranted in finding an indictment at such term against any person other than the one for whose trial the court was convened. Wilson v. State, 1 Blackf. (Ind.) 428.

But in Harrington v. State, 36 Ala. 241, referring to the practice in England, where, under the authority clothed in the judges by virtue of the commission of general jail delivery, the justice to whom it was directed had the power to originate business as well as to try those cases originated by other judges, and accordingly the right to take indictments against all persons in actual or constructive custody, citing 2 Hale's P. C. 345; 2 Hawks Ch., 6, § 2; 1 Chitty's Crim. Law. 145, 146, the court held that the Alabama statute providing that "special terms of the city court may be held by order of the judge

whenever it may be necessary for the trial of criminal causes, and to deliver the jail of all persons charged with crimes and offenses," conferred authority as extensive as that which was conferred upon the English judges by the commission of jail delivery, and that if it be conceded that an indictment cannot be found at a special term unless the defendant is in official or constructive custody, if the court in which the indictment is found is a court of general jurisdiction, and if an indictment found at a special term thereof would be invalid, the record would have to show that the indictment was found at a special term, and that the defendant was not in custody, or the Supreme Court would presume to the contrary.

4. *Ex p.* Two Calf, 11 Neb. 221.

**No Evidence Heard.** — In Illinois it was held that the fact that the term at which the accused was held went by without indictment found did not entitle him to a discharge, the record failing to show that any evidence was heard by the grand jury. People v. Hessing, 28 Ill. 410.

5. State v. Lambert, 9 Nev. 323; Jones v. Com., 19 Gratt. (Va.) 481; Glover v. Com., 86 Va. 382; Waller v. Com., 84 Va. 492.

**Character of Term.** — But under a provision that if a person remains in custody without presentment, indictment, or information found or filed against him before the end of the second term of the court in which he is held to answer, he shall be entitled to discharge, if the offense is one for which he can only be tried on indictment two terms must pass at which indictments can be found, and it is not sufficient to warrant a discharge, no matter how many terms may pass at which informations may be found. Jones v. Com., 19 Gratt. (Va.) 481.

may be waived if the defect is not brought to the attention of the court in proper order.<sup>1</sup>

*c. SECOND OR NEW INDICTMENT* — (1) *After Bill Ignored.* — The return of a bill *ignoramus* or a failure to indict does not operate as a bar to the prosecution,<sup>2</sup> and the grand jury may reconsider the same charge during the same session, notwithstanding they may have voted against the finding of a true bill at an earlier period thereof.<sup>3</sup>

(2) *Pending Another Indictment.* — The pendency of one indictment is no good plea in abatement to another indictment for the same cause, because whenever either of the indictments is tried a judgment thereon will afford a good plea in bar to the other.<sup>4</sup> But it is sometimes provided that the finding of the

**Indictment for Different Offense.** —

Where the indictment must be found before the expiration of two terms at which an indictment might be found or the prisoner will be discharged, the statute does not contemplate that if an indictment is found within two terms the defendant cannot be tried upon another found thereafter, but only contemplates that he shall not be held longer than two terms before finding an indictment against him. *Waller v. Com.*, 84 Va. 492.

**Dismissal Not Intended as Bar.** — The object of a statute providing that if a person is held to answer for a public offense, and is not indicted at the next term at which he is held to answer, the court shall order the prosecution to be dismissed unless good cause to the contrary is shown, is to protect the citizen from imprisonment upon insufficient cause. A dismissal of an indictment would not, under the statute, bar another prosecution for the same offense. *State v. Lambert*, 9 Nev. 323.

**Terms, How Calculated.** — The term at which a defendant is held to answer is not to be counted as one of the terms at which he must be indicted under the statute. *Glover v. Com.*, 86 Va. 382, *overruling Hall v. Com.*, 78 Va. 678.

1. *Sutton v. Com.*, 97 Ky. 308, wherein the defendant pleaded instead of moving to set aside, the latter being the proper remedy under the statute in *Kentucky*, and it was held that he could not thereafter object.

2. *Com. v. Miller*, 2 Ashm. (Pa.) 61; *U. S. v. Martin*, 50 Fed. Rep. 918; *State v. Boswell*, 104 Ind. 541; *State v. Collis*, 73 Iowa 542; *State v. Lambert*, 9 Nev. 323.

**After Discharge.** — In *Pennsylvania* it

was held that where a defendant has once been discharged on a return of *ignoramus*, a new bill sent up without a further hearing, and without leave of court, should be formally quashed, in the absence of proof that such a course was required to meet some grave emergency. *Rowand v. Com.*, 82 Pa. St. 409.

3. *People v. Chautauque County*, 11 Civ. Pro. Rep. (Chautauque County Ct.) 172; *State v. Branch*, 68 N. Car. 186; *State v. Harris*, 91 N. Car. 656, holding that a new bill might be submitted to the same jury, but that such submission was necessary and without it the jury could not reconsider its own action; *State v. Brown*, 81 N. Car. 568; *U. S. v. Simmons*, 46 Fed. Rep. 65, wherein the court recognized the right of the jury to reconsider its own action before any report of its first action was made. *Contra* in English practice: *Reg. v. Humphreys*, C. & M. 601, 41 E. C. L. 327; *Reg. v. Austin*, 4 Cox C. C. 385.

4. *Florida.* — *Eldridge v. State*, 27 Fla. 162.

*Illinois.* — *Gannon v. People*, 127 Ill. 507.

*Indiana.* — *Hardin v. State*, 22 Ind. 347; *Dutton v. State*, 5 Ind. 533.

*Iowa.* — *Reddan v. State*, 4 Greene (Iowa) 137.

*Kentucky.* — *Blyew v. Com.*, 91 Ky. 200.

*Massachusetts.* — *Com. v. Drew*, 3 Cush. (Mass.) 279; *Com. v. Murphy*, 11 Cush. (Mass.) 472; *Com. v. Many*, 14 Gray (Mass.) 82; *Com. v. Woods*, 10 Gray (Mass.) 482; *Com. v. Berry*, 5 Gray (Mass.) 93.

*Nevada.* — *State v. Lambert*, 9 Nev. 323.

second indictment operates to suspend the first, and that the latter shall be quashed.<sup>1</sup>

*New York.* — *People v. Monroe Oyer & T. Ct.*, 20 Wend. (N. Y.) 108.

*North Carolina.* — *State v. Lee*, 114 N. Car. 844.

*Ohio.* — *O'Meara v. State*, 17 Ohio St. 518; *Whiting v. State*, 48 Ohio St. 220.

*Pennsylvania.* — *Rosenberger v. Com.* 118 Pa. St. 77.

*Texas.* — *Bonner v. State*, 29 Tex. App. 223.

**Consolidation of Indictments.** — See *infra*, XVIII. 9. *Separate Indictments as Counts of One* — *Consolidation*.

**Election.** — The state can proceed only upon one of them, but may elect upon which it will proceed. *O'Meara v. State*, 17 Ohio St. 518.

**Lost Indictment Found after Return of New.** — Trial may be had on a first indictment which had been lost but recovered after the finding of the new indictment. *Reddan v. State*, 4 Greene (Iowa) 137.

**Necessity of Disposition of First Indictment.** — But it is also held that when for any cause a second indictment is sent against the same party for the same offense, the record should show that some disposition has been made of the first indictment by *nol. pros.*, or otherwise, and it should clearly appear upon which indictment the conviction was had. If the indictment is defective, it might be quashed on the application of the prosecutor, and a new one executed. *Anderson v. State*, 3 Heisk. (Tenn.) 86; *Clinton v. State*, 6 Baxt. (Tenn.) 507, *explaining and reconciling Vincent v. State*, 3 Heisk. (Tenn.) 120, in that, in the latter case, it sufficiently appeared to the court that the defendant relied upon the good indictment which appeared in the record.

But when a person has pleaded to an indictment invalid by reason of its having been found upon the testimony of unsworn witnesses, it was held that he may be required to plead to another indictment for the offense, though the first indictment has not been quashed. *Rex v. Chamberlain*, 6 C. & P. 93, 25 E. C. L. 299.

**Failure to Enter Formal Nol. Pros.** — A plea that the defendant was held under a former indictment for the same offense at the time of the finding of indictment on which the trial was proceeding was held bad where the fact was that the judge granted an order to

*nol. pros.* the first bill before the second was found, but the order was not drawn and formally entered of record on the minutes until afterwards. *Williams v. State*, 57 Ga. 478.

**Successive Indictments for Different Degrees.** — In *People v. Van Horne*, 8 Barb. (N. Y.) 159, the court said: "In passing we cannot forbear the remark that the practice of renewing a complaint before a subsequent grand jury, after a previous grand jury have fully examined into the facts of the case, and have presented an indictment founded thereon, is not to be commended. The accuser and accused ought, as a general rule, to abide by the decision of the first grand jury, who act upon the complaint and find a bill against the accused. To countenance these successive complaints founded on the same charge, where the accuser, or the friends of the accused, believe that the first grand jury have mistaken the degree of the offense of which the accused is guilty, would lead to a disgraceful scramble between the enemies and friends of the accused, the former struggling to procure an indictment for the highest and the latter for the lowest degree of the offense charged, which would be fatal to a firm, steady, and impartial administration of criminal justice."

**Indictment Pending Appeal from Magistrate.** — Where a defendant is charged in a warrant on appeal from a justice's court and in a bill of indictment for the same offense, the solicitor may elect to proceed upon either, and if he proceeds upon the indictment it has the effect of a *nolle prosequi* as to the warrant. *State v. Respass*, 85 N. Car. 534.

1. *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 3; *Hudspeth v. State*, 50 Ark. 534; *State v. Cheek*, 63 Mo. 366; *State v. Daugherty*, 106 Mo. 182; *State v. Vincent*, 91 Mo. 662.

Such a statute was construed as not operating to render the indictment first found absolutely nugatory without some action of the court, and where a second indictment was found pending the trial on the first, it was held that after verdict thereon the first indictment would not be quashed. *People v. Monroe Oyer & T. Ct.*, 20 Wend. (N. Y.) 108.

**The Plea Must Show that the indict-**

*d. SECRECY.* — Sometimes by statute, and more often by the terms of the oath administered to grand jurors, their deliberations are required to be secret, and the proceedings of the grand jury are, on grounds of public policy, protected from disclosure and publicity.<sup>1</sup> Grand jurors cannot be examined to impeach their own finding.<sup>2</sup> But while the courts seem to be agreed

ment pleaded to was the first indictment found, and that the offense charged in each indictment is the same. *Austin v. State*, 12 Mo. 393.

**Different Offenses on Face of Indictment.**

— In *State v. Whitmore*, 5 Ark. 247, the same defendant was charged with a similar offense in three separate indictments, but from all that appeared on any of the indictments the offenses were separate and distinct. Upon motion to quash these indictments it was held that the indictments, on their face, charged separate and distinct offenses, and while they might have been one and the same offense, the defendant could not raise the question by a motion to quash, but might plead the matter in bar, and if the plea were supported by proof all the indictments except one might be quashed. See further, *State v. Barkman*, 7 Ark. 387; *Ball v. State*, 48 Ark. 94; *State v. Hall*, 50 Ark. 28.

1. *Alabama.* — *White v. State*, 44 Ala. 412.

*California.* — *People v. Tinder*, 19 Cal. 539.

*Connecticut.* — *State v. Hamlin*, 47 Conn. 114.

*Georgia.* — *Simms v. State*, 60 Ga. 145.

*Illinois.* — *Gitchell v. People*, 146 Ill. 175.

*Indiana.* — *Creek v. State*, 24 Ind. 151.

*Iowa.* — *State v. Gibbs*, 39 Iowa 318; *State v. Mewherter*, 46 Iowa 88; *State v. Davis*, 41 Iowa 311.

*Kentucky.* — *Com. v. Skeggs*, 3 Bush (Ky.) 19.

*Minnesota.* — *State v. Beebe*, 17 Minn. 241; *Loveland v. Cooley*, 59 Minn. 259.

*Missouri.* — *State v. Grady*, 84 Mo. 222; *State v. Wammack*, 70 Mo. 410; *State v. Baker*, 20 Mo. 339; *Beam v. Link*, 27 Mo. 262; *Kennedy v. Holladay*, 105 Mo. 24.

*Nevada.* — *State v. Logan*, 1 Nev. 515.

*New York.* — *People v. Hulbut*, 4 Den. (N. Y.) 133.

*Pennsylvania.* — *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

*South Carolina.* — *State v. Boyd*, 2 Hill L. (S. Car.) 289.

*Tennessee.* — *State v. Darnal*, 1 Humph. (Tenn.) 292; *Crocker v. State*, Meigs (Tenn.) 127.

*Texas.* — *State v. Oxford*, 30 Tex. 428; *Jacobs v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 110.

*Virginia.* — *Richardson v. Com.*, 76 Va. 1007.

*Washington.* — *Watts v. Territory*, 1 Wash. Ter. 409.

*West Virginia.* — *State v. Baltimore*, etc., R. Co., 15 W. Va. 362.

*England.* — *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66.

**Absence of Provision in Oath.** — Secrecy is also required, in the absence of such a provision in the oath, on the ground of public policy. *Little v. Com.*, 25 Gratt. (Va.) 921; *Sands v. Robison*, 12 Smed. & M. (Miss.) 710.

**Punishment for Divulging Proceedings.**

— It is sometimes provided by statute that the disclosing of the fact of the finding of an indictment before the arrest of the accused, by a grand juror or any officer of the court, shall be subject to punishment. See *White v. State*, 44 Ala. 412; *Hines v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 935. And in the absence of statute, a grand juror may in certain cases render himself liable to punishment as an accessory after the fact. *Sands v. Robison*, 12 Smed. & M. (Miss.) 711.

*At Common Law* a grand juror disclosing the evidence before the grand jury was made an accessory to the offense if a felony, or a principal if treason. 4 Black. Com. 126.

2. See cases in the preceding note.

**Examination of Jurors to Support Finding.**

— In *Simms v. State*, 60 Ga. 146, it is said that the rule is that grand jurors cannot be sworn and examined to impeach their finding, but may be sworn and examined in support thereof. See further, *Com. v. Hill*, 11 Cush. (Mass.) 139, wherein the defendant in an indictment for receiving stolen property was relying upon a variance between the allegation in the indictment and the proof upon the question

upon the reasons of the rule,<sup>1</sup> they sometimes differ in their determination of its extent and of what particular kinds of disclosures fall within the rule, or the reason thereof,<sup>2</sup> as is also the case with regard to the examination of others than the jurors;<sup>3</sup> and

whether or not the person who stole the property was unknown to the grand jury. The thief, being called by the commonwealth, testified that he stole the property from a person named, and that he testified to the facts before the grand jury. The foreman of the grand jury was introduced for the purpose of rebutting the alleged variance, and for this purpose it was held that he was a competent witness; that to declare it against public policy to permit any member of the grand jury to testify to any fact which has transpired before the jurors is too broad a statement of the rule against the divulging by grand jurors of matters transpiring before them, and the extent of the limitation upon the testimony of grand jurors was said to be best defined by the very terms of the oath of their office by which "the commonwealth's counsel, their fellows", and their own, they are to keep secret."

1. The reason of the injunction of secrecy in the oath of the grand jury is one of public policy, that the evidence produced before it may not be counteracted by subornation. *Crocker v. State*, Meigs (Tenn.) 127. The object is to prevent the escape of the party charged or to promote freedom of deliberation. *McLellan v. Richardson*, 13 Me. 86; *Com. v. Twitchell*, 1 Brews. (Pa.) 556; *Sands v. Robison*, 12 Smed. & M. (Miss.) 710; *State v. Broughton*, 7 Ired. L. (N. Car.) 98.

2. **How Many Concurred in Finding.** — Thus, under the rule, it is held that inquiry cannot be made of the grand jurors as to how many concurred in finding an indictment. *Gitchell v. People*, 146 Ill. 175; *State v. Gibbs*, 39 Iowa 318; *State v. Mewherter*, 46 Iowa 88; *State v. Hamlin*, 47 Conn. 114; *State v. Baker*, 20 Mo. 338; *State v. Wammack*, 70 Mo. 410; *Creek v. State*, 24 Ind. 151; *State v. Oxford*, 30 Tex. 428. See *infra*, II. §. d. *Concurrence in Finding*.

Other cases, recognizing the general rule, hold that such an inquiry does not fall within the rule or the reason. *Sparrenberger v. State*, 53 Ala. 481; *Territory v. Hart*, 7 Mont. 51; *State v. Symonds*, 36 Me. 130; *People v. Shat-*

*tuck*, 6 Abb. N. Cas. (Buffalo Super. Ct.) 35; *State v. Horton*, 63 N. Car. 595. *Low's Case*, 4 Me. 452, distinguishing between an inquiry as to how a juror voted, and the general fact of whether there was a proper concurrence without regard to how any particular member voted; though in *Gitchell v. People*, 146 Ill. 175, the contrary was held not only upon grounds of public policy, but under a statute providing that inquiry cannot be made of a member of the grand jury how other members voted.

**Irregularities — Interference with Deliberations.** — In some cases the testimony of grand jurors has been admitted to prove that the judge of the court interfered and directed a particular indictment to be found. *State v. Will*, (Iowa 1896) 65 N. W. Rep. 1010. But the contrary was held in *Pennsylvania* upon the introduction of a grand juror to prove such interference on the part of the prosecuting attorney. *Zeigler v. Com.*, (Pa. 1888) 14 Atl. Rep. 237.

**Examination of Witnesses.** — The fact that an indictment was found upon the evidence of witnesses in other cases has been permitted to be shown by the affidavit of grand jurors. *Com. v. Green*, 126 Pa. St. 531; *Com. v. McComb*, 157 Pa. St. 611. See also *infra*, II. §. c. (4) *Evidence and Its Sufficiency*.

So the fact that other witnesses than those marked on an indictment were examined, the statute requiring the names of all witnesses examined to be marked on the indictment, was held proper to be shown by a grand juror. *Ex p. Schmidt*, 71 Cal. 212. But when the minutes of the grand jury, when returned, become a part of the record, it has been held that they cannot be impeached on this point. *State v. Little*, 42 Iowa 51.

The part the clerk took in the examination of witnesses was permitted to be shown by a grand juror. *State v. Miller*, (Iowa 1895) 64 N. W. Rep. 288.

3. Thus, in *State v. Fasset*, 16 Conn. 470, it was contended that the witnesses called before the grand jury not being sworn to secrecy might testify to what took place before that body; but *Williams, C. J.*, said: "Such a practice would nullify the rule. If it be the



it is said that the rule of secrecy is the immunity of the public and not the privilege of the juror, and therefore should create an obligation on the conscience of the juror, and be enforced by a court only when required for the advancement of public justice, but cannot be urged by the juror called as a witness when it would defeat justice or encourage perjury.<sup>1</sup>

object of the law to keep secret the proceedings before the grand jury, it is necessary that the law should impose silence upon those whom it has compelled to be before them." See, however, *Com. v. Twitchell*, 1 Brews. (Pa.) 551, wherein it was held that the proceedings before the grand jury should not be inquired into by examining the district attorney or attending officers, but it was suggested that a third person who was present may be called to prove irregularities in the proceedings of the grand jury. So also a third person who was present may be called to prove statements made by a witness before the grand jury different from those made on the trial. *Little v. Com.*, 25 Gratt. (Va.) 932; *Reg. v. Hughes*, 1 C. & K. 519, 47 E. C. L. 519.

1. *Ruffin, C. J.*, in *State v. Broughton*, 7 Ired. L. (N. Car.) 98; *State v. Wood*, 53 N. H. 484; *U. S. v. Terry*, 14 Sawy. (U. S.) 49; *Izer v. State*, 77 Md. 110; *Kirk v. Garrett*, 84 Md. 383.

"So much depends upon time and circumstances that the competency of a grand juror to testify is peculiarly a matter of discretion with the court to discriminate as to it." *Sands v. Robison*, 12 Smed. & M. (Miss.) 711.

**The Fact of Examination of a Witness** before the grand jury does not come within the rule of secrecy. *People v. Northey*, 77 Cal. 634; *Hunter v. Randall*, 69 Me. 183.

*The Fact that the Accused Was Examined* against himself may be shown by a grand juror. *State v. Frizell*, 111 N. Car. 723.

**Proof of Testimony before Grand Jury.** — When a witness testifies before the court on the trial, grand jurors may be examined to prove contradictory testimony given before the grand jury, *State v. Benner*, 64 Me. 278; to the same effect, *Com. v. Mead*, 12 Gray (Mass.) 167; *Com. v. Hill*, 11 Cush. (Mass.) 137; *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21; *Sands v. Robison*, 12 Smed. & M. (Miss.) 704; *U. S. v. Kirkwood*, 5 Utah 123; *State v. Wood*, 53 N. H. 484; or to support a witness

whose testimony has been impeached, *Perkins v. State*, 4 Ind. 222. So, where a grand juror is himself a witness before the grand jury, proof of his statements may be used to impeach his testimony on the trial. *U. S. v. Kirkwood*, 5 Utah 125.

*Contra.* — When the right to examine grand jurors is restricted by statute they cannot, in civil cases, be examined for the purpose of impeachment. *Loveland v. Cooley*, 59 Minn. 259; *Pinney's Will*, 27 Minn. 283.

**Admission of Defendant before Jury.** — Admissions of a defendant voluntarily made before a grand jury may be proven by the grand jurors, and this is not in opposition to a statute which provides that "every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted, on a matter before them, but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony, or upon trial thereof." *U. S. v. Kirkwood*, 5 Utah 125.

**Protection of Witness from Prosecution.** — When a witness before a grand jury is protected from prosecution on account of testimony which under the law he is compelled to give in certain classes of cases, the immunity extends only to the particular matter about which he is examined, and if he implicates himself in other offenses he may be prosecuted therefor, and a grand juror may testify to such admissions. *People v. Reggel*, 8 Utah 21.

**Grand Juror to Prove Perjury.** — A grand juror may be examined to prove perjury committed by a witness before the grand jury. *People v. Young*, 31 Cal. 564.

**In Civil Cases.** — In an action for slan-

**9. Proceedings by and before Grand Jury — a. INITIATING PROCEEDINGS.** — Methods of initiating proceedings by indictment are not uniform in the various states.<sup>1</sup> Following the English practice, bills are usually prepared and presented to the grand jury by the prosecuting attorney before any action taken by it,<sup>2</sup> the expediency of such action sometimes resting altogether in

der (*Sands v. Robison*, 12 Smed. & M. (Miss.) 704), or for malicious prosecution (*Granger v. Warrington*, 8 Ill. 309), and in other civil actions (*Kirk v. Garrett*, 84 Md. 383), it has been held that grand jurors may testify to evidence given before them. But the rule is different where, by statute, the testimony of grand jurors is restricted. Thus, under the statute in *Missouri*, "grand jurors can only be called upon to disclose the names of witnesses who appear before them, and the evidence heard in the grand jury room, in two instances: First, when it is necessary to show whether the testimony of a given witness on a trial of an indictment is consistent with or different from that given before the grand jury; and, second, when a person is on trial for, perjury committed by him before the grand jury. In all other cases the statute prohibits grand jurors from disclosing testimony or the names of witnesses." And in an action for slander (*Tindel v. Nichols*, 20 Mo. 326), or malicious prosecution, it cannot be shown by the grand jurors what witnesses stated before the grand jury. *Fotheringham v. Adams Express Co.*, 34 Fed. Rep. 646; *Beam v. Link*, 27 Mo. 262; *Kennedy v. Holladay*, 105 Mo. 24.

**1. Private Prosecutor.** — See *infra*, V. 3. *a. Indorsement of Prosecutor.*

**2. Ayrs v. State**, 5 Coldw. (Tenn.) 27. See also *infra*, V. 5. *Signing or Counter-signing by Prosecuting Attorney.*

But it was said by Brewer, J., in *Frisbie v. U. S.*, 157 U. S. 163, that "in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment."

**Prosecuting Officer Pro Tem.** — In *Montana* the District Court has authority to appoint a special prosecuting attorney in the absence of the regular district attorney. *Territory v. Harding*, 6 Mont. 323; *Territory v. Layne*, 7 Mont. 227.

In *Texas* it is not proper to set aside or quash an indictment because the person who acted as district attorney had no power so to act; the indictment is the act of the grand jury, and in case of a vacancy in the office of the district attorney, or of the district attorney's temporary disability to act, any person might act in the preparation of indictments by the authorization of the court; but the powers and duties of the grand jury do not cease because there happens to be no district attorney. *State v. Gonzales*, 26 Tex. 199.

But where the appointment is authorized in particular cases, it was held that the power of the court was a special power, that in its exercise the facts must appear on the existence of which the validity of the appointment depends, and that, the facts as shown in the order not being such as justified the appointment under the special power conferred by the constitution, the indictment preferred by such an officer was not good. *Pippin v. State*, 2 Sneed (Tenn.) 44.

**Presumption.** — The court will presume the regular appointment of a prosecuting attorney *pro tem.* *Isham v. State*, 1 Sneed (Tenn.) 113; *Moody v. State*, 6 Coldw. (Tenn.) 302. See also *infra*, V. 3. *a. Indorsement of Prosecutor.*

**Unconstitutional Legislation.** — In *Delaware* it was held that inasmuch as the office of attorney-general is provided for by the constitution, it is a constitutional office. The mode of filling it being established by the constitution to be by executive appointment, and the tenure of it being fixed, it is not within the constitutional power of the legislature to provide that unless the attorney-general submit an indictment for certain misdemeanors specified, to the grand jury, within a certain time, two other members of the bar named and appointed to it for the purpose shall be authorized and empowered to prepare and sign with their names, as attorneys for the state, proper bills or bills of indictment in such cases and submit them

the discretion of the prosecuting officer.<sup>1</sup> Again, the institution of proceedings may depend upon the requirement of a preliminary hearing or commitment.<sup>2</sup>

*b. SCOPE OF INQUIRY — INQUISITORIAL POWERS.* — While it is the duty of each grand juror to bring to the attention of his fellows any violations of the criminal law which shall have come to his knowledge or have been given in charge,<sup>3</sup> and this duty is generally embraced in the oath administered, the power of the grand jury in this behalf cannot be defined by an invariable rule.

to the grand jury, and if found, to proceed to try them with all the powers usually exercised by the attorney-general. *State v. Morris*, 1 *Houst. Cr. Cas.* (Del.) 124.

1. *State v. Bowman*, 43 *S. Car.* 108.

2. For a treatment of this subject, see article PRELIMINARY HEARING.

Mr. Justice Field, in his charge to the grand jury, in 2 *Sawy. (U. S.)* 673, said: "A preliminary examination of the accused before a magistrate, where he can meet his prosecutor face to face, and cross-examine him, and the witnesses produced by him, and have the benefit of counsel, is the usual mode of initiating proceedings in criminal cases, and is the one which presents to the citizen the greatest security against false accusations from any quarter. And this mode ought not to be departed from, except in those cases where the attention of the jury is directed to the consideration of particular offenses by the court, or by the district attorney, or the matter is brought to their knowledge in the course of their investigations, or from their own observations, or from disclosures made by some of their number." Characterized as "able and well considered" in *State v. Bowman*, 43 *S. Car.* 108.

In Pennsylvania there must be a preliminary hearing, or the matters touching the indictment must be given in charge by the court or must be of the personal knowledge of the grand jury, or the bill must be sent to the grand jury by the prosecuting attorney. *McCullough v. Com.*, 67 *Pa. St.* 30; *Hartman's Appeal*, 85 *Pa. St.* 441; *Com. v. Green*, 126 *Pa. St.* 531. A district attorney has power to prefer an indictment without a previous commitment, under the supervision of the court. *Rowand v. Com.*, 82 *Pa. St.* 409; *Com. v. Taylor*, 12 *Pa. Co. Ct. Rep.* 326.

**Presumption.** — A bill of indictment

may be sent up to the grand jury by the attorney-general or by the district attorney, with the sanction of the court, and in the absence of the showing that the sanction of the court was obtained, it would not be presumed that the bill was sent up surreptitiously. *Brown v. Com.*, 76 *Pa. St.* 336, citing *McCullough v. Com.*, 67 *Pa. St.* 30.

**Action by Grand Jury to Prevent Bar of Statute.** — If it is necessary for the grand jury to originate a prosecution in order to stop the running of the statute of limitations, the indictment will not be quashed. *People v. Strong*, 1 *Abb. Pr. N. S. (N. Y. Gen. Sess.)* 244.

**On Complaint.** — Under a statute which provides that no prosecution for adultery shall be commenced except on the complaint of the husband or wife, save when such husband or wife is insane, it was held that, the statute not pointing out how the objection shall be raised, the description of the offense is complete without reference to it, and as the complaint of the proper party is not jurisdictional nor descriptive of the offense, it is not necessary to allege it in the indictment, and if not commenced on complaint of the proper party, objection must be taken by motion to dismiss or it is waived. *State v. Brecht*, 41 *Minn.* 52.

**Waiver of Objection for Want of Examination.** — It has been held that after verdict the prisoner cannot object, as a ground for arrest of judgment, that he was not examined for the crime for which he was indicted. *Angel v. Com.*, 2 *Va. Cas.* 231; *Com. v. Cohen*, 2 *Va. Cas.* 158; *State v. Stewart*, 7 *W. Va.* 731. And that a writ of error will not lie on that ground. *Campbell v. Com.*, 2 *Va. Cas.* 314.

3. *Groves v. State*, 73 *Ga.* 205; *U. S. v. Kilpatrick*, 16 *Fed. Rep.* 769; *State v. Lee*, 87 *Tenn.* 114; *Hartman's Appeal*, 85 *Pa. St.* 441; *Com. v. Green*, 126 *Pa. St.* 531.

It sometimes originates prosecutions,<sup>1</sup> when the evidence is properly before it,<sup>2</sup> and presents upon its own knowledge,<sup>3</sup> and sometimes there is a general inquisitorial power vested in it under which it may cause any citizen to come before it to be interrogated as to any violation of law within his knowledge,<sup>4</sup> or the

1. *Blaney v. State*, 74 Md. 153; *State v. Wolcott*, 21 Conn. 272.

2. It may find an indictment against one person upon testimony taken upon a charge against another person. *People v. Northey*, 77 Cal. 618; *State v. Beebe*, 17 Minn. 241. But see *Com. v. Green*, 126 Pa. St. 531.

3. *Nunn v. State*, 1 Ga. 243; *Groves v. State*, 73 Ga. 209; *State v. Terry*, 30 Mo. 371; *State v. Cain*, 1 Hawks (N. Car.) 353; *State v. Love*, 4 Humph. (Tenn.) 255; *State v. Lee*, 87 Tenn. 114; *Reg. v. Russell, C. & M.* 247, 41 E. C. L. 139. See also *supra*, I. *Subjects of Treatment Defined*.

**The Distinction Between an Indictment and a Presentment** is this: An indictment was a charge of some criminal offense, formally drawn up by an attorney for the crown (or state) and found by a grand jury, upon the oath of witnesses, and presented by the grand jury to the court. A presentment was a charge of some criminal offense, drawn up by the grand jury, not usually with much attention to the necessary averments, and found upon the testimony of *their own body*, and presented by the grand jury to the court. *State v. Guilford*, 4 Jones L. (N. Car.) 86; *Lewis v. Wake County*, 74 N. Car. 197; Justice Field's charge to the grand jury in 2 Sawy. (U. S.) 678.

**Trial on Presentment.** — Sometimes the trial is directly on the presentment. *Smith v. State*, 1 Humph. (Tenn.) 396.

In *Georgia* it was held that the general assembly meant by section 4632 of the code to obliterate the distinction between presentments and indictments and to make the first as good as the last for arraignment and trial of all violators of penal laws, when they declared therein that "all presentments by the grand juries of this state, charging defendants with violations of the penal laws, shall be treated as indictments," and clerks and solicitors generally should treat both alike in arraignments and trials. *Groves v. State*, 73 Ga. 209, *overruling Hawkins v. State*, 54 Ga. 653, in so far as it conflicts with this decision.

**Testimony of Others than Jurors.** — A *Presentment* cannot be found upon the

testimony of others than the grand jury, and if the issue joined on a plea in abatement showing this to have been the case, is found for the defendant, there must be verdict and judgment in his favor. *State v. Love*, 4 Humph. (Tenn.) 255. But a presentment need not show on its face that it was found on the information of grand jurors, and the absence of such a showing will not give rise to a presumption that it was found upon the testimony of other witnesses. *State v. Lewis*, 87 Tenn. 119, on a motion to quash. See, however, on demurrer to a plea in abatement, *State v. Lee*, 87 Tenn. 114. See also *Mackin v. People*, 115 Ill. 312.

**Number of Jurors.** — By the common law the grand jury could only present upon the knowledge of one or more of that body, but it has never been held that it must appear from the body of the presentment, or elsewhere, that it had been so done, and where the statute requires the knowledge of two, there is no more reason why it should appear to have been returned upon the knowledge of two under such statute. *State v. Darnal*, 1 Humph. (Tenn.) 292.

**Personal Knowledge of Jurors.** — A grand jury may properly find an indictment upon the personal knowledge of any of its members communicated to his fellows under no other sanction than the grand juror's oath. *Com. v. Hayden*, 163 Mass. 453; *Com. v. Woodward*, 157 Mass. 516.

4. *Ex p. Brown*, 72 Mo. 83; *Ward v. State*, 2 Mo. 120.

On the other hand, while recognizing the inquisitorial power of the grand jury to a certain degree, a line is drawn at the indiscriminate drag-net method of searching into the affairs of a whole community for the detection of a possible and unsuspected offense. *U. S. v. Kilpatrick*, 16 Fed. Rep. 769; *Lewis v. Wake County*, 74 N. Car. 194; *In re Lester*, 77 Ga. 147, wherein the court says that the grand jury has no right "to make every man a spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social inter-

power to send for witnesses and examine them is expressly conferred, being confined to particular classes of offenses, the nature of which is deemed to justify such a course;<sup>1</sup> but in these instances the power is restricted to those cases in which it is expressly conferred.<sup>2</sup>

c. CONDUCT OF PROCEEDINGS—(1) *Privacy in General.*—While, in contemplation of law, the grand jurors are supposed to be personally present in court, their proceedings are conducted privately, and in a separate room.<sup>3</sup>

(2) *Subpœna of Witnesses.*—The clerk of the court usually issues the subpœnas to testify before the grand jury,<sup>4</sup> and the

course with his fellows by forcing him to become a public informer.”

1. *The Object of the Statute* authorizing the grand jury to send for witnesses is to enable them by a sort of inquisitorial examination to ascertain the commission of the offenses enumerated in the statute which can be committed secretly and to suppress them by vigorous punishment. *Harrison v. State*, 4 Coldw. (Tenn.) 196.

2. *State v. Smith, Meigs* (Tenn.) 99; *Harrison v. State*, 4 Coldw. (Tenn.) 196; *State v. Robinson*, 2 Lea (Tenn.) 114; *Deshazo v. State*, 4 Humph. (Tenn.) 275; *State v. Blocker*, 14 Ala. 450.

*Disclosure of Offense Not Within Statute.*—Thus, where the grand jury has inquisitorial power as to certain offenses, and witnesses are subpœnaed to appear before it to testify to such offenses, it is held that an indictment cannot be found upon the evidence of such witnesses for other offenses concerning which there is no inquisitorial power. *State v. Robinson*, 2 Lea (Tenn.) 114.

*Re-examination of Witnesses.*—Where the grand jury has inquisitorial powers in certain cases, it may, upon information furnished by witnesses brought before it, find an indictment in due form and return it to court without a re-examination of the witnesses. *State v. Parrish*, 8 Humph. (Tenn.) 80.

3. *Com. v. Crans*, 3 Pa. L. J. 453; *State v. Branch*, 68 N. Car. 186, wherein the right of the court to compel the grand jury to hear evidence in open court was denied, and reviewing *Earl of Shaftesbury*, 8 How. St. Tr. 772, a precedent for the contrary practice, the court said: “A perusal of that case will satisfy any one that it ought not to be made a precedent, for the reason that it was in the time of

Charles II., when the Duke of York, with the countenance of the king (his brother), had joined the Roman Catholics, and the attempt of the Jesuits to make that ‘the established religion’ was stoutly opposed by the people, and by no others more zealously than the citizens of London, of whom the grand jury was drawn; and who, although compelled to hear the witnesses for the crown examined in public, because ‘such was the pleasure of the king,’ were ‘stout enough’ to cross-examine the witness for the crown, and after being charged that it was not their business to pass upon the credit of the witnesses of the crown (that should be left for the jury of trial), had the manhood to refuse to find the bill, and to indorse ‘*ignoramus*,’ for which, as the report says, there was such applause and loud cheering that nothing could be heard, and the judge retired. This case was never drawn into a precedent in England, and the practice there has ever since been for grand juries in their sessions, which are held in their own room, \* \* \* to examine such witnesses as are indorsed on the bill.” See also *supra*, II. 8. d. *Secrecy*.

4. *Baldwin v. State*, 126 Ind. 24.

*The Grand Jury* has no power to summon witnesses, in the absence of statutory authority. *State v. Lee*, 87 Tenn. 114.

*The Attorney-General* cannot issue a subpœna to witnesses to attend the grand jury, and one so subpœnaed cannot be forced to testify. *Warner v. State*, 13 Lea (Tenn.) 52.

*Subpœna May Issue in Vacation* to command witnesses to appear at the ensuing term. *O’Hair v. People*, 32 Ill. App. 277.

*Subpœna to Appear before Court.*—Witnesses should be subpœnaed to appear before the court to testify before

witnesses summoned are amenable to the court for disobedience of the subpoena.<sup>1</sup>

(3) *Swearing Witnesses.* — The manner of swearing witnesses who appear before the grand jury is generally regulated by statute in the United States, under which the foreman of the grand jury may perform that duty, but in the absence of such statute witnesses must be sworn in open court.<sup>2</sup> The record

the grand jury, and not to appear before the grand jury. *State v. Butler*, 8 Yerg. (Tenn.) 83.

**Designation of Particular Case.** — In *Pennsylvania* a subpoena was issued to testify generally, without any statement of the matter or parties involved. The court said: "In the case before us there was the use of the writ of subpoena, as a mere order of the court, without statement of party or case, commanding the defendants to appear before the grand jury for the purpose of giving their testimony touching the late riots. If there is any law authorizing such process, we have not been informed of it." *Hartranft's Appeal*, 85 Pa. St. 442.

**Voluntary Appearance.** — Objection cannot be taken that a witness went before the grand jury and disclosed his knowledge of an offense under investigation without subpoena. *State v. Stewart*, 45 La. Ann. 1164. See also *State v. Frizell*, 111 N. Car. 722.

1. *Baldwin v. State*, 126 Ind. 24.

**The Court May Recognize a Witness to Appear** at a future day of the same term or at a future term. *Gwynn v. State*, 64 Miss. 328.

**Refusal to Testify — Contempt.** — See *Heard v. Pierce*, 8 Cush. (Mass.) 338; *Ward v. State*, 2 Mo. 120; *Warner v. State*, 13 Lea (Tenn.) 52; *Hirsch v. State*, 8 Baxt. (Tenn.) 89; *Hartranft's Appeal*, 85 Pa. St. 441; *State v. Judge*, 32 La. Ann. 1222; *People v. Kelly*, 24 N. Y. 74; *Lockwood v. State*, 1 Ind. 161.

**Indictment.** — Where by statute a refusal to testify in certain cases is made punishable by indictment as for a misdemeanor instead of as for a contempt, the old method is superseded. *State v. Blocker*, 14 Ala. 450.

**Impeaching Legality of Grand Jury.** — In *Ex p. Haymond*, 91 Cal. 547, a witness refused to appear and testify before a grand jury upon the ground that the grand jury was not a lawful body, and he was committed for contempt. He sued out a writ of habeas corpus,

and the court held that he could not question the legality of the grand jury in that proceeding, and it was sufficient that the body was a *de facto* grand jury.

**Perjury before Jury.** — The grand jury may indict a witness who commits perjury before it. *State v. Terry*, 30 Mo. 368.

2. *State v. Cain*, 1 Hawks (N. Car.) 353; *State v. Barnes*, 7 Jones L. (N. Car.) 20; *Duke v. State*, 20 Ohio St. 225; *State v. Kilcrease*, 6 S. Car. 444; *Gilman v. State*, 1 Humph. (Tenn.) 59; *Ayrs v. State*, 5 Coldw. (Tenn.) 29. *Contra*, *State v. Fasset*, 16 Conn. 465, where it was held that a magistrate might swear witnesses in the grand jury room.

**Presence of Judge.** — A witness need not be sworn in the immediate presence of the judge, and even the temporary absence of the judge from the bench will not affect the validity of an oath administered during such absence. *Jetton v. State*, Meigs (Tenn.) 192.

**Statutory Mode Cumulative.** — Though the foreman may administer the oath, nevertheless it may be administered in open court, according to the old practice. *State v. Allen*, 83 N. Car. 680; *State v. White*, 88 N. Car. 698.

**The Form of the Oath** fixed by statute must be complied with. *Ashburn v. State*, 15 Ga. 247.

**General or in Particular Case.** — Where the statutory form of oath requires the name of the case to be stated and an oath in different form and substance is administered, the evidence given will not authorize an indictment. *Ashburn v. State*, 15 Ga. 247. But in *U. S. v. Reed*, 2 Blatchf. (U. S.) 464, it was held that the general oath was sufficient, distinguishing the old practice, where the bill was sent to the jury before any investigation was had. And see *Reg. v. Russell*, C. & M. 247, 41 E. C. L. 139, wherein it was said that the manner of swearing witnesses who went before the grand jury, if incorrect, would not vitiate an indictment, because the jury

need not affirmatively show that the witnesses before the grand jury were sworn.<sup>1</sup>

(4) *Evidence and Its Sufficiency.* — The grand jury cannot find an indictment without evidence before it when the prosecution does not emanate from knowledge on its own part,<sup>2</sup> and the evidence should be such that if unexplained it would warrant a conviction;<sup>3</sup> but courts have generally refused to permit any inquiry into the sufficiency of the proof upon which bills are found<sup>4</sup> if

was at liberty to find the bill upon its own information.

1. *King v. State*, 5 How. (Miss.) 730; *Duke v. State*, 20 Ohio St. 228; *Gilman v. State*, 1 Humph. (Tenn.) 59. See also *State v. Sheppard*, 97 N. Car. 401.

**Impeachment of Finding — Want of Oath.** — Indorsement on an indictment is not evidence of the fact that witnesses before the grand jury were sworn, but can be used only to aid the memory of the clerk if he is called upon to testify on the point. *State v. Barnes*, 7 Jones L. (N. Car.) 21.

It is also held that the want of oath cannot be shown by a grand juror. *Simms v. State*, 60 Ga. 146.

**Presumption.** — An indictment will not be quashed upon the ground that the indorsement on its back that the witnesses were sworn and sent to the grand jury is not signed by the clerk. The Supreme Court will presume in favor of the legality of the proceedings of the court below, and if the fact is not with the presumption it rests on the defendant to show it by his sealed exceptions. *Bennett v. State*, 2 Yerg. (Tenn.) 473; *Com. v. Salter*, 2 Pearson (Pa.) 462.

**Waiver of Objection.** — Where the objection that an indictment was not properly found, as that the witness was not sworn in court, may be taken by motion to quash or plea in abatement, such an objection is not a ground for arresting the judgment after a verdict on a plea in bar. *State v. Barnes*, 7 Jones L. (N. Car.) 21; *State v. Roberts*, 2 Dev. & B. L. (N. Car.) 540.

2. *State v. Grady*, 84 Mo. 220.

**Second Indictment.** — Where an indictment is defective or is recommitted to the same grand jury, it may find another indictment without recalling the witnesses who had already been before it. *State v. Clapper*, 59 Iowa 279; *McIntire v. Com.*, (Ky. 1887) 4 S. W. Rep. 1; *Com. v. Woods*, 10 Gray (Mass.) 482; *Com. v. Clune*, 162 Mass. 206; *State v. Peterson*, 61 Minn. 73; *Whiting v.*

*State*, 48 Ohio St. 220; *State v. Reinhart*, 26 Oregon 466. *Contra*, *State v. Ivey*, 100 N. Car. 539. See also *Com. v. Green*, 126 Pa. St. 531; *Com. v. McComb*, 157 Pa. St. 611.

**Minutes of Committing Magistrate.** — Sometimes, where a defendant is bound over before a committing magistrate, the grand jury may find an indictment upon the minutes of the committing magistrate without having the witnesses again before it. *State v. Rodman*, 62 Iowa 456. But see *Hope v. People*, 83 N. Y. 423.

3. *People v. Tinder*, 19 Cal. 539; *People v. Hyler*, 2 Park. Cr. Rep. (N. Y. Oyer & T. Ct.) 566; *In re Grand Jury*, 62 Fed. Rep. 840; Justice Field's charge to the grand jury in 2 Sawy. (U. S.) 670.

4. *Alabama.* — *Jones v. State*, 81 Ala. 80; *Washington v. State*, 63 Ala. 189; *Sparrenberger v. State*, 53 Ala. 481.

*Indiana.* — *Stewart v. State*, 24 Ind. 142.

*Iowa.* — *State v. Fowler*, 52 Iowa 103; *State v. Harris*, 36 Iowa 268; *State v. Tucker*, 20 Iowa 508; *State v. Smith*, 74 Iowa 580.

*Kentucky.* — *McIntire v. Com.*, (Ky. 1887) 4 S. W. Rep. 1; *Com. v. Minor*, 89 Ky. 555.

*Michigan.* — *People v. Lauder*, 82 Mich. 115.

*Mississippi.* — *Smith v. State*, 61 Miss. 759.

*Montana.* — *Territory v. Pendry*, 9 Mont. 67.

*Nevada.* — *State v. Logan*, 1 Nev. 515.

*New Jersey.* — *State v. Dayton*, 23 N. J. L. 55.

*New York.* — *People v. Strong*, 1 Abb. Pr. N. S. (N. Y. Gen. Sess.) 244; *Hope v. People*, 83 N. Y. 422.

*Ohio.* — *Turk v. State*, 7 Ohio, pt. II, 240.

*South Carolina.* — *State v. Boyd*, 2 Hill L. (S. Car.) 288.

*Texas.* — *Dockery v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 281;

there is any legal evidence upon which the jury might have acted,<sup>1</sup> but if there was no evidence before the grand jury to support the indictment it is held that the fact may be shown.<sup>2</sup>

(5) *Testimony on Behalf of Accused.*—The defendant has no right to have witnesses heard in his behalf before the grand jury,<sup>3</sup> the general rule being that the grand jury is to hear evidence

Kingsbury v. State, (Tex. Crim. App. 1897, 39 S. W. Rep. 365.

**Incompetent Witness or Testimony.**—The fact that the grand jury examined an incompetent witness is not sufficient ground for setting aside or quashing an indictment. *State v. Tucker*, 20 Iowa 508; *Dockery v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 281; *Hammond v. State*, (Miss. 1897) 21 So. Rep. 149; *State v. Shreve*, (Mo. 1897) 38 S. W. Rep. 548. But if the indictment is based solely on incompetent testimony it is void. *Royce v. Territory*, (Okla. 1897) 47 Pac. Rep. 1083.

*Examination of Wife of Accused.*—In *New York* it was held that if the prisoner's wife is examined against him, before the grand jury, the indictment should be quashed. *People v. Moore*, 65 How. Pr. (Niagara Oyer & T. Ct.) 177.

But such an objection cannot be made for the first time after trial and conviction. *State v. Houston*, 50 Iowa 513.

1. *State v. Bunger*, 14 La. Ann. 465; *State v. Logan*, 1 Nev. 515; *People v. Lauder*, 82 Mich. 116; *Bloomer v. State*, 3 Sneed (Tenn.) 69.

**Legality of Evidence.**—In *New York*, while support can be found for the general statement of the text, *People v. Strong*, 1 Abb. Pr. N. S. (N. Y. Gen. Sess.) 244, other cases show that the practice there warrants a wide range of investigation into the legality of the evidence before the grand jury. *People v. Clark* (New York County Oyer & T. Ct.) 8 N. Y. Crim. Rep. 169, 179; *People v. Vaughan*, 19 N. Y. Misc. Rep. (Kings County Ct.) 298; *People v. Restenblatt*, 1 Abb. Pr. (N. Y. Gen. Sess.) 268; *People v. Price*, (Albany County Ct. Sess.) 6 N. Y. Crim. Rep. 141.

In *Oklahoma* it was held that when a defendant files a motion to set aside and quash an indictment on the ground that it was found without legal and competent evidence, but upon hearsay testimony, and makes application to have a day set for the taking of testi-

mony on his motion, the court cannot, without error, refuse such application, summarily overrule the motion, and proceed to trial on the indictment. *Royce v. Territory*, (Okla. 1897) 47 Pac. Rep. 1083.

2. *State v. Logan*, 1 Nev. 509.

**But the Affidavit of a Grand Juror** upon this point cannot be received. *State v. Grady*, 84 Mo. 220; *State v. Logan*, 1 Nev. 515 [citing *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66; *State v. M'Leod*, 1 Hawks (N. Car.) 344; *State v. Baker*, 20 Mo. 338; *People v. Hulbut*, 4 Den. (N. Y.) 135; *State v. Fasset*, 16 Conn. 457]. *Contra*, *People v. Briggs*, 60 How. Pr. (Albany Oyer & T. Ct.) 17. See also *supra*, II. 8. d. *Secrecy*.

**Sufficiency of Affidavit to Support Motion.**—In *New York* it was held that the mere affidavit of the defendant upon information and belief is insufficient to support a motion to set aside an indictment on the ground that there was inadequate evidence before the grand jury. *People v. Sebring*, 14 Misc. Rep. (N. Y. Supreme Ct.) 31.

3. *U. S. v. Blodgett*, 35 Ga. 336, citing *Respublica v. Shaffer*, 1 Dall. (Pa.) 236, wherein McKean, C. J., said: "It is a matter well known and well understood that, by the laws of our country, every question which affects a man's life, reputation, or property must be tried by twelve of his peers, and that their unanimous verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire not only upon what foundation the charge is made, but likewise upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury; you will supersede the legal authority of the court in adjudging of the competency and admissibility of witnesses; and having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body than the twelve peers prescribed by the law of the land." *U. S. v. Palmer*, 2 Cranch (C. C.) 11; *Lung's Case*, 1 Conn. 428.



only in support of the charge and not in exculpation of the defendant.<sup>1</sup> But while it seems that originally evidence of exculpation would not be heard,<sup>2</sup> the harshness of that rule of practice has led to some qualification of it.<sup>3</sup>

(6) *Self-incriminating Testimony.* — A person accused of crime cannot be compelled to testify against himself before the grand jury,<sup>4</sup> though it is not illegal nor a ground for setting aside an

1. U. S. v. Terry, 39 Fed. Rep. 362, citing 2 Hale P. C. 157; 2 Hawk. P. C. 25, § 145.

2. See authorities cited in the preceding note.

3. **By Statute** in some states the grand jury may inquire into other evidence if "they have reason to believe that other evidence within their reach will explain away the charge." *People v. Singer*, 18 Abb. N. Cas. (Queens County Oyer & T. Ct.) 97; *People v. Goldenson*, 76 Cal. 328; *Com. v. Minor*, 89 Ky. 555. But the jurors are not bound to call for such testimony. *People v. Goldenson*, 76 Cal. 328; *Com. v. Minor*, 89 Ky. 555.

**In the Absence of Statute.** — Mr. Justice Field, in charging the grand jury in 2 Sawy. (U. S.) 670, said: "You will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: if in the course of your inquiries you have reason to believe that there is other evidence, not presented to you, within your reach which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced."

In *U. S. v. White*, 2 Wash. (U. S.) 29, the court recognized the right to send witnesses for the defense to the grand jury with the consent of the prosecuting attorney, but not without it, and in *U. S. v. Terry*, 39 Fed. Rep. 363, it was held that the prosecuting attorney might refuse to send for such testimony, and the court construes the language of Field, J., above quoted, to be restricted in its application to cases where the evidence already before the jury does not satisfy it sufficiently to induce it to determine upon its action, and where from that evidence it believes that other testimony is attainable, not to rebut and disprove the evidence already adduced, but, consistently with the substantial truth of the latter, to explain away or qualify the charge.

4. *Boone v. People*, 148 Ill. 440; *State v. Froiseth*, 16 Minn. 296; *People v. Singer*, 18 Abb. N. Cas. (Queens County Oyer & T. Ct.) 96; *People v. Haines* (New York County Gen. Sess.) 6 N. Y. Crim. Rep. 100. But see *U. S. v. Jones*, 69 Fed. Rep. 978; *Mencheca v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 203, and *Spearman v. State*, 34 Tex. Crim. Rep. 279, wherein it appears that the fact that a person was examined against himself is not ground for quashing or setting aside an indictment.

In *Michigan*, too, it was held that where a person attends the grand jury under compulsion of subpoena and testifies under the same compulsion, and an indictment is afterwards found against him upon other competent testimony, there is no ground for quashing the indictment, though the testimony of the defendant cannot be used against him on the trial. *People v. Lauder*, 82 Mich. 125, citing, to the proposition that the testimony of the defendant before the grand jury cannot be used against him on the trial, *Rex v. Lewis*, 6 C. & P. 161, 25 E. C. L. 333, and numerous cases touching evidence before coroners.

**Joint Defendants.** — When two defendants are indicted and their names appear as witnesses on the indictment, presumably they were sent to the grand jury as witnesses against each other and not against themselves. *State v. Frizell*, 111 N. Car. 722.

**Evidence in Other Matters.** — The fact that a person, in the investigation of some other charge by the grand jury, was required to give evidence which would have been material on the particular charge for which he is indicted is no cause for setting aside the indictment on the ground that he was required to testify against himself, unless it appears from the indorsement or entry of his name on the indictment as a witness that the grand jury found the bill, in whole or in part, on his evidence. *State v. Hawks*, 56 Minn. 129.

indictment in all cases that the defendant voluntarily gave his testimony.<sup>1</sup> And where a party is protected from the consequences of his own evidence he cannot refuse to testify.<sup>2</sup>

**Under Inquisitorial Powers of Jury.** — Thus under statutes imposing upon a party the duty of divulging his whole knowledge upon certain matters, he is expressly protected from prosecution based upon his own testimony.<sup>3</sup>

(7) *Presence of or Interference by Others than Grand Jurors* — **In General.** — As hereinbefore stated, indictments must be found by authorized grand jurors, other persons being excluded from participation,<sup>4</sup> and the action of the grand jury in finding or refusing to find indictments cannot be interfered with or influenced by any person whatsoever.<sup>5</sup> Statutes have been generally enacted

1. *People v. King*, 28 Cal. 267.

**The Mere Fact of Appearance** as a witness by the defendant is not sufficient to invalidate the indictment. *State v. Anderson*, 10 Oregon 448.

**Waiver of Privilege.** — See *People v. Lauder*, 82 Mich. 109.

**Voluntary Testimony after Compulsory Attendance.** — In *New York* it was held that a defendant cannot be compelled to attend a grand jury even to give voluntary evidence, and an indictment found upon evidence so given should be quashed. *People v. Singer*, 18 Abb. N. Cas. (Queens County Oyer & T. Ct.) 96. *Contra*, *State v. Donelon*, 45 La. Ann. 744, the accused being advised that he need not give evidence criminalizing himself.

2. *In re Peasley*, 44 Fed. Rep. 272; *In re Counselman*, 44 Fed. Rep. 270.

3. *Warner v. State*, 13 Lea (Tenn.) 52; *Hirsch v. State*, 8 Baxt. (Tenn.) 89.

**Rule Qualified.** — Under a statute granting inquisitorial power and exempting from liability to indictment any witness who testifies under the statute concerning matters in which he himself is implicated, an indictment against such a person is sufficient to withstand a plea in abatement, where his testimony before the grand jury was not upon the identical case for which he was indicted. *Owens v. State*, 2 Head (Tenn.) 455; *People v. Reggel*, 8 Utah 21.

**Application to Grand Juror.** — The *Tennessee* statute exempting from liability persons subpoenaed to appear and testify before the grand jury touching offenses over which the inquisitorial powers of the grand jury extend does not apply to a grand juror who voluntarily implicates himself in communi-

cating to his fellows information upon which to base a presentment. *State v. Hatfield*, 3 Head (Tenn.) 232.

4. See *supra*, II. 2. *Qualifications of Grand Jurors*, and *infra*, II. 10. *Objections*.

**The Presence of a Person Drawn as a Grand Juror** without proper notice, who does not participate in the finding, will not avoid an indictment. *State v. Clough*, 49 Me. 573; and a statute authorizing the setting aside of an indictment on account of the presence of persons not jurors does not apply to persons who were drawn but who were not qualified to act, as for this objection the defendant must exercise his privilege of challenge. *Doss v. State*, 28 Tex. App. 506; *Lacy v. State*, 31 Tex. Crim. App. 78; *Territory v. Staples*, 2 Idaho 778; *State v. Clough*, 49 Me. 573. See also *supra*, II. 3. *f. Number Necessary to be Sworn*.

5. *State v. Will*, (Iowa 1896) 65 N. W. Rep. 1010; *Welch v. State*, 68 Miss. 341; *People v. Sellick* (Erie County Ct. Sess.) 4 N. Y. Crim. Rep. 329; *Com. v. Frey*, 11 Pa. Co. Ct. Rep. 523. See also *supra*, II. 6. *The Charge*.

**Advice by Committing Magistrate.** — In *People v. Freund* (New York County Gen. Sess.) 33 N. Y. Supp. 612, Recorder Goff, of the Court of General Sessions of New York City, said that while acting in the capacity of committing magistrate he had authority, pending an examination before him, to advise the grand jury not to entertain a charge until after the examination.

**Circular Letters of Advice.** — The fact that circular letters were addressed by unauthorized persons to each member of the jury list, purporting to advise him of the duties of grand jurors and

for the purpose of preserving the privacy of the deliberations of the grand jury.<sup>1</sup>

**Prosecuting Attorney.** — But the rule does not prohibit the presence of authorized officers, at least up to the time of the action of the grand jury in determining the result. Thus the prosecuting attorney is the legal adviser of the grand jury in respect of the manner of its proceeding, and may be present and assist it by his counsel.<sup>2</sup> But he can act only as adviser and has no

stating some of their statutory powers, is not sufficient to invalidate an indictment, no prejudicial effect upon the defendant being shown. *People v. Shea*, 147 N. Y. 78.

**Examination of Witness by Clerk.** — The clerk of the grand jury being a practicing attorney, at the request of the foreman of the grand jury asked the witnesses questions. It was held that this was not ground for setting aside the indictment. *State v. Miller*, (Iowa 1896) 64 N. W. Rep. 288.

**1. A Bailiff or Sheriff May Be in the Jury Room** during the deliberations of the jury, if he is not present when the vote is taken. *State v. Kimball*, 29 Iowa 267; *Richardson v. Com.*, 76 Va. 1007.

**Stenographer.** — In *Indiana*, while the use of a stenographer by the prosecuting attorney before the grand jury is not provided for by statute, and while there is an express statutory provision, Rev. Stat. 1881, § 1655, that "the grand jury must select one of their number as clerk, who must take minutes of their proceedings (except the notes of the individual members on a presentment or indictment), and also of the evidence given before them, which shall be preserved for the use of the prosecuting attorney, to subserve the purposes of justice," yet such a departure from the mode indicated by the statute as the use of a private stenographer should not result in the abatement of a particular indictment without some showing that the accused was injuriously affected, or that something unauthorized was said or done which probably injured him. *Courtney v. State*, 5 Ind. App. 356. See also, to the point that the presence of a stenographer before a grand jury is not inconsistent with a due administration of justice, *U. S. v. Simmons*, 46 Fed. Rep. 65. But in *State v. Bowman*, (Maine 1897) 38 Atl. Rep. 331, an indictment was quashed for this reason.

In *Michigan* it was said to be proper

to permit a grand juror to act as stenographer, but the court remarked that no other person could be present to act in that capacity. *People v. Launder*, 82 Mich. 131.

**Sufficiency of Objection.** — Under a statute providing that "when any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment, or when any person other than the grand jurors was present before the grand jury during the investigation of the charge except as required or permitted by law," it is incumbent on the defendant to show, in support of a motion to set aside an indictment because of the presence of a stranger during the deliberations of the grand jury, that he was present unlawfully, or that, in the language of the statute, he was not "required or permitted by law" to be present. *State v. Fertig*, (Iowa 1896) 67 N. W. Rep. 87.

**Finality of Decision on Motion to Quash.** — In *Kentucky* the decision of the trial court upon a motion to set aside an indictment on the ground that persons other than grand jurors were present at the finding of the indictment is final by statute, and not subject to exception or appeal. *Com. v. Simons*, (Ky. 1896) 37 S. W. Rep. 949.

**2. Illinois.** — *Shoop v. People*, 45 Ill. App. 110.

*Indiana.* — *Shattuck v. State*, 11 Ind. 473; *State v. Henning*, 33 Ind. 191.

*Louisiana.* — *State v. Aleck*, 41 La. Ann. 83; *State v. Adam*, 40 La. Ann. 745.

*New York.* — Anonymous, 7 Cow. (N. Y.) 563.

*Pennsylvania.* — *Com. v. Frey*, 11 Pa. Co. Ct. Rep. 523; *Com. v. Bradney*, 126 Pa. St. 199.

*South Carolina.* — *State v. McNinch*, 12 S. Car. 95.

*Texas.* — *Stuart v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 118.

*West Virginia.* — *State v. Baker*, 33 W. Va. 319.

right to exercise any manner of control over its actions.<sup>1</sup>

**The Defendant** is not entitled to be present at the deliberations or proceedings of the grand jury.<sup>2</sup>

**d. CONCURRENCE IN FINDING.** — Following the common law, at least twelve of the grand jury must concur in finding an indict-

*United States.* — *Ex p. Crittenden*, Hempst. (U. S.) 176; *U. S. v. Reed*, 2 Blatchf. (U. S.) 435; *Mr. Justice Field's* charge to the grand jury, *Mizner v. Vaughn*, 2 Sawy. (U. S.) 270.

**Contra.** — *Lung's Case*, 1 Conn. 428.

**Examination of Witnesses.** — It is held in some states that the prosecuting attorney may take part in the examination of witnesses so long as he is not present at, and does not take part in, the deliberation as to the finding of the jury. *Bennett v. State*, 62 Ark. 516; *Raymond v. People*, 2 Colo. App. 329; *Shattuck v. State*, 11 Ind. 473; *State v. Aleck*, 41 La. Ann. 83; *State v. Adam*, 40 La. Ann. 745; *Com. v. Frey*, 11 Pa. Co. Ct. Rep. 523. **Contra.**, *Stuart v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 118; *Anonymous*, 7 Cow. (N. Y.) 563.

**Private Counsel** cannot go before the grand jury to urge the finding of an indictment. *Wilson v. State*, 70 Miss. 595; *Welch v. State*, 68 Miss. 341; *State v. Addison*, 2 S. Car. 356.

Sometimes he is not permitted to be present at all. *Durr v. State*, 53 Miss. 425. **Contra.**, *State v. Whitney*, 7 Oregon 386; *State v. Justus*, 11 Oregon 180, wherein it is said that, at most, such a proceeding is a mere irregularity which must be taken advantage of in proper time and in the proper manner, or objection cannot be made.

In *Arkansas* it was held that the examination of witnesses before the grand jury by a person who was neither the prosecuting attorney nor the deputy of such attorney, but who was acting with the consent of the prosecuting officer, would not affect an indictment, it appearing that he was not present while the grand jury was deliberating and that he said nothing to influence the finding. *Bennett v. State*, 62 Ark. 516.

**As Witness.** — Private counsel may appear as a witness. *People v. Bradner*, 44 Hun (N. Y.) 234, *affirmed* in 107 N. Y. 1.

**Prosecuting Attorney Pro Tem.** — One appointed to act in the absence of the regular prosecuting attorney may perform the functions of the prosecuting attorney before the grand jury. *Ray-*

*mond v. People*, 2 Colo. App. 329. See also, *infra*, V. 5. *Signing or Countersigning by Prosecuting Attorney.*

1. *U. S. v. Schumann*, 7 Sawy. (U. S.) 439; *Com. v. Bradney*, 126 Pa. St. 199; *Com. v. Frey*, 11 Pa. Co. Ct. Rep. 523.

**Deliberation as to Finding.** — In connection with the proposition in the text it is held that the prosecuting attorney cannot be present when the jurors are deliberating as to their finding. *Rothschild v. State*, 7 Tex. App. 519; *State v. Aleck*, 41 La. Ann. 83. See also the cases cited in the preceding note. In *Com. v. Salter*, 2 Pearson (Pa.) 462, it was said that it is no objection on motion to quash an indictment that the district attorney was present during some part of the examination of witnesses, though the court said that when the evidence is fairly presented to the grand jury he should withdraw and leave the jury to its unbiased deliberations. *Com. v. Salter*, 2 Pearson (Pa.) 462. But his presence has in some instances been held a mere irregularity, if he takes no part in the deliberations and does not attempt to influence the findings. *U. S. v. Terry*, 39 Fed. Rep. 355; *Com. v. Bradney*, 126 Pa. St. 199.

**After the Deliberation and Vote** of the jury the prosecuting attorney may enter and advise the jurors how to write their finding. *State v. McNinch*, 12 S. Car. 89.

**Report Drawn by Unofficial Attorney.** — The fact that the final report of the grand jury was not drawn by a member of that body, nor by the district attorney, but by an attorney at law called by it to draft the report, will not invalidate an indictment found by the jury where it does not appear that the attorney was present at any of the deliberations, or otherwise assisted the jurors in their proceedings and findings. *State v. Harris*, 39 La. Ann. 228.

2. *State v. Wolcott*, 21 Conn. 280; *State v. Hamlin*, 47 Conn. 95 [*explaining Lung's Case*, 1 Conn. 428]; *State v. Smith*, 74 Iowa 580. See also, *supra*, II. 9. c. (5) *Testimony on Behalf of Accused.*

ment,<sup>1</sup> unless by valid statutory enactment the concurrence of fewer than twelve is sufficient.<sup>2</sup> But the return of an indictment into court with the indorsement "a true bill" thereon is sufficient evidence of the fact that the lawful number concurred in the finding.<sup>3</sup>

*e. MINUTES OF PROCEEDINGS — In General.* — It is often provided that the grand jury shall keep minutes of its proceedings, the foreman or a clerk usually performing that duty,<sup>4</sup> and it has

1. *Wilson v. People*, 3 Colo. 327; *People v. Butler*, 8 Cal. 435; *Doyle v. State*, 17 Ohio 222; *State v. Symonds*, 36 Me. 128; *State v. Lightbody*, 38 Me. 200; *Low's Case*, 4 Me. 439. See *supra*, II. 3. *f. Number Necessary to be Sworn*; and *infra*, V. 3. *c. Indorsement of Finding and Signature of Foreman.*

2. *State v. Salts*, 77 Iowa 193; *Lyles v. Com.*, 88 Va. 396.

**Constitutionality of Statute.** — Under the constitutions of some states it has been held that the number required to concur (twelve) cannot be lessened by statute. *English v. State*, 31 Fla. 340; *Donald v. State*, 31 Fla. 255; *State v. Barker*, 107 N. Car. 913.

3. *English v. State*, 31 Fla. 340; *Manion v. People*, 29 Ill. App. 532; *Dutell v. State*, 4 Greene (Iowa) 125; *Laurent v. State*, 1 Kan. 313; *Turns v. Com.*, 6 Met. (Mass.) 224; *Harriman v. State*, 2 Greene (Iowa) 270; *State v. McNeill*, 93 N. Car. 552; *Watts v. Territory*, 1 Wash. Ter. 409. See also *supra*, II. 8. *d. Secrecy*, note.

**Voting on Several Bills at Once.** — Where there is sufficient evidence upon which to find a number of bills the procedure of the grand jury as to voting upon the bills is merely incidental, and if it were a matter that could be inquired into at all, there could be no objection that the grand jury voted but once on finding all the bills. *Jacobs v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 110.

4. **Clerk a Private Citizen.** — The appointment of a citizen, not a member of the grand jury, as clerk of that body is unauthorized, and it was held that a motion in arrest of judgment on that ground should be granted. *State v. Watson*, 34 La. Ann. 669.

**Filing, Etc.** — It is sufficient if the minutes are returned to the clerk of the court, though he fails to mark them filed. *State v. Briggs*, 68 Iowa 420; *State v. Guisenhouse*, 20 Iowa 227; *State v. Postlewait*, 14 Iowa 446; *State v. Cross*, (Iowa 1895) 64 N. W. Rep. 614.

They need not be docketed, *State v. Craig*, 78 Iowa 637; though when returned and filed they are a part of the record. *State v. Hamilton*, 42 Iowa 655; *State v. Craig*, 78 Iowa 637.

**Minutes of Evidence — Sufficiency.** — The fact that the minutes of the grand jury are not full will not preclude witnesses testifying to the subject matter thereof. *State v. Van Vleet*, 23 Iowa 27; *State v. Hurd*, (Iowa 1897) 70 N. W. Rep. 614.

Minutes including testimony taken in other cases are not necessarily invalid, no prejudice to the defendant being shown. *State v. Guisenhouse*, 20 Iowa 227.

**Memorandum for Prosecuting Attorney.** — In *Texas* it was held that a statute providing that after the grand jury finds a bill the foreman shall make a memorandum of the same for the purpose of enabling the prosecuting attorney to write the indictment does not require all or any part of the testimony to be set down, but is merely directory, for the benefit of the prosecuting attorney. *Jacobs v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 110.

**Use as Independent Evidence.** — The minutes of the grand jury have been held inadmissible as independent evidence to impeach a witness on the trial, the court saying: "Unlike a deposition or affidavit, they do not purport to give statements of facts in full, but are what the law requires, mere 'minutes.'" *State v. Hayden*, 45 Iowa 14.

**Minutes Transcribed.** — The minutes need not be in the handwriting of the clerk, and it is no objection that after they were taken they were transcribed in the office of the county attorney by a typewriter, and the transcript filed instead of the original copy. *State v. Hurd*, (Iowa 1897) 70 N. W. Rep. 614.

**Inspection by Defendant.** — The defendant cannot demand as a matter of right an inspection of the minutes of the grand jury, *People v. Naughton*, 38 How. Pr. (N. Y. Oyer & T. Ct.) 430;

been held that the minutes so required need not embrace immaterial evidence not used on the trial.<sup>1</sup>

**List of Witnesses.** — It is also sometimes provided that the foreman of the grand jury shall return a list of the witnesses examined, but such statutes have been held to be merely directory,<sup>2</sup> although the accused is generally, to a greater or less extent, entitled to information as to the witnesses against him.<sup>3</sup>

**10. Objections** — *a.* IN GENERAL. — Where it appears of record that the whole proceeding in forming a panel is void *ab initio*, as where a jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select jurors, it is said that objection may be taken at any time.<sup>4</sup> But when the objection is founded upon a mere irregularity in summoning the panel, or upon the disqualification of a particular juror, the matter must be presented in the proper way and contested *in limine*,<sup>5</sup> and cannot be raised after

*People v. Jaehne*, (New York County Gen. Sess.) 4 N. Y. Crim. Rep. 161; unless for a particular purpose, under statutory authority. *People v. Richmond* (New York County Gen. Sess.) 5 N. Y. Crim. Rep. 97.

1. *State v. Hurd*, (Iowa 1897) 70 N. W. Rep. 614.

2. *State v. Wilkinson*, 76 Me. 317; *Hathaway v. State*, 32 Fla. 56; *Com. v. Edwards*, 4 Gray (Mass.) 1. See also *infra*, V. 3. *b.* *Indorsement of Witnesses.*

3. For furnishing list of witnesses before trial in criminal cases, see article WITNESSES.

4. *Sanders v. State*, 55 Ala. 186; *Harrington v. State*, 36 Ala. 237; *Davis v. State*, 46 Ala. 81; *O'Byrnes v. State*, 51 Ala. 25; *Miller v. State*, 33 Miss. 357; *Curtis v. Com.*, 87 Va. 590; *Yelm Jim v. Territory*, 1 Wash. Ter. 63; *U. S. v. Gale*, 109 U. S. 65; *In re Wilson*, 140 U. S. 581.

5. *Alabama*. — *Floyd v. State*, 30 Ala. 511; *Sanders v. State*, 55 Ala. 186; *Horton v. State*, 47 Ala. 58; *State v. Clarissa*, 11 Ala. 57; *State v. Pile*, 5 Ala. 73; *State v. Williams*, 3 Stew. (Ala.) 461; *Collier v. State*, 2 Stew. (Ala.) 388; *Shaw v. State*, 18 Ala. 547.

*Arizona*. — *Kirby v. Territory*, (Arizona 1891) 28 Pac. Rep. 1135.

*Arkansas*. — *Straughan v. State*, 16 Ark. 42; *Stewart v. State*, 13 Ark. 744; *Shropshire v. State*, 12 Ark. 190; *Fenalty v. State*, 12 Ark. 630; *Brown v. State*, 13 Ark. 96; *Brown v. State*, 10 Ark. 607; *State v. Brown*, 10 Ark. 78; *Dixon v. State*, 29 Ark. 167; *Wilburn v. State*, 21 Ark. 198; *Miller v. State*,

40 Ark. 492; *Carpenter v. State*, 62 Ark. 286; *Hudspeth v. State*, 50 Ark. 534.

*California*. — *People v. Stacey*, 34 Cal. 308; *People v. Coffman*, 24 Cal. 232.

*Delaware*. — *State v. Brown*, (Del. 1896) 36 Atl. Rep. 458.

*Florida*. — *Potsdamer v. State*, 17 Fla. 895; *Reynolds v. State*, 33 Fla. 301.

*Georgia*. — *Turner v. State*, 78 Ga. 177; *Williams v. State*, 60 Ga. 88; *Johnson v. State*, 62 Ga. 179.

*Illinois*. — *Stone v. People*, 3 Ill. 326; *Barron v. People*, 73 Ill. 258.

*Indiana*. — *O'Brien v. State*, 125 Ind. 40; *Ford v. State*, 112 Ind. 377; *Padgett v. State*, 103 Ind. 552; *Henning v. State*, 106 Ind. 388; *Cooper v. State*, 120 Ind. 380; *Deitz v. State*, 123 Ind. 86; *Powers v. State*, 87 Ind. 144; *State v. Freeman*, 6 Blackf. (Ind.) 248; *State v. Herndon*, 5 Blackf. (Ind.) 75; *Vattier v. State*, 4 Blackf. (Ind.) 73.

*Iowa*. — *State v. Pierce*, 90 Iowa 506; *State v. Reid*, 20 Iowa 413; *State v. Harris*, 38 Iowa 242; *Harriman v. State*, 2 Greene (Iowa) 270.

*Kentucky*. — *Haggard v. Com.*, 79 Ky. 366.

*Louisiana*. — *State v. Nolan*, 8 Rob. (La.) 513; *State v. Jones*, 8 Rob. (La.) 616; *State v. Thompson*, 28 La. Ann. 187; *State v. Canady*, 16 La. Ann. 141; *State v. Griffin*, 38 La. Ann. 502; *State v. Watson*, 31 La. Ann. 379; *State v. Washington*, 33 La. Ann. 896; *State v. Tisdale*, 41 La. Ann. 338; *State v. Sterling*, 41 La. Ann. 679; *State v. Price*, 37 La. Ann. 215.

plea of not guilty, after verdict, or for the first time on appeal,<sup>1</sup> the presumption being in favor of the legality of the constitution of the grand jury.<sup>2</sup>

*Maine.* — *State v. Carver*, 49 Me. 588.

*Massachusetts.* — *Com. v. Smith*, 9 Mass. 107.

*Minnesota.* — *State v. Schumm*, 47 Minn. 373; *State v. Dick*, 47 Minn. 375; *State v. Hoyt*, 13 Minn. 132; *Maher v. State*, 3 Minn. 444.

*Mississippi.* — *Green v. State*, 28 Miss. 687; *Leathers v. State*, 26 Miss. 73; *McQuillen v. State*, 8 Smed. & M. (Miss.) 587; *Lee v. State*, 45 Miss. 117; *Brantley v. State*, 13 Smed. & M. (Miss.) 468.

*Missouri.* — *State v. Pate*, 67 Mo. 490.

*Montana.* — *Territory v. Clayton*, 8 Mont. 9; *Territory v. Harding*, 6 Mont. 326.

*Nebraska.* — *Brown v. State*, 9 Neb. 157.

*New Jersey.* — *Gibbs v. State*, 45 N. J. L. 381.

*New Mexico.* — *Territory v. Barrett*, (N. Mex. 1894) 42 Pac. Rep. 66; *Territory v. Armijo*, 7 N. Mex. 571.

*New York.* — *People v. Jewett*, 6 Wend. (N. Y.) 386; *People v. Griffin*, 2 Barb. (N. Y.) 427; *People v. Dolan*, 6 Hun (N. Y.) 232, 64 N. Y. 485.

*North Carolina.* — *State v. Seaborn*, 4 Dev. L. (N. Car.) 305; *State v. Underwood*, 6 Ired. L. (N. Car.) 96; *State v. Martin*, 2 Ired. L. (N. Car.) 101.

*Ohio.* — *Turk v. State*, 7 Ohio, pt. ii, 242; *Parks v. State*, 4 Ohio St. 234.

*Oklahoma.* — *Stanley v. U. S.*, 1 Okla. 336.

*Pennsylvania.* — *Com. v. Salter*, 2 Pearson (Pa.) 462; *Com. v. Chauncey*, 2 Ashm. (Pa.) 101; *Com. v. Windish*, 176 Pa. St. 167.

*Rhode Island.* — *State v. Maloney*, 12 R. I. 251.

*Tennessee.* — *McTigue v. State*, 4 Baxt. (Tenn.) 313; *Ellis v. State*, 92 Tenn. 85; *Dyer v. State*, 11 Lea (Tenn.) 510, wherein it was held that a plea in abatement is waived by going to trial without action thereon; *Epperson v. State*, 5 Lea (Tenn.) 291.

*Texas.* — *Lienburger v. State*, (Tex. rim. App. 1893) 21 S. W. Rep. 603; *State v. Vahl*, 20 Tex. 779.

*Vermont.* — *State v. Ward*, 60 Vt. 142.

*Virginia.* — *Early v. Com.*, 86 Va.

921; *Curtis v. Com.*, 87 Va. 592; *Taylor v. Com.*, 90 Va. 109.

*United States.* — *U. S. v. Gale*, 109 U. S. 65; *In re Wilson*, 140 U. S. 581.

**Change of Venue.** — The defendant waives an objection on account of a disqualification of a grand juror or the mode of constituting the grand jury by pleading to the merits and obtaining a change of venue. *Cooper v. State*, 120 Ind. 380; *Deitz v. State*, 123 Ind. 86.

**Impossibility of Compliance with Statute.** — A statute providing that a plea in abatement, on the ground that the grand jurors by whom it was found were not drawn in the presence of the officers designated by law, must be filed at the term at which the indictment is found was construed to justify a departure from its strict letter to the extent of holding that such a plea is in time if filed at the first term at which it could be filed after the defendant is informed of the existence of the prosecution by arrest under a *capias* on the indictment. *Nixon v. State*, 68 Ala. 536; *Russell v. State*, 33 Ala. 366.

**Motion to Quash.** — The same ruling in effect has been made under a statute requiring a motion to quash to be made on the first day of the term, when the indictment is returned after that time. *State v. Taylor*, 43 La. Ann. 1131; *State v. Collins*, 48 La. Ann. 1454.

**Withdrawal of Plea in Bar.** — The court may in its discretion permit the withdrawal of a plea to the merits for the purpose of hearing a motion to quash for objections to the grand jury. *State v. Collyer*, 17 Nev. 275. See, to the same effect, *State v. Gardner*, 104 N. Car. 739.

1. See cases cited in the preceding note; and see article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153.

In *Stewart v. State*, 13 Ark. 744, the court said: "The distinction would seem to be that the objections to a grand juror, or to the array, which must be pleaded in abatement and are waived by pleading to the indictment, are such as do not appear upon the record of the court, and have to be brought to its notice by plea."

2. *Easterling v. State*, 35 Miss. 212. See also, *supra*, II. 3. *e. Presumption or Record Evidence of Legal Organization.*

*b. MANNER OF OBJECTING.*—But the manner of raising various objections is not the same in all jurisdictions, and the extent of the foregoing rule as to waiver is more or less dependent upon local practice.<sup>1</sup> Thus an objection on account of the defective organization of the grand jury is altogether precluded where a challenge to the array is not permitted.<sup>2</sup>

**Challenge** to the array when the objection is to the panel, or to the polls when the objection is to the individual juror,<sup>3</sup> is generally an available manner of raising such objections, as at common law.<sup>4</sup>

**Plea in Abatement or Motion.**—While the challenge is the general right of one who is held to answer at the time the grand jury is drawn,<sup>5</sup> it is not the exclusive method of objection, and in the absence of a restraining statute such objections may be presented by a plea in abatement,<sup>6</sup> or a motion of that

1. Thus if an objection may be taken by plea in abatement to the indictment, of course it is taken after the jury is organized and before pleading, *State v. Carver*, 49 Me. 588; but when it must be taken by challenge, while the challenge is made before pleading, it is also made before the indictment is found, and could not come at the time when a plea in abatement might be filed. *Thomason v. State*, 2 Tex. App. 556.

2. *State v. Fitzhugh*, 2 Oregon 227; *People v. Hooghkerk*, 96 N. Y. 149; *People v. Petrea*, 92 N. Y. 128; *People v. Sebring*, 14 Misc. Rep. (N. Y. Supreme Ct.) 31; U. S. v. Reed, 2 Blatchf. (U. S.) 435 [approved in U. S. v. Tallman, 10 Blatchf. (U. S.) 21], wherein the determination of the court was that the state statute adopted by the federal statute, having taken away the right of challenging the array, by implication takes away the right to raise the objection in any form; U. S. v. Tuska, 14 Blatchf. (U. S.) 5; *People v. Lauder*, 82 Mich. 109. See also *supra*, II. 3. *Selecting, Summoning, and Impaneling*.

3. **Challenge to Array or Polls.**—The challenge to array is before the jurors have been interrogated respecting their qualifications, and a particular grand juror is challenged after the qualifications of the grand jurors have been thus tested. *Grant v. State*, 2 Tex. App. 164.

4. 2 Hawk. P. C., c. 25, § 16.

5. **Peremptory Challenges** are not allowed. *Jones v. State*, 2 Blackf. (Ind.) 475.

**Statutory Grounds of Objection.**—The

objections must be confined to those specified by statute. *Baker v. State*, 58 Ark. 513; *Hudspeth v. State*, 50 Ark. 534; *People v. Southwell*, 46 Cal. 142; *People v. Lauder*, 82 Mich. 109; *Logan v. State*, 50 Miss. 269; *Nichols v. State*, 46 Miss. 286; *Lee v. State*, 45 Miss. 117; *State v. Holcomb*, 86 Mo. 376; *State v. Williamson*, 106 Mo. 162; *State v. Turlington*, 102 Mo. 642; *Territory v. Hart*, 7 Mont. 48; *Territory v. Clayton*, 8 Mont. 8; *State v. Collyer*, 17 Nev. 275; *Kemp v. State*, 11 Tex. App. 174.

But in the absence of statute it has been intimated that a challenge to a grand juror may be allowed for any cause for which it could be interposed to a petit juror. *State v. Gillick*, 7 Iowa 287.

**Federal Following State Practice.**—Federal courts have the right to, and should, apply the law of the state in which the court is held, when it is not in conflict with a positive federal statute, upon questions relating to objections to grand juries. U. S. v. Eagan, 30 Fed. Rep. 609; U. S. v. Clune, 62 Fed. Rep. 798; *Peters v. U. S.*, 2 Okla. 138; *Stanley v. U. S.*, 1 Okla. 336.

6. *Alabama.*—*Shaw v. State*, 18 Ala. 550; *State v. Pile*, 5 Ala. 74; *State v. Williams*, 3 Stew. (Ala.) 461; *Collier v. State*, 2 Stew. (Ala.) 392.

*Arkansas.*—*Brown v. State*, 12 Ark. 623; *State v. Brown*, 10 Ark. 78; *Brown v. State*, 10 Ark. 607; *Miller v. State*, 40 Ark. 492; *Shropshire v. State*, 12 Ark. 190; *Fenalty v. State*, 12 Ark. 630; *Stewart v. State*, 13 Ark. 744; *Straughan v. State*, 16 Ark. 41; *Brown v. State*, 13 Ark. 96.



nature.<sup>1</sup> In some cases the plea in abatement seems to be regarded as proper, even though the defendant was held to

*Florida.* — Reynolds *v.* State, 33 Fla. 301; Potsdamer *v.* State, 17 Fla. 896; Tervin *v.* State, 37 Fla. 396; Jones *v.* State, 18 Fla. 890; Woodward *v.* State, 33 Fla. 514.

*Georgia.* — Williams *v.* State, 60 Ga. 88.

*Indiana.* — Vattier *v.* State, 4 Blackf. (Ind.) 73; State *v.* Herndon, 5 Blackf. (Ind.) 75; State *v.* Freeman, 6 Blackf. (Ind.) 248.

*Maine.* — State *v.* Clough, 49 Me. 573; State *v.* Symonds, 36 Me. 128; State *v.* Carver, 49 Me. 588.

*Mississippi.* — Rawls *v.* State, 8 Smed. & M. (Miss.) 606; Beason *v.* State, 34 Miss. 602; State *v.* Borroum, 25 Miss. 203; Barney *v.* State, 12 Smed. & M. (Miss.) 68; McQuillen *v.* State, 8 Smed. & M. (Miss.) 587; Green *v.* State, 28 Miss. 687, citing Leathers *v.* State, 26 Miss. 73.

*Nebraska.* — Baldwin *v.* State, 12 Neb. 61.

*Ohio.* — Parks *v.* State, 4 Ohio St. 234.

*Rhode Island.* — State *v.* Malone, 12 R. I. 251; State *v.* Davis, 12 R. I. 492.

*Tennessee.* — Dyer *v.* State, 11 Lea (Tenn.) 510; Epperson *v.* State, 5 Lea (Tenn.) 291.

*Vermont.* — State *v.* Ward, 60 Vt. 142.

*Virginia.* — Early *v.* Com., 86 Va. 921; Taylor *v.* Com., 90 Va. 109.

**Sufficiency of Plea.** — The greatest accuracy and precision are required in pleas in abatement setting up irregularities in the selection or drawing of jurors, and such pleas must be free from uncertainty and ambiguity. Reeves *v.* State, 29 Fla. 527; Shepherd *v.* State, 36 Fla. 374; Woodward *v.* State, 33 Fla. 514; Tervin *v.* State, 37 Fla. 396; Dyer *v.* State, 11 Lea (Tenn.) 510; Epperson *v.* State, 5 Lea (Tenn.) 291.

A plea in abatement to an indictment on the ground that the grand jury was not lawfully selected, chosen, and impaneled must state the facts constituting such illegality. Baldwin *v.* State, 12 Neb. 61; State *v.* Duggan, 15 R. I. 412.

**Trial of Issues** on pleas in abatement setting up irregularities in drawing jurors, or incompetency of jurors, should be by the jury, Woodward *v.* State, 33 Fla. 508; Day *v.* Com., 2

Gratt. (Va.) 562; but when the questions raised are matters of record they are tried by the court. State *v.* Martin, 38 W. Va. 568.

**Waiver of Plea.** — A plea in abatement raising objections to the manner of organizing the jury, or to the qualifications of grand jurors, is waived by going to trial without action thereon. Dyer *v.* State, 11 Lea (Tenn.) 510; Epperson *v.* State, 5 Lea (Tenn.) 291.

**1. Motion to Quash Indictment.** — Stone *v.* People, 3 Ill. 326; State *v.* Strickland, 41 La. Ann. 513; State *v.* Taylor, 43 La. Ann. 1131; State *v.* Clavery, 43 La. Ann. 1133; State *v.* Rowland, 36 La. Ann. 193; State *v.* Gardner, 104 N. Car. 739; State *v.* Durham Fertilizer Co., 111 N. Car. 658; State *v.* Griffice, 74 N. Car. 317; Gibbs *v.* State, 45 N. J. L. 380, holding that the motion to quash was the only method of raising proper grounds of challenge, *distinguishing* State *v.* Rockafellow, 6 N. J. L. 332, in that the only question in the latter case related to the subject matter of the objection, and not to the manner of raising it. See also State *v.* Haywood, 73 N. Car. 437.

But the propriety of a motion to quash, or a plea in abatement, respectively, may depend upon the fact whether or not the defect appears in the record. State *v.* Maloney, 12 R. I. 252; State *v.* Foster, 9 Tex. 65.

*Contra*, as to the propriety of a motion to quash, Bell *v.* State, 42 Ind. 335; Ford *v.* State, 112 Ind. 377; Bellair *v.* State, 6 Blackf. (Ind.) 104; State *v.* Hensley, 7 Blackf. (Ind.) 324; State *v.* Bolt, 7 Blackf. (Ind.) 19; Willey *v.* State, 46 Ind. 363; Tervin *v.* State, 37 Fla. 396; Gladden *v.* State, 13 Fla. 623.

**Motion Taken as Challenge.** — In *Nevada* it was held that while a motion to quash was not the proper method, yet the court could take it as a challenge if it was based upon the ground allowed for challenge. State *v.* Collyer, 17 Nev. 275.

**Motion to Set Aside Indictment.** — Territory *v.* Pratt, 6 Dakota 483. Irregularities in the formation of the grand jury cannot be considered on a motion to set aside an indictment, such a motion being directed only to irregularities in the proceedings of the grand jury, People *v.* Goldenson, 76 Cal. 328; but such a motion was held proper in

answer ;<sup>1</sup> and where the defendant has not been bound over to answer it is held that he may plead in abatement or move to set aside the indictment, as the case may be, since he could not have challenged before impanelment,<sup>2</sup> but the mode of objection is sometimes expressly confined to a challenge as prescribed by statute.<sup>3</sup>

*Kentucky*, Haggard *v.* Com., 79 Ky. 366; and see, where such a motion is proper on behalf of one not held to answer, for the purpose of taking advantage of grounds of challenge, *State v. Russell*, 90 Iowa 569; *People v. Travers*, 88 Cal. 233; *Territory v. Staples*, 2 Idaho 778; *State v. Larkin*, 11 Nev. 324.

**Motion to Quash Venire.** — *State v. Collins*, 48 La. Ann. 1454. Reference should also be had to the statutes, as the grounds as well as the manner of raising objections to the grand jury are often designated therein.

1. *State v. Clarissa*, 11 Ala. 57; *State v. Ward*, 60 Vt. 142.

2. *Alabama*. — *Russell v. State*, 33 Ala. 366.

*Arkansas*. — *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 4.

*California*. — *People v. Travers*, 88 Cal. 233; *People v. Beatty*, 14 Cal. 571.

*Georgia*. — *Turner v. State*, 78 Ga. 177.

*Indiana*. — *Mershon v. State*, 51 Ind. 14; *McClary v. State*, 75 Ind. 260; *Pointer v. State*, 89 Ind. 257; *Miller v. State*, 69 Ind. 284; *Meiers v. State*, 56 Ind. 336; *Ford v. State*, 112 Ind. 377; *Hardin v. State*, 22 Ind. 347.

*Iowa* — *Dutell v. State*, 4 Greene (Iowa) 125; *Norris' House v. State*, 3 Greene (Iowa) 513; *State v. Russell*, 90 Iowa 569.

*Nevada*. — *State v. Larkin*, 11 Nev. 324.

*Wisconsin*. — *Lask v. U. S.*, 1 Pin. (Wis.) 78.

*United States*. — *U. S. v. Clune*, 62 Fed. Rep. 799.

**Refusal to Exercise Privilege.** — Where it appears that at the time the grand jury was impaneled the defendant was not held to answer before it, but under the statute and according to the ruling of the court he had the privilege of moving to set aside the indictment on any ground which would have been a good ground of challenge, either to the panel or to the individual grand juror, if he refuses to exercise his privilege he is not in a position to complain of the ruling of the court in refusing to sus-

tain his motion to set aside the indictment because he was not allowed the privilege of challenging the panel or individual members of the grand jury under the circumstances under which he was held. *State v. Larkin*, 11 Nev. 324.

**Sufficiency of Plea in Abatement.** — A plea in abatement must show why challenge was not made. *Mershon v. State*, 51 Ind. 14; *McClary v. State*, 75 Ind. 260; *Pointer v. State*, 89 Ind. 257.

**Proof in Support of Motion.** — When a defendant is arrested after finding of indictment, in order to avail himself of the benefits of a statute providing that "the indictment must be set aside by the court in which the defendant is arraigned, upon his motion in either of the following cases: \* \* \* [and] when the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror," it is incumbent that the facts set forth in his motion should be supported by proof, at least to the extent of the defendant's oath or verification. *State v. Hardy*, (Idaho 1895) 42 Pac. Rep. 507.

3. *Logan v. State*, 50 Miss. 269; *Lee v. State*, 45 Miss. 117; *Durrah v. State*, 44 Miss. 789; *Head v. State*, 44 Miss. 731; *Nichols v. State*, 46 Miss. 286; *State v. Welch*, 33 Mo. 33; *State v. Bleekley*, 18 Mo. 428; *State v. Connell*, 49 Mo. 286 [followed in *State v. Brown*, 64 Mo. 370]; *State v. Greenman*, 23 Minn. 211, holding that it was intended by the legislature that objections to the panel or to individual grand jurors should be made by challenge at the time of impaneling the jury, at least when they are made by one who has the right and opportunity to challenge, as where the person is held to answer at the term, but the court expressly refrained from deciding whether one not so held could move to set aside the indictment, because the defendant in the particular case was actually held and waived the objection by not challeng-

c. **QUALIFICATIONS OF GRAND JURORS.** — Some early decisions tend to the conclusion that an objection to the qualification of an individual grand juror cannot be taken after indictment found,<sup>1</sup> but the rule has been held otherwise in many cases, especially where the defendant was not held to answer.<sup>2</sup>

ing the panel; *State v. Davis*, 22 Minn. 425, holding that the right to interpose a challenge to the panel of the grand jury or any member thereof is secured by the statute only to persons who are held to answer, but it does not appear in this case how an objection might be made by one who is not so held.

In *Texas*, before the code, objection to the competency of individual members of the grand jury could be taken by plea in abatement, *Vanhook v. State*, 12 Tex. 253; *Martin v. State*, 22 Tex. 214; but since the adoption of the Code of Criminal Procedure, all objections to the organization of the grand jury, unless they are made in the challenge allowed at the time of its organization, or come strictly under the motion to set aside an indictment after it is found, are cut off. *Newman v. State*, 43 Tex. 529; *Thomason v. State*, 2 Tex. App. 556; *Reed v. State*, 1 Tex. App. 3; *Mahl v. State*, 1 Tex. App. 127; *Lacy v. State*, 31 Tex. Crim. Rep. 78; *Owens v. State*, 25 Tex. App. 552; *Lienburger v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 603.

**Particular Objection for Persons Held.** — A statute allowing to a person held to answer a charge an objection as a ground of challenge because one of the persons is the complaining witness against him applies only to a person held to answer. *Baker v. State*, 58 Ark. 513; *Hudspeth v. State*, 50 Ark. 534.

1. *People v. Jewett*, 6 Wend. (N. Y.) 386; *Com. v. Smith*, 9 Mass. 107.

2. *Alabama*. — *State v. Middleton*, 5 Port. (Ala.) 484.

*Florida*. — *Kitrol v. State*, 9 Fla. 9; *Reynolds v. State*, 33 Fla. 301.

*Georgia*. — *Reich v. State*, 53 Ga. 73.

*Louisiana*. — *State v. Thompson*, 28 La. Ann. 187; *State v. Rowland*, 36 La. Ann. 193.

*Maine*. — *State v. Carver*, 49 Me. 588.

*Mississippi*. — *Beason v. State*, 34 Miss. 602; *Barney v. State*, 12 Smed. & M. (Miss.) 68; *Rawls v. State*, 8 Smed. & M. (Miss.) 606.

*New Jersey*. — *Gibbs v. State*, 45 N. J.

L. 384; *State v. Rockafellow*, 6 N. J. L. 332.

*Ohio*. — *Huling v. State*, 17 Ohio St. 588; *Parks v. State*, 4 Ohio St. 234.

*Rhode Island*. — *State v. Davis*, 12 R. I. 492.

*Tennessee*. — *Dyer v. State*, 11 Lea (Tenn.) 510; *Epperson v. State*, 5 Lea (Tenn.) 291; *State v. Duncan*, 7 Yerg. (Tenn.) 271.

*Texas*. — *Stanley v. State*, 16 Tex. 557; *Vanhook v. State*, 12 Tex. 252; *Jackson v. State*, 11 Tex. 261; *Martin v. State*, 22 Tex. 214.

*Virginia*. — *Com. v. Long*, 2 Va. Cas. 318; *Day v. Com.*, 2 Gratt. (Va.) 562.

*Wisconsin*. — *State v. Cole*, 17 Wis. 674.

*United States*. — *U. S. v. Hammond*, 2 Woods (U. S.) 197.

And it is said that the better opinion seems to be, and the current of authority is, to the effect that irregularities in selecting and impaneling grand jurors which do not go to their incompetency can only be objected to by way of challenge, but that their individual incompetency may be pleaded in abatement to the indictment. *Huling v. State*, 17 Ohio St. 588; *U. S. v. Williams*, 1 Dill. (U. S.) 491.

On the other hand, the right is sometimes dependent upon the fact whether the defendant had an earlier opportunity to object, as by being held to answer when the jury was impaneled, *Ford v. State*, 112 Ind. 377; *Hardin v. State*, 22 Ind. 347; *State v. Gibbs*, 39 Iowa 318; *Territory v. Harding*, 6 Mont. 326; and the disqualification referred to in the statement of Chitty (1 Chitty's Crim. Law 309), that if a disqualified juror be returned "he may be challenged by the prisoner before the bill is presented, or if it be discovered after the finding, the defendant may plead it in avoidance," etc., means that which is pronounced by statute and absolutely disqualifies, such as alienage, etc., and which would constitute cause of principal challenge as distinguished from challenge to the favor arising from bias, interest, etc. *U. S. v. Williams*, 1 Dill. (U. S.) 491. See also *Territory*

*d.* RIGHT TO CHALLENGE AND WHEN TO EXERCISE IT. — On the other hand, when the defendant is held to answer he is entitled to challenge, and his right cannot be denied him<sup>1</sup> unless he waives it; but the challenge being, under such circumstances, his only remedy in many states, he must take advantage of his privilege in proper time or his right will be waived,<sup>2</sup> even if, at

*v. Leyba*, (N. Mex. 1897) 47 Pac. Rep. 718; *Patrick v. State*, 16 Neb. 330; *Williams v. State*, 69 Ga. 12; *Lee v. State*, 69 Ga. 705; *Lascalles v. State*, 90 Ga. 347.

**Objection Removed by Statute.** — It is sometimes expressly provided that no presentment or indictment shall be abated on account of the incompetency or disqualification of one or more of the grand jurors who found the same. *State v. Henderson*, 29 W. Va. 147; *State v. Martin*, 38 W. Va. 568.

1. *People v. Romero*, 18 Cal. 94; *People v. Wintermute*, 1 Dakota 63; *State v. Osborne*, 61 Iowa 330; *Territory v. Ingersoll*, 3 Mont. 454; *Maher v. State*, 3 Minn. 446.

**Term to Which Defendant Bound Over.**

— Where a person accused of crime was bound over to a future term, and a grand jury was impaneled at the term when he was so bound over, the defendant was deprived of his right to challenge. *Territory v. Ingersoll*, 3 Mont. 454.

And in *Iowa*, where a person was held to appear at a future term, he was said to have no right to challenge the grand jury which was then in session, and which examined the charge of its own motion and found the indictment. *State v. Chambers*, 87 Iowa 1.

**Substitution.** — A judgment will not be reversed because subsequent to the formation of the grand jury one of the jurors was excused and another substituted, the defendant having no opportunity to exercise his right of challenge, when it does not appear that the new juror was disqualified or that the defendant was prejudiced. *State v. Fowler*, 52 Iowa 103.

**Presence of Defendant.** — The right of challenging an individual grand juror may be exercised or waived by defendant's attorney in the absence of defendant, at least where it does not appear that there was any good ground of challenge, in which case the error, if any, in forming the grand jury in defendant's absence will be without prejudice. *State v. Felter*, 25 Iowa 67.

**Defendant Confined in Jail.** — It is no excuse for failing to challenge the panel of the grand jury that the defendant was confined in jail and had no opportunity to do so, but the accused must demand to be brought into court to exercise his privilege. *People v. Romero*, 18 Cal. 94; *Maher v. State*, 3 Minn. 444; *State v. Hoyt*, 13 Minn. 132; *Hudspeth v. State*, 50 Ark. 534; *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 3; *Kemp v. State*, 11 Tex. App. 174; *Brown v. State*, 32 Tex. Crim. Rep. 119; *Webb v. State*, (Tex. Crim. App. 1897) 40 S. W. Rep. 989.

**Must Show Statutory Ground.** — The party who seeks to have an indictment abated because he had no opportunity to challenge must show the existence of the statutory ground of challenge. *State v. Holcomb*, 86 Mo. 376; *State v. Williamson*, 106 Mo. 162; *State v. Turlington*, 102 Mo. 642.

2. *California.* — *People v. Colmere*, 23 Cal. 631; *People v. Beatty*, 14 Cal. 566; *People v. Hidden*, 32 Cal. 445; *People v. Stacey*, 34 Cal. 308; *People v. Henderson*, 28 Cal. 465.

*Iowa.* — *State v. Dixon*, 3 Iowa 416; *State v. Hinkle*, 6 Iowa 380; *State v. Ingalls*, 17 Iowa 8; *State v. Gibbs*, 39 Iowa 318; *State v. Klingman*, 14 Iowa 404; *Ringgold County v. Ross*, 40 Iowa 176; *State v. Harris*, 38 Iowa 242; *State v. Howard*, 10 Iowa 101; *State v. Pierce*, 90 Iowa 506.

*Montana.* — *Territory v. Clayton*, 8 Mont. 9.

*Nebraska.* — *Patrick v. State*, 16 Neb. 330.

*United States.* — *In re Wilson*, 140 U. S. 581.

See also cases cited in the two preceding notes.

**Before Impaneling.** — Challenge must generally be made before the jury is impaneled, as is indicated by the authorities heretofore cited under this title, touching the necessity of using this method of objecting, which are in the main under statutory provisions.

*But in the Absence of Statute* the question is not a well-settled one. *Musick*

the time of his privilege, he did not know of the existence of the objections.<sup>1</sup>

*e.* WHO MAY CHALLENGE. — A challenge may be interposed by any person held to answer.<sup>2</sup> But only the accused can take advantage of any want of legal sufficiency in the grand jury, and he must appear for that purpose.<sup>3</sup>

*f.* PROCEEDINGS BEFORE GRAND JURY. — Objections for irregularities in the proceedings of grand jurors are variously taken by motion to set aside,<sup>4</sup> motion to quash,<sup>5</sup> or plea in abatement.<sup>6</sup>

**III. RETURN OF INDICTMENT BY GRAND JURY — 1. Necessity.** — An indictment must be returned into open court by the grand jury and in the presence of its members.<sup>7</sup>

*v. People*, 40 Ill. 271, intimating that at common law the challenge may be interposed at any time before indictment found. But in *State v. Clarissa*, 11 Ala. 57, challenge was not allowed after jury sworn, but defendant was left to plead in abatement.

**Before Jury Retires.** — Challenge may be made under statutory permission at any time before the jury retires. *People v. Wintermute*, 1 Dakota 63.

**Deferring Action on Challenge.** — The action of the court in indorsing on the challenge to the grand jury the words "filed subject to argument on face of papers," and in making similar indorsement on other papers connected with the challenge, only signifies that the court withheld immediate action, and not that the accused was concluded thereby. *Murray v. Louisiana*, 163 U. S. 106.

1. *Territory v. Harding*, 6 Mont. 326.

2. *Hudson v. State*, 1 Blackf. (Ind.) 317; *Ross v. State*, 1 Blackf. (Ind.) 390; *Musick v. People*, 40 Ill. 268; *Thayer v. People*, 2 Dougl. (Mich.) 417; *Lee v. State*, 45 Miss. 117; 2 Hawk. P. C., 25; § 16.

3. *State v. Borroum*, 25 Miss. 203.

**The Prosecution** has no right to challenge without statutory authority. *Keitler v. State*, 4 Greene (Iowa) 291. See also *Clawson v. U. S.*, 114 U. S. 477.

**A Mere Statement by the Defendant's Counsel** upon the calling of the grand jury is not sufficient evidence that the defendant was under prosecution at the time of the challenge to the array. *Hudson v. State*, 1 Blackf. (Ind.) 317.

**Sureties on Recognizance** have no right, it is said, to take advantage of any want of legal sufficiency in the grand jury. *State v. Borroum*, 25 Miss. 203.

**Amicus Curiae.** — It has been said that before indictment found, the court may receive objections from any person present, as *amicus curiae*. *Com. v. Smith*, 9 Mass. 110.

4. *Territory v. Staples*, 2 Idaho 778; *State v. Fertig*, (Iowa 1896) 67 N. W. Rep. 87; *State v. Kimball*, 29 Iowa 267; *Lacy v. State*, 31 Tex. Crim. Rep. 78; *Doss v. State*, 28 Tex. App. 506; *State v. Froiseth*, 16 Minn. 296. But see *State v. Will*, (Iowa 1896) 65 N. W. Rep. 1011, where a motion to quash was sustained.

5. *People v. Price*, (Albany County Ct. Sess.) 6 N. Y. Crim. Rep. 141; *People v. Moore*, 65 How. Pr. (Niagara Oyer & T. Ct.) 177.

In *Jillard v. Com.*, 26 Pa. St. 170, the defendant pleaded specially to the indictment that certain witnesses whose names were not marked upon the indictment had been sworn and examined by the grand jury. A demurrer to this plea was sustained, and it was held that such irregularity of the grand jury was not pleadable in bar, and at most was only a ground for a motion to quash, because if such matter were pleadable it would be a novelty in criminal trials to send a traverse jury, summoned only to try the case, to inquire whether the indictment had been found with due regard to prescribed forms.

6. *Lawrence v. Com.*, 86 Va. 573; *Pointer v. State*, 89 Ind. 255; *Durr v. State*, 53 Miss. 427, wherein a motion to quash is expressly disapproved.

**Sufficiency of Plea.** — A plea in abatement on the ground that there was illegality in the proceedings of the grand jury must certainly negative any probability of legality on the particular point. *Lawrence v. Com.*, 86 Va. 573.

7. *Arkansas*. — *Felker v. State*, 54

**2. Record of Return — a. IN GENERAL.** — The Record Must Show that the Indictment Was Returned into court by the grand jury,<sup>1</sup> either

Ark. 489; *McKenzie v. State*, 24 Ark. 636.

*Colorado*. — *Thornell v. People*, 11 Colo. 307.

*Florida*. — *Goodson v. State*, 29 Fla. 511.

*Illinois*. — *Gardner v. People*, 20 Ill. 430; *Sattler v. People*, 59 Ill. 68; *Yundt v. People*, 65 Ill. 372; *Aylesworth v. People*, 65 Ill. 301; *Kelly v. People*, 39 Ill. 157.

*Indiana*. — *Padgett v. State*, 103 Ind. 550.

*Iowa*. — *Harriman v. State*, 2 Greene (Iowa) 278.

*Louisiana*. — *State v. Pitts*, 39 La. Ann. 914.

*Mississippi*. — *Goodwyn v. State*, 4 Smed. & M. (Miss.) 535; *Cachute v. State*, 50 Miss. 169; *Laura v. State*, 26 Miss. 174.

*New Hampshire*. — *State v. Squire*, 10 N. H. 558.

*Texas*. — *Hardy v. State*, 1 Tex. App. 556.

*United States*. — *U. S. v. Levally*, 36 Fed. Rep. 687.

**The Jury Must Be in Court** when the bill is returned. *State v. Cox*, 6 Ired. L. (N. Car.) 445; *State v. Squire*, 10 N. H. 558. And to ascertain that they are present they ought always to be called by the clerk. *State v. Cox*, 6 Ired. L. (N. Car.) 445.

**Presence of Less than Whole Number.** — In *Russell v. State*, 33 Ala. 370, conceding without deciding that the presence of less than twelve of the grand jury at the time the indictment is returned to the court is an objection available otherwise than by plea in abatement, it was held that the presence of less than the prescribed number would not be presumed when the record asserts that the grand jury returned the indictment into court, and nothing is disclosed in the record to contradict the conclusion that twelve of the grand jury were present.

But in *Texas*, where a less number than the twelve organized as a jury constitute a quorum to perform the functions of the grand jury, it is no objection to an indictment that only eleven members of the grand jury were present when it was returned, one member of the grand jury having been irregularly excused. *Watts v. State*, 22 Tex. App. 572; *Smith v. State*, 19 Tex. App. 95.

**By Whom Presented.** — It will not affect the further proceedings that an indictment is presented by a member of the grand jury other than the foreman. *Laurent v. State*, 1 Kan. 313. —

**Return by Bailiff or Solicitor-General.** — It was held in *Georgia* that a sworn bailiff of the grand jury was competent to make such return. *Davis v. State*, 74 Ga. 870; *Danforth v. State*, 75 Ga. 614. But the solicitor-general cannot perform this function of the grand jury. *Bowen v. State*, 81 Ga. 483, holding further that *Davis v. State*, 74 Ga. 870, and *Danforth v. State*, 75 Ga. 614, above cited, go quite far enough.

**Competency of Presiding Judge.** — Objection that the judge who ordered the indictment spread upon the minutes and who presided when the indictment was found was incompetent is not well taken, because such acts are merely ministerial and in no way affect the interest of the prisoner. *Glasgow v. State*, 9 Baxt. (Tenn.) 486.

1. *Arkansas*. — *Green v. State*, 19 Ark. 178; *Felker v. State*, 54 Ark. 489.

*Colorado*. — *Thornell v. People*, 11 Colo. 307.

*Florida*. — *Goodson v. State*, 29 Fla. 511; *Johnson v. State*, 24 Fla. 162.

*Illinois*. — *Yundt v. People*, 65 Ill. 372; *Sattler v. People*, 59 Ill. 68; *Kelly v. People*, 39 Ill. 157; *Gardner v. People*, 20 Ill. 430; *Aylesworth v. People*, 65 Ill. 301; *Gardner v. People*, 4 Ill. 83; *Rainey v. People*, 8 Ill. 71; *McKinney v. People*, 7 Ill. 540.

*Indiana*. — *Jackson v. State*, 21 Ind. 79; *Conner v. State*, 19 Ind. 98.

*Louisiana*. — *State v. Pitts*, 39 La. Ann. 914; *State v. Sandoz*, 37 La. Ann. 376; *State v. Shields*, 33 La. Ann. 991.

*Mississippi*. — *Jenkins v. State*, 30 Miss. 408; *Laura v. State*, 26 Miss. 174; *Hague v. State*, 34 Miss. 616; *Cachute v. State*, 50 Miss. 169; *Friar v. State*, 3 How. (Miss.) 422; *Goodwyn v. State*, 4 Smed & M. (Miss.) 535.

*Tennessee*. — *Blevins v. State*, Meigs (Tenn.) 82; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Chappel v. State*, 8 Yerg. (Tenn.) 166; *Brown v. State*, 7 Humph. (Tenn.) 155.

*Virginia*. — *Com. v. Cawood*, 2 Va. Cas. 527.

**After Resubmission.** — Where an indictment has been withdrawn and re-committed by the court to the grand

by a minute entry made at the time of the return,<sup>1</sup> or by an indorsement of the fact upon the indictment itself,<sup>2</sup> and an omis-

jury the record must show that it was returned the second time, and the indorsement "a true bill" cannot be regarded as evidence of the fact that the indictment was returned a second time. *State v. Davidson*, 2 Coldw. (Tenn.) 186.

**Presentment by Foreman.** — Where the record shows an indictment to have been presented in open court it need not show that it was presented by the foreman of the grand jury. *State v. Freeze*, 30 Mo. App. 347; *State v. Hogan*, 31 Mo. 342. That the record does not show that the indictment was returned into court by the foreman of the grand jury, in accordance with the statute, is an objection which is waived unless taken before plea of not guilty. *Kerr v. State*, 36 Ohio St. 614.

**Indorsement of Presentment by Foreman.** — An indorsement showing that an indictment is presented and filed in open court in the presence of the grand jury is good, notwithstanding a statute requiring the presentment to be made by the foreman. *Wrockledge v. State*, 1 Iowa 167; *State v. Shepard*, 10 Iowa 126; *State v. Jolly*, 7 Iowa 15; *People v. Blackwell*, 27 Cal. 65; and an indorsement not prescribed by law may be corrected. Thus the indorsement that the indictment was presented by "the foreman of the grand," omitting the word "jury," may be corrected by supplying the word. *State v. Harris*, 12 Nev. 418.

1. *Felker v. State*, 54 Ark. 489; *Green v. State*, 19 Ark. 178; *State v. Shields*, 33 La. Ann. 991; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Brown v. State*, 7 Humph. (Tenn.) 155; *Hogan v. State*, 30 Wis. 428.

**At Common Law** there was no room for any presumption of the return of the finding of the grand jury into court in the absence of a record entry. *State v. Beebe*, 17 Minn. 241; *Green v. State*, 19 Ark. 178.

**Distinction between Indictment and Presentment.** — In *State v. Muzingo*, Meigs (Tenn.) 112, it was held that a presentment returned into court by the grand jury became a part of the record when it was filed by the clerk without any minute entry of the fact, but that it was otherwise with an indictment.

**Statutory Enactments Sometimes Control the Question.** — Thus in *Texas* it is provided that "the fact of the present-

ment of an indictment in open court by a grand jury shall be entered upon the proceedings of the court, noting briefly the style of the criminal action and the file number of the indictment, but omitting the name of the defendant unless he is in custody or under bond." *Edglish v. State*, (Tex. App. 1892) 18 S. W. Rep. 678; *Hardy v. State*, 1 Tex. App. 556; *Walker v. State*, 7 Tex. App. 52; *Lynn v. State*, 28 Tex. App. 515.

**2. Sufficiency.** — Great strictness has sometimes been required in the indorsement on an indictment showing the return of the finding of the grand jury. Thus an indorsement on the indictment, "filed in open court," was said to be insufficient because it did not show that the indictment was returned into court by the grand jury. *McKenzie v. State*, 24 Ark. 636; *Green v. State*, 19 Ark. 178. But in other cases less strictness is required, although there must be enough to indicate the proper return. Thus, in the absence of either a record entry or an indorsement on the record, the indictment will be bad on plea in abatement. *Goodson v. State*, 29 Fla. 511. And the indorsement "filed in open court" will be sufficient. *Westcott v. State*, 31 Fla. 458, especially where a minute entry shows that such an indictment has been returned. *Oli-ver v. State*, 38 Fla. 46.

An indictment properly indorsed "a true bill" and filed by the clerk sufficiently appears to have been returned into court by the grand jury. *Mose v. State*, 35 Ala. 427; *McKee v. State*, 82 Ala. 32; *State v. Jolly*, 7 Iowa 15; *State v. Axt*, 6 Iowa 511; *State v. Conlee*, 25 Iowa 237; *State v. Schill*, 27 Iowa 263; *State v. Jones*, 2 Kan. App. 1; *State v. Beebe*, 17 Minn. 241; *Cooper v. State*, 59 Miss. 267; *State v. Lord*, 118 Mo. 1.

In *North Carolina* it was held, one of the judges dissenting, that the recital in the indictment that "the jurors upon their oath present" sufficiently shows that the indictment was presented by the jury in open court, and that proof to the contrary could not be heard on a plea in abatement. *State v. Weaver*, 104 N. Car. 758, citing *State v. Gainus*, 86 N. Car. 632; *State v. Bordeaux*, 93 N. Car. 560.

**Defendant Not in Custody.** — It is sometimes provided by statute that an in-

sion will be fatal.<sup>1</sup> The record should show the identity of the indictment found by the grand jury with that which is contained in the record,<sup>2</sup> and the courts have not often required more than is sufficient to serve this purpose.<sup>3</sup>

dictment shall not be docketed or entered upon the minutes or records of the court until the defendant shall be arrested, and in such a case it would be a violation of the law for the clerk to make an entry on his record on the day the indictment was returned. *State v. Lord*, 118 Mo. 1, citing *State v. Corson*, 12 Mo. 405. But some memorandum must be made, such as noting the fact upon the indictment. *Green v. State*, 19 Ark. 178.

1. See the cases cited in the last two notes.

#### Motion in Arrest — Statutory Grounds.

— In *Indiana* it was held that a motion in arrest on the ground that the record did not show a return of the indictment into open court did not present one of the statutory grounds for such a motion, *Padgett v. State*, 103 Ind. 550; but it was formerly held that a motion in arrest would lie on this ground, *Adams v. State*, 11 Ind. 304, which case, though overruled in *Wall v. State*, 23 Ind. 150, was afterwards cited with apparent approval in *Heacock v. State*, 42 Ind. 393.

**Mere Informalities** in the return will not be good ground for arresting judgment. *Russell v. State*, 33 Ala. 366.

2. *Laura v. State*, 26 Miss. 174; *Cornwell v. State*, 53 Miss. 389; *Collins v. State*, 13 Fla. 657; *Johnson v. State*, 24 Fla. 162; *Mergentheim v. State*, 107 Ind. 567; *Vandyne v. State*, 130 Ind. 26; *Cruiser v. State*, 18 N. J. L. 206.

It must appear with certainty that the indictment upon which the defendant was tried was returned into court, *Cruiser v. State*, 18 N. J. L. 206; and where the record showed the indictment to have been returned at the October term, and the indictment itself copied into the record appeared to have been found at the November term, it was held that a conviction could not stand. *Hague v. State*, 34 Miss. 616.

**Record Entry of Filing.** — Upon an objection that it did not appear that an indictment had been filed, it was held that the following entry: "On the 12th day of October, 1869, the grand jury of said county filed in said Circuit Court of said county aforesaid an indictment in the words and figures following"

was sufficient, because it appears sufficiently clear that the indictment was duly presented and filed under the statute, which has in contemplation, among other things, that the accused shall be tried upon the identical indictment found by the grand jury, and that the indictment is found in the county where the offense is committed. *Lee v. State*, 45 Miss. 117. See also *Hogan v. State*, 30 Wis. 428.

Under a statute requiring the fact of the presentment of the indictment in open court to be entered upon the proceedings of the court, noting the style of the action and the file number of the indictment, etc., the number and style so noted must identify the indictment upon which the defendant is tried. *English v. State*, (Tex. App. 1892) 18 S. W. Rep. 678.

#### There Need Not Be a Separate Record.

**Entry** that each particular item was found and returned a true bill by the grand jury, giving the names of the jurors who found each bill, the indorsement itself being a part of the record. *State v. O'Brien*, 18 R. I. 109; *Turns v. Com.*, 6 Met. (Mass.) 224; *State v. Onnmacht*, 10 La. Ann. 198; *Clare v. State*, 68 Ind. 17; *Engeman v. State*, 54 N. J. L. 247.

**The Nature of the Offense** need not be set out in the minutes. *Tellison v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 1082; *Rowlett v. State*, 23 Tex. App. 191; *Steele v. State*, 19 Tex. App. 425; *De Olles v. State*, 20 Tex. App. 145.

3. *Illinois*. — *Morton v. People*, 47 Ill. 468; *Hughes v. People*, 116 Ill. 330; *Kelly v. People*, 132 Ill. 363.

*Indiana*. — *Adams v. State*, 11 Ind. 304; *Wall v. State*, 23 Ind. 150 [*overruling* *Springer v. State*, 19 Ind. 180]; *Reeves v. State*, 84 Ind. 116; *Willey v. State*, 46 Ind. 363; *Clare v. State*, 68 Ind. 17; *Heath v. State*, 101 Ind. 512; *Epps v. State*, 102 Ind. 539; *Padgett v. State*, 103 Ind. 550.

*Kansas*. — *Millar v. State*, 2 Kan. 174.

*Kentucky*. — *Pearce v. Com.*, (Ky. 1888) 8 S. W. Rep. 893.

*Louisiana*. — *State v. Banks*, 40 La. Ann. 736.



**Amending the Record.** — Where a trial and conviction occur at the same term that the indictment is found, the court may at any time during the term cause entry to be made on the minutes that the indictment was returned into court, together with the date of the return.<sup>1</sup> If the fact is not brought to the notice of the court until the following term, an order *nunc pro tunc* may be entered,<sup>2</sup>

*Mississippi.* — Goodwyn v. State, 4 Smed. & M. (Miss.) 535.

*Tennessee.* — Bennett v. State, 8 Humph. (Tenn.) 118.

See also the preceding notes under this section.

**Manner of Presentment.** — It is not necessary that the record should set out the manner in which the indictment was presented or the memoranda and entries from which the record was made up. State v. Guilford,<sup>3</sup> 4 Jones L. (N. Car.) 83.

**Presumption After Destruction of Record.** — Upon the return of a writ of certiorari to the Supreme Court it appeared that the record entries showing the impaneling of the grand jury and the return by it of the indictment had been destroyed by fire, pending the prosecution, and that therefore the omissions in the transcript as to such facts could not be supplied. It was held that the clerk being authorized by statute to record, in a book kept for that purpose, indictments found by the grand jury and properly returned into court, the legal presumption arising from the fact that the clerk recorded the indictment was that it had been found by the grand jury and properly returned into court, the law presuming, until the contrary is shown, that all officers perform their official duties. Miller v. State, 40 Ark. 493.

1. Franklin v. State, 28 Ala. 12; Bodkin v. State, 20 Ind. 281; State v. Mason, 32 La. Ann. 1018; State v. Willis, 3 Head (Tenn.) 157; Rhodes v. State, 29 Tex. 190.

**New Order Instead of Amendment.** — An order should be entered at the time, and an amendment should not be made by erasing or altering any order previously entered; or if the order is not entered at the time, it should be entered at a subsequent term. Rhodes v. State, 29 Tex. 190.

**Contradiction of Record.** — In Collins v. State, 13 Fla. 654, the defendant offered to show by testimony of the clerk that no record entry upon the minutes as to the action of the grand

jury in open court in reference to the indictment was made by the clerk until several days after the discharge of the grand jury. The court refused to hear such evidence and this action was held to be correct, the court saying: "If it should be admitted that the fact that the grand jury make the presentment in open court should properly be entered by the clerk upon the minutes at the time the grand jury, in open court, by their act, consummate and complete the accusation, it is not perceived how it is error if, being omitted at the time, the court directs it to be done afterwards during the term. The court does not, by this act, add to or take from the acts of the grand jury — it does not thereby create or alter a finding or amend an indictment;" citing, upon the same point, Com. v. Cawood, 2 Va. Cas. 527, wherein it was held that the recording of the action of the grand jury in open court was a ministerial act, and its omission could be supplied by an entry after the term in which the accusation was preferred, and reciting that the intimation in Holton v. State, 2 Fla. 504, to the effect that it may be doubted whether such an entry can be made during the same term after judgment, is entirely unsustained by any authority.

**On Change of Venue.** — In Caldwell v. State, 41 Tex. 91, the defendant was tried on a copy of a lost indictment after a change of venue. After verdict objection was made by a motion in arrest to the validity of the indictment, because the record did not show that the indictment was returned into court by the grand jury, and it was held that had there been any doubt as to the authenticity of the substituted indictment it should have been raised before the change of venue, when the court would have had ample time to ascertain the authenticity of its own records, and, if necessary, to make a complete record of the proceeding from its inception.

2. Green v. State, 19 Ark. 178; Bowen v. State, 81 Ga. 482; Waterman

and it is said that the accused must be present in court when such order is made.<sup>1</sup>

**b. RECORDING AND FILING.** — When an indictment is properly found and returned into court, appropriate record entries are made by the clerk, varying according to the practice in each state. But in all the states such entries, however made, should identify the indictment upon which the defendant is tried.<sup>2</sup> And while an indictment is said to be no part of the minutes of the court, the clerk, in making up a record on appeal of which the minutes and the indictment both form a part, must necessarily connect them in proper sequence.<sup>3</sup> The indictment, when properly pre-

*v. State*, 116 Ind. 51; *Johnson v. State*, 24 Fla. 162; *State v. Willis*, 3 Head (Tenn.) 157, *distinguishing Chappel v. State*, 8 Yerg. (Tenn.) 166, and *Henry v. State*, 4 Humph. (Tenn.) 272, where the objection was taken after trial and sustained, in that the Act of 1852, Code, § 5242, changed the law on this point and obviated the objection.

In *Mississippi* it was held that where the entry on the minutes did not sufficiently identify the indictment upon which the defendant was to be tried, the right of the court at a subsequent term to order a fresh entry depended upon the question whether the defendant was in custody or on bail at the time the indictment was found. *Cornwell v. State*, 53 Miss. 389.

**Certiorari from Supreme Court to Supply Omission.** — In *Miller v. State*, 40 Ark. 492, it is said: "This court has repeatedly decided that the entry showing the impaneling of the grand jury is part of the record in every criminal case prosecuted upon an indictment found by such grand jury, and that on appeal or writ of error, such entry should be copied into the transcript, as well as the record entry showing that the indictment was returned into court by the grand jury. And when such entries do not appear in the transcript, it has been the practice of the court, in favor of life or liberty, to award a certiorari to supply the omission before affirming a judgment of conviction. And if it appeared from the return upon the certiorari that there was no record entry of the impaneling of the grand jury, or of the return of the indictment into court by the grand jury, the practice has been to reverse the judgment of conviction." *Citing Green v. State*, 19 Ark. 178.

1. *Green v. State*, 19 Ark. 178.

2. *Gonzales v. State*, 18 Ind. 90,

where no indictment was in the record nor did it appear that any indictment had been found, and the judgment of conviction was reversed and the defendant discharged.

**Name of Defendant.** — In *Com. v. Snider*, 2 Leigh (Va.) 744, the record showed two indictments against surveyors of roads without naming the surveyors, and it was held that there was not a sufficient finding shown by the record.

**Minutes Showing Date of Finding.** — If it appears from the minutes of the court that a bill of indictment was found in the current year, an entry at the conclusion of the bill giving a date in a future year will be disregarded. *Williams v. State*, 55 Ga. 391.

**Before Arrest of Defendant.** — It is sometimes provided that record entries of the finding and filing of an indictment shall not be made when the defendant is not in custody. *State v. Corson*, 12 Mo. 405. But after arrest such entry should be made. *Cachute v. State*, 50 Miss. 171. And the right to make the entry after arrest will not be affected by the fact that an improper entry was made before arrest. *Cornwell v. State*, 53 Miss. 389; *Cook v. State*, 57 Miss. 654.

3. *Goodwyn v. State*, 4 Smed. & M. (Miss.) 535.

**The Name of the Offense** need not be set out on the minutes. *Rowlett v. State*, 23 Tex. App. 191; *Goodwyn v. State*, 4 Smed. & M. (Miss.) 535. And if the offense is misnamed on the minute book, exception must be taken before pleading, and not for the first time on appeal. *Rowlett v. State*, 23 Tex. App. 191.

**Order of Record.** — In *Cawley v. State*, 37 Ala. 152, an objection was made to the record of conviction because the sentence was copied into the transcript

sented and filed, is itself a part of the record of the court;<sup>1</sup> hence the indorsement "a true bill,"<sup>2</sup> or other indorsement, need not be copied on the record,<sup>3</sup> though it is occasionally the practice to record the finding by noting "a true bill" or "*ignoramus*" on the minutes<sup>4</sup> or on an order book kept for the purpose.<sup>5</sup> It is sometimes provided that indictments shall be spread upon the minutes of the court,<sup>6</sup> or the record made in some other record book of the court,<sup>7</sup> though it has been held unnecessary that the indictment shall appear *in extenso* upon the record, both in those cases where it is sufficient to note merely the finding<sup>8</sup> and in those where provisions exist requiring such copies.<sup>9</sup>

before the indictment, from which it was argued, by inference, that the sentence of the court preceded the finding of the indictment, and that, therefore, the accused was tried and sentenced without an indictment. The court refused to sustain the objection.

1. *Mose v. State*, 35 Ala. 421; *Stewart v. State*, 24 Ind. 142; *Pickrel v. Com.*, (Ky. 1895) 30 S. W. Rep. 617; *Goodwyn v. State*, 4 Smed. & M. (Miss.) 535; *State v. Lord*, 118 Mo. 1; *State v. Grate*, 68 Mo. 22; *State v. Clark*, 18 Mo. 432; *State v. O'Brien*, 18 R. I. 109; *Brown v. State*, 7 Humph. (Tenn.) 155.

2. *State v. Guilford*, 4 Jones L. (N. Car.) 86; *Padgett v. State*, 103 Ind. 553; *Beard v. State*, 57 Ind. 8; *Clare v. State*, 68 Ind. 17; *Greene v. State*, 79 Ind. 537; *State v. Bennett*, 45 La. Ann. 54; and the cases in the preceding note.

**When the Indictment is Spread upon the Minutes**, the failure of the clerk to copy the indorsement thereon, "a true bill," will not vitiate the indictment, it appearing by the record that the indictment was returned into court by the grand jury, and the copy of the original indictment showing that it was properly indorsed "a true bill." *State v. Heron*, 86 Tenn. 442.

3. It is not necessary that the minutes should set out the signature of the foreman and the indorsement "a true bill." *State v. Clay*, 45 La. Ann. 269.

4. *Hopkins v. Com.*, 50 Pa. St. 9.

5. *Simmons v. Com.*, 89 Va. 156, *following* *Com. v. Cawood*, 2 Va. Cas. 527, which asserted the necessity of such a record of the finding, and is said to be the first case in the United States upon the subject of record evidence of the finding of the fact that the grand jury accused the prisoner in open court of the offense charged in the indictment. *Collins v. State*, 13 Fla. 657.

6. *Glasgow v. State*, 9 Baxt. (Tenn.)

486; *Brown v. State*, 7 Humph. (Tenn.) 156.

7. *Courtney v. State*, 5 Ind. App. 356.

**On Change of Venue.** — Under a statute requiring indictments to be recorded the record is made in the court where the indictment is found and not in the court where the trial is had upon a change of venue. *Reed v. State*, 8 Ind. 200, *distinguishing* *Doty v. State*, 7 Blackf. (Ind.) 427, in that the defendant in the latter case had not pleaded to the indictment in the county wherein it was found before the change of venue. But in *Beauchamp v. State*, 6 Blackf. (Ind.) 299, it was held that upon a change of venue the indictment need not be recorded in the court in which it was found.

8. *Hopkins v. Com.*, 50 Pa. St. 9; *Com. v. Tiernan*, 4 Gratt. (Va.) 545. See also *Hodges v. Com.*, 89 Va. 265.

9. **Effect of the Statute.** — A statute requiring indictments to be spread upon the minutes proceeds upon cautionary and conservative grounds to prevent a failure of justice in case of loss or destruction of the original, and not with a view to fixing a higher or exclusive verity to the record from the minutes. *Brown v. State*, 7 Humph. (Tenn.) 156. And the failure to spread an indictment upon the minutes in no way enlarges or diminishes the rights of the defendant. *Glasgow v. State*, 9 Baxt. (Tenn.) 486. And the same is true under provisions for the recording of indictments in a book kept for that purpose. *Heath v. State*, 101 Ind. 512; *Courtney v. State*, 5 Ind. App. 356; *Ransbottom v. State*, 144 Ind. 250; *Reed v. State*, 8 Ind. 200.

**Recording after Term.** — If an indictment is presented and filed on the last day of the term, the provision of the statute relating to the recording of indictments with their indorsements, and the comparison of the record with the

*c.* **INDORSEMENT OF FILING.** — While the clerk's indorsement of the filing and the date of filing is evidence of the fact,<sup>1</sup> a mistake in the indorsement will not invalidate the indictment,<sup>2</sup> and the court may at any time during the term, as well after as before conviction, require the clerk to make the proper indorsement on the indictment and to date such indorsement according to the facts and sign it,<sup>3</sup> or may cause the proper indorsement to be made by an order *nunc pro tunc* at any time, it seems, as the failure of the clerk in this regard does not entitle the defendant

originals before the last day of the term, must be regarded as so far directory that the recording of the indictment at a later day cannot be cause for quashing the indictment. Such a delay does not endanger the accused or prejudice his substantial rights upon the merits. *Courtney v. State*, 5 Ind. App. 367.

1. *Holland v. State*, 60 Miss. 944; *State v. Harris*, 12 Nev. 419.

**Conflict between Indorsement and Body of Indictment.** — Thus the criticism that the indictment, by its averments, shows that it was presented on a day when the court was not in session is fully met by the legal evidence of the indorsement thereon of the finding and presenting to the court, which will control as to the date when the indictment was presented. *Holland v. State*, 60 Miss. 944.

**Indorsement of Date of Finding.** — The indorsement of the date of filing may supply an omission in the indorsement of the date of the finding of an indictment, as it will be presumed that the indictment was filed at the same term at which it was found. *State v. McGuire*, 87 Iowa 142.

**Indorsement Not Made by Hand of Clerk.** — The fact that the entries required to be made on an indictment are not made by the hand of the clerk, but are made by another person in his presence and by his direction, is no objection to the indictment. *Jackson v. State*, 55 Miss. 532.

And where an indictment contained an indorsement of the filing on a certain day, which indorsement was stamped with a rubber stamp impression, including the signature of the clerk, and followed by another indorsement stating that the indictment was returned into court and filed by the clerk, etc., the signature to the latter being in the handwriting of the clerk, it was said that conceding that the stamping of the clerk's name could not

be substituted for a written signature, the defect was cured by the other certificate of filing properly signed. *Lea v. State*, 64 Miss. 300.

2. *Terrell v. State*, 41 Tex. 466, a case of mistake in the date.

**Omission of Date.** — The object of the statute requiring a minute to be made upon an indictment by the clerk of the "true day, month, and year" when the indictment is found is to put it in the power of the court to determine with certainty whether the offense is barred by the statute of limitations. An entry "received and filed this 29th 1838," properly signed by the clerk, is sufficient when from the records of the term it appears that it was of a certain month. *State v. Bartlett*, 11 Vt. 652.

**A Mistake as to the County** in which it was filed will not invalidate an indictment which was in fact presented and filed in the proper county. *State v. Smouse*, 50 Iowa 43.

**Nature of Objection** — *Matter in Abatement.* — A motion to dismiss an indictment because a proper minute had not been made of the date when the indictment was returned into court is matter in abatement, and must be made before a plea of not guilty or it will be deemed to be waived, *State v. Butler*, 17 Vt. 149; if, indeed, such an objection could be made at any time. *Russell v. State*, 33 Ala. 370.

**First Time on Appeal.** — The omission of the clerk to put the usual file mark on an indictment which has been duly presented in open court by the grand jury cannot be made the subject of objection for the first time on appeal. *Willingham v. State*, 21 Fla. 761; *State v. Hughes*, 4 Iowa 554.

**Motion in Arrest.** — Nor can the objection be taken by a motion in arrest of judgment. *Pittman v. State*, 25 Fla. 648; *State v. Coupenhaver*, 39 Mo. 430.

3. *Franklin v. State*, 28 Ala. 12; *Pence v. Com.*, 95 Ky. 618; *Rippey v.*

to be discharged.<sup>1</sup> Statutes requiring such indorsements have, moreover, been held to be merely directory.<sup>2</sup>

**IV. SUPPLYING LOST INDICTMENT BY COPY** — *The General Rule.* — When an indictment which has been duly found and returned into court is lost or destroyed, it may be supplied by a copy and the defendant may be tried on such copy.<sup>3</sup> The right to substitute a copy for a lost indictment has been considered and upheld under statutes for supplying lost records generally, as well as

State, 29 Tex. App. 37; *Boren v. State*, 32 Tex. Crim. Rep. 637.

**Filing in Open Court.** — The filing by the clerk need not be done in open court. *Willey v. State*, 46 Ind. 363.

1. *State v. Clark*, 18 Mo. 433; *State v. Gowen*, 12 Ark. 62.

2. *Stanley v. State*, 88 Ala. 154; *Dawson v. People*, 25 N. Y. 399.

3. *Arkansas*. — *Miller v. State*, 40 Ark. 489.

*Georgia*. — *Branson v. State*, (Ga. 1896) 24 S. E. Rep. 404.

*Iowa*. — *State v. Shank*, 79 Iowa 48; *State v. Rivers*, 58 Iowa 102; *State v. Stevisiger*, 61 Iowa 623.

*Kansas*. — *Millar v. State*, 2 Kan. 175.

*Kentucky*. — *Com. v. Keger*, 1 Duv. (Ky.) 241.

*Louisiana*. — *State v. Heard*, 49 La. Ann. 375.

*Mississippi*. — *Helm v. State*, 67 Miss. 571.

*Missouri*. — *State v. Simpson*, 67 Mo. 648.

*Tennessee*. — *Epperson v. State*, 5 Lea (Tenn.) 294; *State v. Gardner*, 13 Lea (Tenn.) 134, *overruling State v. Harrison*, 10 Yerg. (Tenn.) 542.

*Texas*. — *State v. Ivy*, 33 Tex. 646; *State v. Adams*, 17 Tex. 232; *Withers v. State*, 21 Tex. App. 210.

**Mutilated Indictment.** — The prosecuting attorney has a right to substitute an indictment for one which, though not lost or mislaid, has become so mutilated as to be unintelligible. *State v. Ivy*, 33 Tex. 647. But an accidental mutilation of an indictment by cutting it into several pieces does not destroy its identity or prevent its restoration to a condition in which it can be made intelligible and substantially complete in all essential particulars. *Com. v. Roland*, 97 Mass. 599.

**Copy from Record of Indictment.** — The object of statutes requiring indictments to be recorded is to prevent a failure of justice in case of loss. *Miller v. State*, 40 Ark. 489; *Reed v. State*, 8 Ind. 200; *Brown v. State*, 7 Humph. (Tenn.) 156;

*Glasgow v. State*, 9 Baxt. (Tenn.) 486; *Withers v. State*, 21 Tex. App. 210. And the copy is supplied from such records where they are made. Thus, after the jury is impaneled and sworn, the attorney-general may read a certified copy of the indictment from the minutes of the court. *Epperson v. State*, 5 Lea (Tenn.) 294; *State v. Gardner*, 13 Lea (Tenn.) 134.

**Order of Substitution.** — It has been held that the record must affirmatively show the substitution of the particular copy, and that this must not be left to mere inference from an order granting leave to substitute without identifying the copy which is to be substituted. *Turner v. State*, 7 Tex. App. 596; *Beardall v. State*, 9 Tex. App. 266; *Rogers v. State*, 11 Tex. App. 608. And the correctness of the substituted copy must be established. *Branson v. State*, (Ga. 1896) 24 S. E. Rep. 404; *State v. Thomas*, (Iowa 1896) 66 N. W. Rep. 743.

But it has been held that while it is proper that the loss or destruction of the indictment should be shown by affidavit, the failure to make such an affidavit is a technical defect which may be disregarded where the copy of the indictment upon which the defendant is tried is a copy of the indictment as found on the record. *Millar v. State*, 2 Kan. 175.

**Copy from Minutes** — *Order Unnecessary.* — Where the copy is a certified copy from the minutes of the court, it has been held that it may be read without a special order of substitution, upon proof that the original was lost or mislaid. *Epperson v. State*, 5 Lea (Tenn.) 295, where the proof consisted of the affidavit of the clerk that he had made diligent search among the papers in his office and was unable to find the original indictment.

**Sufficiency of Certification.** — A copy certified by the clerk is sufficient. *State v. Rivers*, 58 Iowa 102; *Epperson v. State*, 5 Lea (Tenn.) 294.

under statutes pertaining specially to criminal proceedings,<sup>1</sup> while the right is also recognized in the absence of statute.<sup>2</sup>

**Minority Rule.** — In some jurisdictions, however, it has been held that an indictment cannot be supplied by copy, but a new indictment must be found.<sup>3</sup>

**Indictment Lost After Plea or Trial.** — Where an indictment is lost after the defendant has pleaded to or been tried upon it, there seems to be no serious difficulty in allowing the substitution of a copy.<sup>4</sup>

**V. THE INDICTMENT — 1. General Matters of Form.** — The indictment consists of three prominent features: (1) the caption and commencement; (2) the charge; and (3) the conclusion.<sup>5</sup> The form of indictments is frequently regulated by statute,<sup>6</sup> the legislature having plenary power in that regard,<sup>7</sup> and provisions

1. *State v. Gardner*, 13 Lea (Tenn.) 134, wherein the court held that "the plain principle of the common law and of sound reason should apply in a criminal case as well as in civil cases; that is, when the papers are lost, they shall be carefully and accurately supplied, by satisfactory evidence of their loss and their contents," and further, that an indictment might be supplied by construction of the Act of 1847-48 (§ 3907 of the Code), which provides that "any record, proceeding, or paper, filed in any action at law or equity, if lost or mislaid unintentionally, or fraudulently made away with, may be supplied upon application, under the orders of the court, by the best evidence the nature of the case will admit of," *overruling State v. Harrison*, 10 Verg. (Tenn.) 542; *Withers v. State*, 21 Tex. App. 210, in which case, while a statute was involved permitting the substitution of an indictment by copy, it was held that the power to supply a lost indictment was inherent in the court, even in the absence of any statute.

2. *State v. Simpson*, 67 Mo. 648, holding that the statute in force providing for the supplying of lost records had no reference to criminal proceedings, but that the court possessed this power notwithstanding such statutes did not apply. *Withers v. State*, 21 Tex. App. 212; *Com. v. Keger*, 1 Duv. (Ky.) 241.

3. *Ganaway v. State*, 22 Ala. 772; *Bradshaw v. Com.*, 16 Gratt. (Va.) 507.

**The Safer Practice.** — In *Schultz v. State*, 15 Tex. App. 266, without deciding upon the validity of the statute providing for the supplying of a lost indictment, it was said to be the safer and better practice, whenever it could

be done, to substitute a lost indictment by having another returned by the grand jury.

4. **When a Defendant Pleads to an indictment regularly found by the grand jury** he admits the genuineness thereof, and if the indictment is lost after the defendant has pleaded thereto, it may be supplied without reference to the statute providing for the supplying of lost indictments or the constitutionality of such statute, because that question does not arise under such facts, and the substitution may be made under the direction of and in a manner satisfactory to the court. *Schultz v. State*, 15 Tex. App. 266 *et seq.*, upon the authority of *Ganaway v. State*, 22 Ala. 772, distinguished in *Bradford v. State*, 54 Ala. 230, in the former of which cases the indictment was lost before the trial was begun, and the court held that it could not be supplied except by the finding of a new indictment by the grand jury; and in the latter case the indictment was lost after the trial had commenced and the defendant's plea of not guilty had been entered, and the power of the court to supply such indictment was upheld.

**After Trial** a copy may be supplied. *Mount v. State*, 14 Ohio 295.

5. *State v. Moore*, 24 S. Car. 153. In a strict sense, however, the caption forms no part of the indictment. See *infra*, V. 2. a. (1) *The Caption*.

6. See *infra*, X. 2. *Statutory Offenses*.

7. *State v. O'Flaherty*, 7 Nev. 157.

**Constitutional Provisions.** — The provision of the Constitution of the United States that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment,"

of this character are intended to simplify the pleadings in criminal actions.<sup>1</sup> A statute defining an indictment as a "written statement" will sustain an indictment partly written and partly printed.<sup>2</sup> Cases touching the use of separate sheets,<sup>3</sup> the effect of mutilation of the indictment,<sup>4</sup> interlineations or erasures,<sup>5</sup> and abbreviations,<sup>6</sup> are cited in the notes. As to the language in which the indictment must be written, see article ENGLISH LANGUAGE, vol. 7, p. 720.

## 2. Caption and Commencement — a. THEIR GENERAL NATURE —

(1) *The Caption.* — The caption is a preamble to the indictment, a historical synopsis of the prior proceedings, and accompanies the indictment upon removal thereof from an inferior to a superior court.<sup>7</sup> It originated in the English practice, where the indictment was found in an inferior court and removed to a superior

etc., is not an inhibition upon the states restraining them in the prosecution of such offenses to the common-law indictment, but is designed as a protection against encroachments on the part of the federal government. *Niles v. State*, 24 Ala. 689; *Caldwell v. State*, 28 Tex. App. 566, *affirmed* in 137 U. S. 692; *Jane v. Com.*, 3 Metc. (Ky.) 18.

The provision in state constitutions that prosecutions are to be by indictment or information means that a defendant is entitled to be charged by a grand jury in the form of an indictment, or by the proper officer of the government by information, but does not restrain the legislature from prescribing the forms of such instruments. *State v. Mullen*, 14 La. Ann. 577; *State v. Comstock*, 27 Vt. 553.

1. *Dillon v. State*, 9 Ind. 408; *State v. Hinckley*, 4 Minn. 345.

In the Absence of Statute courts are not disposed to relax the common-law strictness with regard to the form of indictments. *Cain v. State*, 18 Tex. 387.

2. *O'Bryan v. State*, 27 Tex. App. 339.

3. *Counts on Separate Sheets.* — The counts of an indictment need not be written on the same sheet of paper. *State v. Lennon*, 8 Rob. (La.) 543.

4. *Mutilation.* — In *Com. v. Roland*, 97 Mass. 599, it was held that an accidental mutilation of the indictment by cutting it in several pieces does not destroy its identity or prevent its being restored to a condition in which it can be made intelligible and substantially complete in all essential particulars.

5. *Interlineations* will not necessarily vitiate an indictment. *May v. State*, 14 Ohio 461; *Rahm v. State*, 30 Tex.

App. 310; *Jones v. State*, (Ga. 1896) 25 S. E. Rep. 617.

*Presumption.* — If the indictment is legible it will be presumed that the interlineations therein were made before or at its execution, *French v. State*, 12 Ind. 670; or that the indictment appears on record as it was presented to and found by the grand jury, in the absence of irresistible proof to the contrary. *State v. Florez*, 5 La. Ann. 430.

On Motion in Arrest, erasures and interlineations will not invalidate an indictment, even if they are unexplained. *Com. v. Fagan*, 15 Gray (Mass.) 194.

6. *Dates in Arabic Figures* in the caption to an indictment are no objection. *Johnson v. State*, 29 N. J. L. 453; *Barnes v. State*, 5 Yerg. (Tenn.) 188; *State v. Smith, Peck* (Tenn.) 165. See generally article ABBREVIATIONS, vol. 1, p. 42; and *infra*, XIII. *Laying Time*.

7. *State v. Kennedy*, 8 Rob. (La.) 591; *People v. Bennett*, 37 N. Y. 117; *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 266; *McBean v. State*, 3 Heisk. (Tenn.) 23; *Dyer v. State*, 11 Lea (Tenn.) 514; *McClure v. State*, 1 Yerg. (Tenn.) 206; *Tipton v. State, Peck* (Tenn.) 308; *State v. Long*, 1 Humph. (Tenn.) 386; 1 Chitty's Crim. Law 326.

*Schedule at Common Law.* — The caption of an indictment at common law is defined as follows: "Where an inferior court, in obedience to a writ of certiorari, from the king's bench, transmits the indictment to the crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule,

court for trial,<sup>1</sup> and is no part of the indictment,<sup>2</sup> but is a part of the record,<sup>3</sup> and as such is subject to amendment.<sup>4</sup> In the *United States*, indictments being generally tried in the same courts in which they are found, the caption is the record entry in the trial court, or a transcript thereof, preceding and introducing the indictment in the record of the cause sent up to an appellate court,<sup>5</sup>

is annexed to the indictment, and both are sent to the crown office. The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment." *Starkie Cr. Pl.*, p. 258.

1. See cases cited in the preceding note.

**Analogous Practice in United States.** — The purpose of the caption may be the same as it was under the English practice in a jurisdiction where the practice of removing indictments for trial is in vogue. *People v. Town Auditors*, 44 *How. Pr. (N. Y. Oyer & T. Ct.)* 238; *People v. Guernsey*, 3 *Johns. Cas. (N. Y.)* 266.

**Removal from Superior to Inferior Court.** — An indictment found in a Court of Oyer and Terminer, being a superior court, and removed to a Court of Sessions, an inferior court, need not have a caption. *Loomis v. People*, 19 *Hun (N. Y.)* 601.

**Contents of Caption.** — The caption contains a description of the court in which the indictment was found, the time and place where it was found, and the jurors by whom it was found. 1 *Chitty's Crim. Law* 326; *People v. Bennett*, 37 *N. Y.* 121; *Reeves v. State*, 20 *Ala.* 33; *Noles v. State*, 24 *Ala.* 672; *Harrington v. State*, 36 *Ala.* 236; *Thomas v. State*, 5 *How. (Mass.)* 20.

2. *Alabama.* — *Rose v. State*, *Minor (Ala.)* 29; *Noles v. State*, 24 *Ala.* 672.

*Colorado.* — *Farnum v. U. S.*, 1 *Colo.* 311.

*Delaware.* — *State v. Smith*, 2 *Harr. (Del.)* 532.

*Louisiana.* — *Territory v. McFarlane*, 1 *Martin (La.)* 221.

*Maine.* — *State v. Conley*, 39 *Me.* 78.

*Missouri.* — *State v. Meinhardt*, 73 *Mo.* 565; *State v. Blakely*, 83 *Mo.* 360.

*New Hampshire.* — *State v. Gary*, 36 *N. H.* 360.

*New York.* — *People v. Bennett*, 37 *N. Y.* 117; *Myers v. People*, 4 *Thomp. & C. (N. Y.)* 298.

*North Carolina.* — *State v. Brickell*, 1 *Hawks (N. Car.)* 354.

*Pennsylvania.* — *Com. v. Shaffner*, 2 *Pearson (Pa.)* 450.

*South Carolina.* — *State v. Moore*, 24 *S. Car.* 153; *State v. Williams*, 2 *McCord L. (S. Car.)* 301; *Vandyke v. Dare*, 1 *Bailey L. (S. Car.)* 65.

*Texas.* — *English v. State*, 4 *Tex.* 125.

*Vermont.* — *State v. Thibreau*, 30 *Vt.* 100; *State v. Nixon*, 18 *Vt.* 74; *State v. Gilbert*, 13 *Vt.* 647.

*United States.* — *U. S. v. Bornemann*, 35 *Fed. Rep.* 824; *U. S. v. Thompson*, 6 *McLean (U. S.)* 57.

**Matters of Caption Inserted in Indictment.** — Matters properly belonging to the caption need not be inserted in any indictment, *Reeves v. State*, 20 *Ala.* 33; *Dean v. State*, *Mart. & V. (Tenn.)* 127; *State v. Moore*, 24 *S. Car.* 153; and if inserted they may be rejected as surplusage. *Rose v. State*, *Minor (Ala.)* 28; *State v. Kennedy*, 8 *Rob. (La.)* 591; *Mitchell v. State*, 8 *Yerg. (Tenn.)* 514.

3. **One Caption for Whole Term.** — There is but one caption for the whole sessions, and from that each particular record is made up. *Rex v. Marsh*, 6 *Ad. & El.* 236, 33 *E. C. L.* 66. So in the *American* practice, where the caption is the preamble to the record of the indictment sent from the trial court to an appellate court. *McBean v. State*, 3 *Heisk. (Tenn.)* 24; *Reeves v. State*, 20 *Ala.* 33.

4. See article AMENDMENTS, vol. 1, p. 458.

5. *Alabama.* — *Quinn v. State*, 49 *Ala.* 354; *Reeves v. State*, 20 *Ala.* 33; *Harrington v. State*, 36 *Ala.* 236; *Noles v. State*, 24 *Ala.* 672.

*Delaware.* — *State v. Smith*, 2 *Harr. (Del.)* 532.

*Indiana.* — *State v. Paine*, 1 *Ind.* 163.

*Louisiana.* — *State v. Marion*, 15 *La. Ann.* 495; *State v. Kennedy*, 8 *Rob. (La.)* 591.

*Mississippi.* — *Thomas v. State*, 5 *How. (Miss.)* 20.

*Missouri.* — *State v. Freeman*, 21 *Mo.* 482; *State v. Daniels*, 66 *Mo.* 205.

*New Hampshire.* — *State v. Gary*, 36 *N. H.* 360.

*New York.* — *Wagner v. People*, 2



and its object is to show that the inferior court had jurisdiction.<sup>1</sup> It is not necessary that all the jurisdictional facts should be shown when the court is one of general criminal jurisdiction;<sup>2</sup> and the general rule is that whatever ought to appear in the record is sufficiently shown if it can be gathered from any part of the record,<sup>3</sup>

Keyes (N. Y.) 684, 54 Barb. (N. Y.) 367; People v. Myers, 2 Hun (N. Y.) 6.

*Tennessee*. — Tipton v. State, Peck (Tenn.) 308; State v. Long, 1 Humph. (Tenn.) 386; M'Clure v. State, 1 Yerg. (Tenn.) 206; Barnes v. State, 5 Yerg. (Tenn.) 188; Firby v. State, 3 Baxt. (Tenn.) 360.

*Vermont*. — State v. Nixon, 18 Vt. 74.

*Virginia*. — Robinson v. Com., 88 Va. 900.

1. State v. Kennedy, 8 Rob. (La.) 591; Tipton v. State, Peck (Tenn.) 308; State v. Freeman, 21 Mo. 482; Rex v. Fearnley, 1 Leach C. C. 425. See also Bell v. People, 2 Ill. 397.

2. State v. Pearce, 14 Fla. 153; State v. Haddock, 2 Hawks (N. Car.) 461; Weinzorpflin v. State, 7 Blackf. (Ind.) 186; State v. Marion, 15 La. Ann. 495; State v. Bell, Add. (Pa.) 175; State v. McCarty, 2 Pin. (Wis.) 513.

**Courts under Special Commission.** — A caption is necessary in those cases where the court acts under a special commission. State v. Wasden, Term (N. Car.) 163.

**Unorganized County — Order for Grand Jury.** — Under an act providing for the organization of grand juries to inquire into certain offenses committed in an unorganized county, by an order from the judge of the District Court of the district to which such county is attached for judicial purposes designating the county in his district wherein the alleged offense shall be inquired into, it was held that it sufficiently appeared on the record that the court in which the indictment was found had jurisdiction, though the order designating such court was not shown by the bill of exceptions, the indictment itself containing an averment that such county was designated by the judge of the District Court, and it also appearing in the bill of exceptions that a motion to quash the indictment on the ground that the trial court had no jurisdiction was made in the trial court. Dodge v. People, 4 Neb. 225.

3. *Alabama*. — Noles v. State, 24 Ala. 672; Harrington v. State, 36 Ala. 241.

*Delaware*. — State v. Smith, 2 Harr. (Del.) 532.

*Indiana*. — Bailey v. State, 39 Ind. 438; Howell v. State, 4 Ind. App. 148.

*Louisiana*. — State v. Marion, 15 La. Ann. 495; State v. Kennedy, 8 Rob. (La.) 591; State v. Granville, 34 La. Ann. 1088; Territory v. McFarlane, 1 Martin (La.) 221.

*Massachusetts*. — Com. v. Mullen, 13 Allen (Mass.) 551.

*Missouri*. — State v. Freeman, 21 Mo. 482; Kirk v. State, 6 Mo. 469; State v. Blakeley, 83 Mo. 360; State v. Daniels, 66 Mo. 205.

*Montana*. — U. S. v. Upham, 2 Mont. 172.

*New York*. — People v. Peck, (Supreme Ct.) 2 N. Y. Crim. Rep. 314, 96 N. Y. 650.

*North Carolina*. — State v. Wasden, Term (N. Car.) 763; State v. Brickell, 1 Hawks (N. Car.) 354.

*Pennsylvania*. — State v. Bell, Add. (Pa.) 177.

*Vermont*. — State v. Gilbert, 13 Vt. 647.

*United States*. — Caha v. U. S., 152 U. S. 211; U. S. v. Bornemann, 35 Fed. Rep. 824.

In State v. Freeman, 21 Mo. 482, it was held, Judge Leonard speaking for the court, that "the caption, of course, is no part of the indictment; but it must appear upon the face of the record while the cause is in the court where the indictment was found, and from the transcript of the record after its removal into this court upon appeal or writ of error, not only that the indictment is sufficient in form and substance, but also that it was properly preferred by a lawful grand jury to a court having jurisdiction over the matter; and if all this does not appear, it is error of which the defendant may take advantage. \* \* \* But if it does appear it is sufficient, although the commencement of the indictment be wholly omitted." Quoted in State v. Daniels, 66 Mo. 205, citing, to the same effect, Kirk v. State, 6 Mo. 469; McDonald v. State, 8 Mo. 283.

even where it is the practice to return each indictment into court with a caption attached thereto.<sup>1</sup>

(2) *The Commencement* — *In General.* — The commencement is the formal beginning of the indictment,<sup>2</sup> introducing the charge of the grand jury and reciting that it is made upon oath.<sup>3</sup>

*In Name and by Authority of State.* — Under the constitutional requirement that criminal prosecutions shall be carried on in the name and by the authority of the state, precedents indicate that this is made to appear in the commencement of the indictment when it

1. *Com. v. Hines*, 101 Mass. 33; *Com. v. Mullen*, 13 Allen (Mass.) 551; *Com. v. Brown*, 116 Mass. 339; *Com. v. Smith*, 108 Mass. 486; *Com. v. Stone*, 3 Gray (Mass.) 453; *Com. v. Colton*, 11 Gray (Mass.) 1. See also *State v. Robinson*, 85 Me. 147.

2. For Example, "The jurors of the people of the state of —, in and for the body of the county of —, upon their oaths present," etc., is a commencement of an indictment. *People v. Bennett*, 37 N. Y. 121; *State v. Kennedy*, 8 Rob. (La.) 597. See also *McBean v. State*, 3 Heisk. (Tenn.) 23.

"Jurors" for "Grand Jurors." — It is not necessary that an indictment should commence with the words "The grand jurors" of the state, etc., but it is sufficient if it commences with the words "The jurors" of the state, where other entries in the record show that it was found by a grand jury. *Com. v. Edwards*, 4 Gray (Mass.) 1; *State v. Pearce*, 14 Fla. 153; *U. S. v. Williams*, 1 Cliff. (U. S.) 5. See also *People v. Bennett*, 37 N. Y. 117.

3. *Presentment on Oath* — *Necessity of Averment.* — That the presentment is made on oath is a usual averment in the commencement of an indictment. It seems to have been necessary at common law. 1 Chitty Crim. Law 201. But see *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66. It has also been held essential in this country. *State v. McAllister*, 26 Me. 376; *State v. Wagner*, 118 Mo. 626; *Huffman v. Com.*, 6 Rand (Va.) 685, wherein one of several counts was defective in omitting this averment, but the count preceding as well as the one following were regular in this respect, and the record stated that the jurors were sworn; therefore the indictment was held good.

*Sufficiency of Showing.* — The record showing that the grand jurors were sworn, and the caption of the indictment

showing that they were "duly chosen, impaneled, and sworn," etc., and that they "do present," etc., is a sufficient statement that the presentment is upon their oath. *Potsdamer v. State*, 17 Fla. 895; *Byam v. State*, 17 Wis. 145; *State v. Smith*, 26 La. Ann. 63. See also *infra*, V. 2. b. (7) *That the Grand Jurors Were Sworn*.

*Matter of Form.* — The omission to state that the presentment is upon oath is a defect of form and cannot be assigned as error. The objection must be taken before trial. *Curtis v. People*, 1 Ill. 256.

"Oaths" for "Oath." — An indictment which purports to have been found by the grand jury "upon their oaths," instead of "upon their oath," is sufficient. *Jerry v. State*, 1 Blackf. (Ind.) 395; *State v. Lang*, 63 Me. 215; *Com. v. Sholes*, 13 Allen (Mass.) 554; *State v. Morris Canal, etc., Co.*, 22 N. J. L. 537. See also *Perkins v. State*, 50 Ala. 155.

*Affirmation Instead of Oath.* — An indictment presented upon the affirmation of some of the jurors need not state in the commencement why such jurors were affirmed instead of sworn. *Com. v. Fisher*, 7 Gray (Mass.) 492; *Com. v. Jackson*, 1 Grant's Cas. (Pa.) 266; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78; *Anonymous*, 9 C. & P. 78, 38 E. C. L. 42.

But it has been held, on the other hand, that the indictment must show that those affirming were such as were excused from swearing, as that they were Quakers or conscientiously scrupulous of taking an oath, *State v. Putnam*, 1 N. J. L. 301; *State v. Fox*, 9 N. J. L. 244; *State v. Rockafellow*, 6 N. J. L. 341, 7 N. J. L. 362, note; *State v. Harris*, 7 N. J. L. 361; though such an objection is now one of form which must be taken before the jury is sworn, or it will be waived, *Engeman v. State*, 54 N. J. L. 247.

is expressly shown;<sup>1</sup> but the authorities in which the question has been presented seem to be agreed that there need be no formal statement of the fact in the indictment when it appears from the record that the prosecution is actually conducted by the authority of the state,<sup>2</sup> as the only object of the constitution requiring prosecution to be in the name of the state is to

1. *Fairlee v. People*, 11 Ill. 1; *Mains v. State*, 42 Ind. 327; *Lovell v. State*, 45 Ind. 550; *State v. Reid*, 20 Iowa 413; *Com. v. Stephenson*, 3 Metc. (Ky.) 226; *Vanwickle v. State*, 22 Tex. App. 625; *State v. Hilton*, 41 Tex. 565.

2. *Arkansas*. — *Holt v. State*, 47 Ark. 196.

*Florida*. — *Savage v. State*, 18 Fla. 909.

*Indiana*. — *Crutz v. State*, 4 Ind. 385; *Cronkhite v. State*, 11 Ind. 309.

*Iowa*. — *Harriman v. State*, 2 Greene (Iowa) 277; *Wrockledge v. State*, 1 Iowa 167; *Baurose v. State*, 1 Iowa 374.

*Kentucky*. — *Allen v. Com.*, 2 Bibb. (Ky.) 210.

*Louisiana*. — *State v. Russell*, 2 La. Ann. 604; *State v. Valsin*, 47 La. Ann. 115; *State v. Moore*, 8 Rob. (La.) 518.

*Mississippi*. — *Greeson v. State*, 5 How. (Miss.) 33; *State v. Johnson*, Walk. Miss. 392.

*Missouri*. — *State v. England*, 19 Mo. 386.

*North Dakota*. — *State v. Kerr*, 3 N. Dak. 523.

*South Dakota*. — *State v. Thompson*, 4 S. Dak. 95.

*Texas*. — *Drummond v. Republic*, 2 Tex. 157.

*Wisconsin*. — *State v. Delue*, 1 Chand. (Wis.) 166.

*Contra*. — *Whitesides v. People*, 1 Ill. 21; *Saine v. State*, 14 Tex. App. 144, where the information commenced: "In the name and by the authority of the state," omitting the words "of Texas." The court said: "We have been unable to find any case in which this precise question has been adjudicated in this state. There are several decisions holding that the conclusion of an indictment in the words required by the constitution and the law, viz., 'against the peace and dignity of the state,' cannot be dispensed with, and that any different conclusion renders the indictment defective in matter of substance, and cannot be amended. \* \* \* We can perceive no reason why these decisions should not apply also to the commencement of an indictment or in-

formation, and believing that they do, we hold the information in this case to be fatally defective." But see, as opposed to this, *Drummond v. Republic*, 2 Tex. 157, which was not adverted to in the foregoing opinion, holding that no prescribed form of words is necessary in an indictment in order that the prosecution be "carried on in the name and by the authority of the republic of Texas," and that it was enough that the prosecution was conducted by the proper law officer acting under the authority and conducting the prosecution in the name of the government.

**Abbreviation of State.** — Under the law requiring all prosecutions to be in the name of the state, it is no objection that the name of the state is abbreviated, as "Mo." for "Missouri." *State v. Foster*, 61 Mo. 550.

"State of Iowa," instead of "The state of Iowa," is sufficient. *Harriman v. State*, 2 Greene (Iowa) 277.

**In Each Count.** — That the prosecution is carried on by the authority and in the name of the state is not necessary to be averred in every count of the indictment. It is sufficient when it appears from the caption of the indictment itself, and this will refer to all the counts. *Davis v. State*, 19 Ohio St. 274.

**Omission Cured by Verdict.** — An omission in respect to the requirement that prosecutions shall be in the name and behalf of the state is a formal defect, which is cured by verdict. *Horne v. State*, 37 Ga. 90; *State v. Foster*, 61 Mo. 550.

**Business Card Printed on Indictment.** — It was objected that an indictment did not commence, "In the name and by the authority of the state," because it was drawn on paper manufactured at a particular establishment, whose business card or advertisement was printed on the indictment preceding its beginning; but the court held that this was not a part of and did not affect the indictment. *West v. State*, 6 Tex. App. 492; *Winn v. State*, 5 Tex. App. 621; *Owens v. State*, 25 Tex. App. 552.

exclude any other or foreign power from the exercise of such authority.<sup>1</sup>

*b. CONTENTS OF CAPTION AND COMMENCEMENT*—(1) *Method of Treating the Subject*.—In the United States the authorities upon many questions touching the sufficiency of the caption or of the commencement are so destitute of precision<sup>2</sup>—either by reason of general statements applied to parts of one when those parts properly belong to the other,<sup>3</sup> or by referring to the caption of the record in testing the sufficiency of the indictment,<sup>4</sup> or by changes adopted in the practice<sup>5</sup> or introduced by prescribed statutory forms<sup>6</sup>—that the caption and commencement will here be treated together as a more convenient method of discriminating between them.

(2) *Marginal Statement*.—Under the old practice there was no marginal statement on the indictment except the style of the county, thus: "Middlesex, to wit."<sup>7</sup> It is the office of the

1. *Greeson v. State*, 5 How. (Miss.) 33; *Allen v. Com.*, 2 Bibb. (Ky.) 210.

2. *People v. Bennett*, 37 N. Y. 121.

3. See *People v. Willson*, 109 N. Y. 345, wherein it is held that the caption, referring to the beginning of the indictment itself, need not show when and where the court was held or the name of the judge thereof; *State v. Daniels*, 66 Mo. 205, wherein the indictment was objected to because it purported to have been found in a court which never existed. The objection was based on the following form: "State of Missouri, county of Pettis, ss.—In the Criminal Court of Missouri, Pettis county, Missouri: The grand jurors," etc. The court spoke of this objection as "based upon the name given to the court in the caption or introductory part of the indictment." See also *Kirk v. State*, 6 Mo. 469.

4. See *People v. Bennett*, 37 N. Y. 121.

In *Indiana*, where the indictment itself commenced, "The grand jurors," etc., it was held that the record could not be referred to for the purpose of supplying the omission of the averment of time in the indictment, as the caption is no part of the indictment. *State v. Hopkins*, 7 Blackf. (Ind.) 494. But on the other hand it was held that the commencement of the indictment itself embraces the date. Thus, "State of Indiana, Hendricks County, Hendricks Circuit Court, October term, 1846. The grand jurors," etc., makes the date a part of the indictment and a reference thereto in the indictment good. *State v. Paine*, 1 Ind. 163. To

the same effect, see *State v. Haddock*, 2 Hawks (N. Car.) 462.

5. Thus in *South Carolina* it was held that while there was some contrariety of opinion in that state as to where the caption ended and the commencement began, the caption is ended with the words "upon their oaths, present." *State v. Moore*, 24 S. Car. 153; *State v. Creight*, 1 Brev. (S. Car.) 169.

In *Tennessee* the recital that the grand jurors "being duly summoned, elected, impaneled, sworn, and charged to inquire," etc., is said to constitute a part of the English caption, but has by usage become incorporated with, and constitutes a part of, the indictment, by the practice in that state. *McBean v. State*, 3 Heisk. (Tenn.) 23.

In *Massachusetts* it is the practice for every indictment to have a caption attached to it and returned by the grand jury as a part of the presentment in each case, and in this respect the caption as there used is essentially different from that of other tribunals, where the separate indictments are returned without caption and a caption is added by the clerk as a general one, embracing all the indictments found at the term. *Com. v. Edwards*, 4 Gray (Mass.) 5; *Com. v. Hines*, 101 Mass. 33. See also *State v. Ford*, 21 Wis. 610.

6. Whereby matters usually belonging to the caption are assigned to the commencement. *State v. Brooks*, 94 Mo. 121; *Vanvick v. State*, 22 Tex. App. 625; *Territory v. Woolsey*, 3 Utah 473.

7. *Barnes v. State*, 5 Yerg. (Tenn.) 188; *Mitchell v. State*, 8 Yerg. (Tenn.)

caption or record to state the court in which the indictment is found,<sup>1</sup> and while the county appears in the marginal statement in some of the forms prescribed by statute,<sup>2</sup> yet in others, the name of the court as well as other matters which were formerly not inserted in the indictment itself are incorporated in the formal beginning of the indictment.<sup>3</sup>

(3) *Term or Time*.—The time when an indictment is found need not appear on the face of the indictment itself,<sup>4</sup> and the

528; *State v. Kennedy*, 8 Rob. (La.) 591; *Taylor v. Com.*, 2 Va. Cas. 94; *Burgess v. Com.*, 2 Va. Cas. 483.

**Omission of County.**—If the name of the county is omitted in the margin of the indictment it will nevertheless be sufficient if the county is named in the body thereof. *Tefft v. Com.*, 8 Leigh (Va.) 721. So where the statute provides that the indictment itself shall contain the title of the prosecution, specifying the name of the court, and the form prescribed contains the name of the county, while it is the common practice to insert the county in the title, if it appears from the record that the indictment was found by the grand jury of the proper county, the irregularity in the omission in the title will not, alone, be a ground for reversal. *Johnson v. Com.*, (Ky. 1891) 15 S. W. Rep. 662; *State v. Sprinkle*, 65 N. Car. 463.

**Omission of State.**—The county being inserted in the margin, it is no objection on motion in arrest of judgment that the name of the state is omitted, *State v. Lane*, 4 Ired. L. (N. Car.) 113; nor that it is entitled in the name of the territory instead of the state, *Way v. Woolery*, 6 Wash. 157; *Foster v. Woolery*, (Wash. 1893) 32 Pac. Rep. 1083, the last two cases being decided on appeal from an order quashing a writ of habeas corpus.

1. *State v. Kennedy*, 8 Rob. (La.) 591; *State v. Gary*, 36 N. H. 360; *Com. v. Shaffner*, 2 Pearson (Pa.) 450; *Barnes v. State*, 5 Yerg. (Tenn.) 188; *Dean v. State*, Mart. & Y. (Tenn.) 127; 2 Hale P. C. 165; 2 Hawk. P. C. 25.

2. *State v. Stokely*, 16 Minn. 282, wherein it was held that when unorganized counties are attached to an organized county for judicial purposes, the indictment is entitled in the name of all the counties.

3. *Territory v. Pratt*, 6 Dakota 483; *Wall v. State*, 51 Ind. 453; *Johnson v. Com.*, (Ky. 1891) 15 S. W. Rep. 662; *State v. Cutter*, 65 Mo. 503; *Giebel v.*

*State*, 28 Tex. App. 151; *Mau-zau-mau-ne-kah v. U. S.*, 1 Pin. (Wis.) 124.

**Directory Statutes.**—In *People v. Walters*, 1 Idaho 271, it is held that the statute prescribing a title for indictments is directory. See also *State v. McIntire*, 59 Iowa 264.

*The Name of the Defendant* being omitted from the title of an indictment is a mere formal defect which does not prejudice the rights of the defendant and is not fatal. *Dukes v. State*, 11 Ind. 557.

**The Number of the District** is no part of the title of the court, and if inserted may be rejected as surplusage, and therefore it is not a fatal defect on demurrer that the court is thus incorrectly designated. *State v. Munch*, 22 Minn. 70.

**Omission of Title of Court.**—In *Dakota* it was provided by statute that an indictment "must contain the title of the action, specifying the name of the court to which the indictment was presented and the names of the parties;" and, further, that an indictment "is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it, though the name of the court be not stated." Under these provisions it was held that an indictment which in the title correctly stated the territory, county, and judicial district was sufficient. *Territory v. Pratt*, 6 Dakota 483.

**Name of Offense.**—See *infra*, X. 1. *j. Characterizing the Offense*.

4. *State v. Miller*, 6 Ind. App. 654; *State v. Folke*, 2 La. Ann. 744; *State v. Haddock*, 2 Hawks (N. Car.) 462; *Hudson v. State*, 40 Tex. 15; *Wright v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 973; *Burgess v. Com.*, 2 Va. Cas. 483; *Haught v. Com.*, 2 Va. Cas. 3.

In *England* it has been held that a day certain when the court was holden must be shown in the transcript, *Dakin's Case*, 2 Saund. 289*b*; and a statement in the caption that the court was held

statement of the wrong term at the head of the indictment will not vitiate where the record shows when it was found.<sup>1</sup> So where a complete caption is a part of the frame of each indictment, a wrong day in such caption is immaterial if the offense is charged at a day before it was found, and the date of the presentment appears by the record of the court.<sup>2</sup>

on an impossible date was deemed fatal, *Rex v. Fearnley*, 1 T. R. 316.

In California the term of the court was said to be sufficiently stated in the indictment when the day is given on which the indictment is found. *People v. Baetty*, 14 Cal. 566.

In Indiana a caption or prefatory statement by the clerk, reciting that the indictment was found at the October term, 1846, by the grand jurors "duly impaneled, sworn, and charged as grand jurors in and for the county of Allen, at the said term," was held sufficient to show that the indictment was found at the term at which the grand jury was sworn. *Engleman v. State*, 2 Ind. 92.

In Massachusetts, where a caption is put upon each indictment by the grand jury, the caption shows the first day of the term, even though the indictment is found on another day of the term, and where the first day of the term is the fourth day of July, and the caption shows that day, although the court could not then be open, except for the purpose of entering or continuing cases or adjourning, the caption does not show that the indictment was found on the fourth of July, but only shows the day on which the term was begun. *Com. v. Chamberlain*, 107 Mass. 210.

In *Com. v. Gee*, 6 Cush. (Mass.) 174, it was held that in regard to all cases of offenses committed before the term, the time of finding the bill is properly stated as of the term; that in regard to offenses committed after the commencement of the term, it is more regular and proper to recite in the caption that the indictment was found at a court begun and holden at, etc., and continued by adjournment to a day named, being after the time of the alleged offense, but whether the omission to do this will require the rejection of all evidence as to such offense, it was not thought necessary to decide. See *Allen v. State*, 5 Wis. 329, where the caption was amended in this regard.

In Missouri an indictment was assailed because it purported in the caption thereof to have been presented

at a "special term," whereas the indictment was found at an adjourned term, and it was held that the defendant could not be prejudiced by the manner in which the term of the court was designated. *State v. Sweeney*, 68 Mo. 97.

In New Hampshire it was held to be unnecessary to state in an indictment that it was found at a trial term, where the trial term and law term were both terms of the Supreme Judicial Court of New Hampshire, and it was held sufficient to aver in the indictment that it was found at a term of the Supreme Court. *State v. Wentworth*, 37 N. H. 220.

In North Carolina an indictment commencing, "North Carolina, Columbus county, Superior Court of Law, Fall term, 1822. The jurors for the state," etc., was objected to because the caption did not state the term. It was held that the term was stated with sufficient certainty, distinguishing the practice where the indictment is found in a court of special or limited jurisdiction. *State v. Haddock*, 2 Hawks (N. Car.) 462.

1. *Firby v. State*, 3 Baxt. (Tenn.) 360; *Mitchell v. State*, 8 Yerg. (Tenn.) 527.

**Error in Caption of Transcript.**—Where the recital in the caption of the transcript is that the term began on a certain day, if the date is incorrectly stated it will be corrected by the record. *Hudson v. State*, 40 Tex. 15.

2. *Com. v. Brown*, 116 Mass. 339.

**Certificate of Clerk.**—An indictment which, taken in connection with the certificate indorsed thereon by the clerk at the time of its return into court, distinctly shows the date of its presentment by the grand jury, and of the commission of the offense, is not invalidated by a defective description in its caption of the term of court at which it was found. *Com. v. Smith*, 108 Mass. 486; *Com. v. Hines*, 101 Mass. 34; *Com. v. Stone*, 3 Gray (Mass.) 453; *Com. v. Colton*, 11 Gray (Mass.) 1; *State v. Robinson*, 85 Me. 147; and the defect, if any, is cured by verdict, *Osborne v. State*, 23 Tex. App. 431.

(4) *Selection and Impaneling.* — The proceedings in selecting and impaneling the grand jury are recorded in the journals of the court,<sup>1</sup> and it has been expressly held that recitals of these matters need not be made in the formal parts of an indictment,<sup>2</sup> though it is generally done.<sup>3</sup>

(5) *Description of Court.* — The caption or record, as distinguished from the commencement of the indictment, should state with sufficient certainty the style of the court,<sup>4</sup> the place where the court was holden,<sup>5</sup> and the judge or judges presiding.<sup>6</sup> But these matters need not appear on the

1. *Jones v. Territory*, (Okla. 1896) 43 Pac. Rep. 1072.

2. *Jones v. Territory*, (Okla. 1896) 43 Pac. Rep. 1072; *Abram v. State*, 25 Miss. 592; *Morgan v. State*, 19 Ala. 556; *People v. Reavey*, 38 Hun (N. Y.) 418. See also *Williams v. State*, 3 Heisk. (Tenn.) 378, wherein the indictment recited that the grand jury was "impounded," instead of "impaneled," and it was held that the presumption was that the word "impaneled" was intended, though the court said that even if the word "impounded" were plainly written there would be no substance in the objection.

3. *Requirement Sometimes Absolute.* — It has in some instances been held that the fact that the jury was selected, impaneled, and sworn, must be made a matter of record, and that the recital in the indictment itself cannot aid the record in that regard. *Abram v. State*, 25 Miss. 591; *Cody v. State*, 3 How. (Miss.) 29. But in this connection reference should also be had to the title *supra*, II. '3. *c. Presumption or Record Evidence of Legal Organization.*

*Statutory Form.* — In *Kruger v. State*, 1 Neb. 369, the motion to quash was interposed because the caption did not follow the form prescribed by the statute, in that it stated that the grand jurors were "selected," whereas the form in the statute used the word "chosen," and it was held that the two words meant the same thing and the objection was bad.

"Sworn, chosen, and selected," instead of "selected, chosen, and sworn," will not vitiate the indictment on account of the transposition of the words indicated. *Wesley v. State*, 65 Ga. 732.

4. *Thomas v. State*, 5 How. (Miss.) 20; *State v. Gary*, 36 N. H. 360; *State v. Jeffreys*, Conf. Rep. (N. Car.) 364;

*State v. Sutton*, 1 Murph. (N. Car.) 281; *State v. Williams*, 2 McCord L. (S. Car.) 301.

5. *Carpenter v. State*, 4 How. (Miss.) 163; *Sam v. State*, 13 Smed. & M. (Miss.) 189; *Lusk v. State*, 64 Miss. 845; *State v. Gary*, 36 N. H. 360 [citing 2 Hale's P. C. 165; 2 Hawkins's P. C., c. 25]. See also *State v. Brisbane*, 2 Bay (S. Car.) 451, where an indictment headed "State of South Carolina, Kershaw District," and proceeding to state that the court was held at the court house of the said district, was held sufficient; *Kelly v. State*, 3 Smed. & M. (Miss.) 524, wherein the caption showed that the Circuit Court where the indictment was found was held for Smith county at the court house in the town of Raleigh, the town of Raleigh being an incorporated town, and this was held sufficient to authorize the High Court of Error and Appeal to take notice of it as a place in that county; *Melton v. State*, 3 Humph. (Tenn.) 389, holding that where it appears from the record that the court was held at L., that the jurors were from the county of L., and were sworn to inquire for the body of that county, it sufficiently appears that the court was held for L. county.

*At the Court House.* — The record on appeal must show that the court by which the indictment was taken was holden at the court house in the proper county, where by law it is required to be holden, because the judge could have no jurisdiction to impanel a jury and take an indictment at a different place. *Bob v. State*, 7 Humph. (Tenn.) 129.

6. *Thomas v. State*, 5 How. (Miss.) 20; *Com. v. Shaffner*, 2 Pearson (Pa.) 450; *State v. Zule*, 10 N. J. L. 348. *Contra*, *Hogan v. State*, 30 Wis. 428; *Tenorio v. Territory*, 1 N. Mex. 282.

indictment itself,<sup>1</sup> though they are often made so to appear.<sup>2</sup>

(6) *Description of Grand Jury* — (a) *Of the County, etc.* — While the caption, it is said, should show that the grand jury was of the county where the indictment was taken,<sup>3</sup> the grand jury may with strict legal correctness be styled the grand jury of the state, and when it is added that the jurors were impaneled and sworn in and for the body of the county, the fact that they were of the county for which they were sworn appears with sufficient certainty.<sup>4</sup>

1. *People v. Peck*, (Supreme Ct.) 2 N. Y. Crim. Rep. 314; *People v. Willson*, 109 N. Y. 345; *State v. Daniels*, 66 Mo. 205; *Harrington v. State*, 36 Ala. 241; *Hogan v. State*, 30 Wis. 428, holding that if it is necessary that the names of the judges should be set out in the description of the court, the proper place for this to appear is in the record, not in the indictment itself.

In *Maine*, where the commencement is extended so as to include matters of caption, it was held that an indictment commencing "State of Maine, Cumberland, ss. At the Supreme Judicial Court, begun and holden at Portland, within and for the county of Cumberland," sufficiently shows that the court was holden in Cumberland in the state of Maine. *State v. Conley*, 39 Me. 78.

In *Massachusetts* a caption in the following language, "Commonwealth of Massachusetts, Middlesex, to wit: At the Superior ———, begun and holden at Lowell, within and for the county of Middlesex," etc., was held sufficient, notwithstanding the omission of the word "court" in the space above indicated, it appearing from the whole record in what court the indictment was found. *Com. v. Mullen*, 13 Allen (Mass.) 552. So an indictment beginning "Commonwealth Mass., Essex, to wit: at the Court of Common Pleas, begun and holden at Salem, within and for the county of Essex," sufficiently shows that the indictment was found at a court held in Massachusetts. *Com. v. Fisher*, 7 Gray (Mass.) 492.

In *Texas* an indictment which recites, "The grand jurors for the county of Brown, state aforesaid, duly organized as such at the May term, A.D. 1892, of the District Court of said county, upon their oaths in said court present that George Bell," etc., directly and affirmatively alleges that it was presented in the District Court of said county. *Bell v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 362.

2. See the following subsection and notes.

3. *Tipton v. State*, *Peck* (Tenn.) 308; *Cornelius v. State*, 12 Ark. 797.

**Any Part of Record.** — The caption forms no part of the indictment, and in *Missouri* it is sufficient if it appears from the record of the court while the cause is in the trial court, or from the transcript of the record after removal to the Supreme Court, that the indictment was found in the state and county, although the whole commencement of the indictment is omitted; and those matters that are in some other states held necessary to be shown in the caption and commencement of an indictment need not be shown in the indictment itself. *State v. Blakeley*, 83 Mo. 360 [citing and following *State v. Daniels*, 66 Mo. 192; *State v. Freeman*, 21 Mo. 482].

4. *Lawson v. State*, 20 Ala. 65; *Perkins v. State*, 50 Ala. 155; *Cornelius v. State*, 12 Ark. 797; *Lovell v. State*, 45 Ind. 550; *Wise v. State*, 2 Kan. 419; *Byrd v. State*, 1 How. (Miss.) 171; *Mackey v. State*, 3 Ohio St. 363; *Scales v. State*, 7 Tex. App. 363; *Vanvickle v. State*, 22 Tex. App. 625; *Williams v. State*, 30 Tex. 406; *Coker v. State*, 7 Tex. App. 84, *distinguishing* *State v. Hilton*, 41 Tex. 565, in that in the latter case the name of the county for which the grand jury was to inquire was entirely omitted.

**Without Recital of Impanelment for County.** — The commencement of an indictment, that "the grand jurors for the state of Alabama upon their oath present," etc., the name of the proper county appearing in the caption, is sufficient without any averment that the jurors were selected, impaneled, sworn, and charged to inquire for the body of the county. *Morgan v. State*, 19 Ala. 556. See also *Jeffries v. Com.*, 12 Allen (Mass.) 145; *State v. Kiger*, 4 Ind. 621, wherein an indictment commencing "State of Indiana, Delaware



Other cases in which the sufficiency of indictments in this particular was adjudicated are cited in the notes.<sup>1</sup>

(b) **Names, Number, or Qualifications — Names or Number.** — An indictment itself need not state the names of the grand jurors, as this, if necessary at all, is proper matter for the caption or the record.<sup>2</sup> It was formerly necessary, it seems, that the names and number of the grand jurors should appear in the caption,<sup>3</sup> but it was afterwards decided otherwise,<sup>4</sup> and if it

county, ss. In the Delaware Circuit Court, September term, 1851. The grand jurors for the state of Indiana upon their oath present," was held sufficient to show that the grand jury was sworn and impaneled at that term in Delaware county.

1. **Arkansas.** — An indictment which recites simply that it was found in the Circuit Court in the county, at a certain term, by the grand jury of the county, without specifying in which of the two districts of the county it was found, is sufficient, it appearing from the term at which the indictment was found, and the date of the clerk's indorsement on it, that it was returned at a time when one of the districts of the court alone could have been legally in session, which raises the presumption that it was returned by a grand jury legally impaneled in that district. *Helt v. State*, 52 Ark. 281. To the same effect, *Sargent v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 364.

**California.** — An indictment entitled as of the city and county of San Francisco is sufficient, because such is the name by which the county of San Francisco is recognized. A Court of Sessions is the court for that territory which is known as the county of San Francisco, and it is not less the county because called the city and county. *People v. Beatty*, 14 Cal. 572, *followed* in *People v. Connor*, 17 Cal. 361.

**Georgia.** — An indictment headed "Georgia, Liberty county," sufficiently shows for what county the grand jurors were drawn and sworn. *Stevens v. State*, 76 Ga. 97.

**Illinois.** — The second count of an indictment commencing "and the grand jurors aforesaid, chosen, selected, and sworn in and for the county of — aforesaid," sufficiently shows by the word "aforesaid" the county for which the indictment was found. *Noe v. People*, 39 Ill. 96.

Where the jurors in a city court are to be selected from the city, an in-

dictment reciting "the grand jurors chosen, selected, and sworn in and for the city of Chicago and county of Cook" is bad. *Bell v. People*, 2 Ill. 398.

**Utah.** — An indictment was held fatally defective because it described the grand jury as "the grand jury of the people of the United States, in the territory of Utah," since the statute required the grand jurors to be residents of the county in which they were selected. *Territory v. Woolsey*, 3 Utah 470.

**Vermont.** — The grand jury within a county, when in regular organization and attendance upon the county court, is necessarily a grand jury both within and for the county, and it is immaterial that the word "for" is omitted in the commencement. *State v. Brady*, 14 Vt. 355.

**Wisconsin.** — In *Mau-zau-mau-ne-kah v. U. S.*, 1 Pin. (Wis.) 124, it seems to have been held that the indictment must truly show that the grand jurors were impaneled for the proper county, and not that they were from the territory, but it does not appear that the caption or title indicated for what county they were to inquire.

2. *State v. Murphy*, 9 Port. (Ala.) 487; *People v. Willson*, 109 N. Y. 345; *People v. Bennett*, 37 N. Y. 117; *Dawson v. People*, 25 N. Y. 399; *State v. Cook*, *Riley L. (S. Car.)* 234. See also *State v. Ford*, 21 Wis. 610.

3. *Faulkner's Case*, 1 Saund. 248. See also *Thomas v. State*, 5 How. (Miss.) 20; *Carpenter v. State*, 4 How. (Miss.) 163, wherein it was held that the record must show that the grand jury consisted of twelve persons.

4. *Aylett v. Rex*, 6 Ad. & El. 247, note, 33 E. C. L. 71, note; *Rex v. Davis*, 1 C. & P. 470, 11 E. C. L. 452; *State v. McAllister*, 26 Me. 376; *State v. Shay*, 30 La. Ann. 116; *State v. Coleman*, 27 La. Ann. 693; *Williams v. People*, 54 Ill. 422; *Fouts v. State*, 8 Ohio St. 98. For a review of the early practice see the

appears that the legal number constituted the jury this will be sufficient.<sup>1</sup>

**Qualification.** — If the caption to an indictment describes the grand jury as good and lawful men, it is sufficient without alleging special qualifications,<sup>2</sup> and it seems that even the designation "good and lawful" is not necessary.<sup>3</sup>

(7) *That the Grand Jurors Were Sworn.* — As heretofore indicated, the grand jury must be sworn in order to constitute a legal body,<sup>4</sup> and while the caption is the proper place to show that the jury was charged<sup>5</sup> and sworn,<sup>6</sup> the oath is also regarded

note by Sergeant Williams in *Faulkner's Case*, 1 Saund. 248, note.

1. *Where More than Twelve* were on the jury, the caption naming twelve was held sufficient. *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66. So where, without naming them, the number is averred. *Aylett v. Rex*, 6 Ad. & El. 247, note, 33 E. C. L. 71, note.

"**The Number Required by Law**" was held a sufficient statement of the number constituting the grand jury. *McGarry v. People*, 2 Lans. (N. Y.) 227.

The Indictment need not state the number of grand jurors, and the statement that the presentment is by a grand jury sufficiently shows that there was a lawful number. *Young v. State*, 6 Ohio 435; *Dawson v. People*, 25 N. Y. 399.

**Designation of Unlawful Number.** — In *Fitzgerald v. State*, 4 Wis. 396, it was held that if the indictment itself states that it was found by twelve jurors it will be bad where the statute requires sixteen.

2. *Stone v. State*, 30 Ind. 115; *Jerry v. State*, 1 Blackf. (Ind.) 395; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *State v. Price*, 11 N. J. L. 203; *State v. Glasgow*, Conf. Rep. (N. Car.) 38; *Bonds v. State*, Mart. & Y. (Tenn.) 143; *Cornwell v. State*, Mart. & Y. (Tenn.) 147; *Benedict v. State*, 12 Wis. 313; *State v. McCarty*, 2 Chand. (Wis.) 199.

3. *Cornelius v. State*, 12 Ark. 782; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *State v. Glasgow*, Conf. Rep. (N. Car.) 38; *State v. Yancey*, 1 Treadw. (S. Car.) 237; *Cornwell v. State*, Mart. & Y. (Tenn.) 149; *Turner v. State*, 9 Humph. (Tenn.) 119; 2 Hawk. P. C., c. 25, § 126.

4. See *supra*, II. 5. *The Oath.*

Under the Code requiring only that it shall be shown in the indictment that the defendant is accused of the crime alleged in it, it is no objection that it is

not stated that the grand jury was drawn and sworn. *People v. Reavey*, 38 Hun (N. Y.) 418.

5. *People v. Town Auditors*, 44 How. Pr. (N. Y. Oyer & T. Ct.) 245; *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265. See *supra*, II. 6. *The Charge.*

**For the Body of the County.** — "Jurors sworn and charged upon their oath," etc., is good, although the words "to inquire for the body of the county" be omitted. *Reg. v. Watton*, 6 Mod. 95. The law points out the duty of the grand jury, and requires them to inquire in and for the body of the county, and therefore presumes the purpose to do so. *Hurley v. State*, 6 Ohio 405.

6. *People v. Town Auditors*, 44 How. Pr. (N. Y. Oyer & T. Ct.) 245; *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265; *Mahan v. State*, 10 Ohio 233; *State v. Fields*, Peck (Tenn.) 140; *Rex v. Turnith*, 1 Mod. 26; *Reg. v. Watton*, 6 Mod. 95; Bac. Abr., tit. Indictment.

"**Then and There.**" — In setting out the swearing of the grand jury, the words "then and there" need not appear, because if it is shown by the record that the jurors were sworn it will sufficiently appear that they were sworn then and there. *Woodside v. State*, 2 How. (Miss.) 657; *State v. Price*, 11 N. J. L. 203; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *State v. Murphy*, 9 Port. (Ala.) 487. See also *Rex v. Waite*, 4 Mod. 248.

But under the old practice in *New York*, which was like the English practice, such words were necessary. *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265 [citing *Rex v. Turnith*, 1 Mod. 26; *Rex v. Morris*, 2 Stra. 901].

In *Missouri* it was held to be unnecessary to state in the indictment that the jury was sworn in the county at the term. *Vaughn v. State*, 4 Mo. 530, *distinguishing* *People v. Guernsey*, 3 Johns. Cas. (N. Y.) 265, above cited, in

sufficiently shown by appearing in the indictment,<sup>1</sup> though the strict requirement of a record entry has sometimes been exacted.<sup>2</sup>

**3. Indorsements**—*a.* **INDORSEMENT OF PROSECUTOR**—**Statutory Requirement.**—It is provided by statute<sup>3</sup> in many states that the indictment shall be indorsed with the name of the prosecutor.<sup>4</sup>

that the *nisi prius* system had been adopted in New York as in England, and it was necessary to state in the indictment under that system that the oath was then and there administered; whereas in Missouri judgment was rendered against the accused in the court in which his conviction took place. But it will be noted that the caption was the subject of consideration in the New York case, while in the Missouri case the commencement of the indictment itself was apparently under consideration. See also *Fizell v. State*, 25 Wis. 364.

**1. Commencement.**—An indictment itself may show the fact, as where the impaneling and swearing is set out in the commencement thereof. *State v. Stuart*, 35 La. Ann. 1015; *State v. Watson*, 31 La. Ann. 379; *Bailey v. State*, 39 Ind. 438; *State v. Long*, 1 Humph. (Tenn.) 386; *M'Clure v. State*, 1 Yerg. (Tenn.) 206; *Com. v. Jackson*, 1 Grant's Cas. (Pa.) 266. See also *Benedict v. State*, 12 Wis. 313; *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66. See further, *supra*, V. 2. a. (2) *The Commencement*.

**Impanelment Sufficient.**—It is sufficient evidence that the grand jury was sworn where the record shows that it was duly impaneled. *Bird v. State*, 53 Ga. 604.

**Presumption.**—On appeal it will be presumed that the grand jury was sworn. *Holloway v. State*, 53 Ind. 554; *Long v. State*, 46 Ind. 582; *Com. v. Pullan*, 3 Bush (Ky.) 48.

**2. Foster v. State**, 31 Miss. 421; *Abram v. State*, 25 Miss. 591, holding that it will not suffice that the bill of indictment contains such an averment.

**3.** The requirement is purely statutory. *U. S. v. Mundell*, 1 Hughes (U. S.) 415.

**4. Prosecutor Party Injured.**—In *Arkansas* a statute providing that the name of the prosecutor shall be indorsed by himself upon indictments for trespass upon persons or property was construed to apply only to cases where the indictments were upon information or testimony of the party injured by the alleged trespass. *State v. Brown*,

10 Ark. 106. But an indorsement on an indictment, "This indictment is preferred upon the testimony of the party injured, who was summoned on presentation and by order of the grand jury," is not in conformity with the statute. *State v. Denton*, 14 Ark. 343.

**Indictment and Presentment.**—When an indictment is founded upon a presentment which appears in the record the attorney-general is excused from marking a prosecutor, and there need be no memorandum showing affirmatively that the indictment was founded on the presentment. *State v. McCann*, Meigs (Tenn.) 92; *State v. Terry*, 30 Mo. 371. But the presentment itself must be legal. *State v. Smith*, Meigs (Tenn.) 100.

**Prosecution by District Attorney Ex Officio.**—Under a statute in *Tennessee*, the court was empowered to order the district attorney to file a bill *ex officio* when it was satisfied that a crime had been committed. *Simpson v. State*, 4 Humph. (Tenn.) 456; *Bennett v. State*, 8 Humph. (Tenn.) 123; *Lawless v. State*, 4 Lea (Tenn.) 175; *Rodes v. State*, 10 Lea (Tenn.) 414; *Parham v. State*, 10 Lea (Tenn.) 504. And the order directing the attorney-general to prosecute *ex officio* need not show that no one would prosecute. *Bennett v. State*, 8 Humph. (Tenn.) 118.

**Order to Prosecute After Indictment Found.**—It is very strongly intimated that the court might enter the order directing the attorney-general to prosecute officially after the indictment is found, and when the objection is made to it on account of the fact that no prosecutor was marked thereon. But the point being that the record showed that the indictment was found before the order of the court directing the attorney-general to prosecute was made, it was held that there was no difference in principle between this question and the question arising upon the total absence of a prosecutor, and that the omission in either case must be taken advantage of at once and before final verdict. *Rodes v. State*, 10 Lea (Tenn.) 414. See also *Bedford v. State*, 2 Swan (Tenn.) 72.

These statutes are generally confined to certain classes of offenses,<sup>1</sup> and no one is to be regarded as prosecutor unless he is so marked on the indictment.<sup>2</sup> While it is sometimes said that

**Prosecutor as Entitled to Part of Fine.**

—In *State v. Robinson*, 29 N. H. 279, it was held that the time after the commission of the offense during which the prosecutor had a right to a part of the fine having expired, the prosecution was a purely public one, and no prosecutor need be named in such a case.

**When Indorsement Made.** — In *Kentucky* and *Mississippi* it was held that the name of the prosecutor must be inserted at the foot of the bill before it is sent to the grand jury. *Allen v. Com.*, 2 Bibb (Ky.) 210; *Com. v. Gore*, 3 Dana (Ky.) 474; *Moore v. State*, 13 Smed. & M. (Miss.) 259.

In *Missouri* it was held that the indorsement must be made before the indictment is returned by the grand jury. *State v. McCartney*, 6 Mo. 649.

**Sufficiency of Indorsement.** — The prosecutor may be described by the name by which he is commonly known, *Reg. v. Gregory*, 10 Jur. 387, 8 Q. B. 508, 55 E. C. L. 508; even if it be not his correct name. *Rex v. Norton*, R. & R. C. C. 510.

**On Face of Indictment.** — The name of the prosecutor on the face of the indictment is a sufficient indorsement. *Williams v. State*, 9 Mo. 270.

**Addition.** — In *Kentucky* the omission of the addition to the name of the prosecutor was held fatal, *Com. v. Gore*, 3 Dana (Ky.) 474; but in *Virginia* a statute requiring the title or profession of the prosecutor to be added was held to be only directory. *Com. v. Dever*, 10 Leigh (Va.) 719.

**"Pros." for Prosecutor**, following the name of the prosecutor on an indictment, is sufficient. *McGuire v. State*, 6 Baxt. (Tenn.) 621.

**A Substantial Expression** indicating that the person marked as the prosecutor is intended as such will be sufficient for that purpose. Thus where the indorsement "good for costs" is followed by the name of a person when the indictment is presented to the court by the grand jury, such name will be presumed to be that of the prosecuting witness. *Munson v. State*, 20 Ohio St. 232.

So the words "by the information of James Baker, laborer, of Harrison county, sworn in court, and indorsed

as prosecutor at his request," are sufficient to show that person to be the prosecutor. *Haught v. Com.*, 2 Va. Cas. 3.

**Death of Prosecutor After Indorsement.**

—The law requiring a prosecutor to be indorsed is complied with when the prosecution is instituted, and the death of the prosecutor thereafter will have no effect upon the indictment to discharge the defendant. *Com. v. Cunningham*, 5 Litt. (Ky.) 292; *State v. Loftis*, 3 Head (Tenn.) 500.

**1. Exception in Provision.** — The provision is sometimes general, exceptions being made in particular cases. *State v. Gossage*, 2 Swan (Tenn.) 263; *Bedford v. State*, 2 Swan (Tenn.) 72. Or the exception is sometimes of certain offenses in the particular class to which the rule is applicable. *State v. Joiner*, 19 Mo. 224.

**Necessity Depending upon Indictment as Found.** — The necessity for such an indorsement depends upon the character of the indictment as it is found by the grand jury, and if the indictment be for such offense as does not require the indorsement of a prosecutor, the conviction may be for a lesser offense, notwithstanding a prosecutor would be necessary on an original indictment for the latter. *Baker v. State*, 12 Ohio St. 214.

**"Trespass" Restricted to Lower Offenses.** — The word "trespass," when used in the Criminal Code in connection with the class of offenses requiring a prosecutor, has a technical meaning. It is confined to the lower grade, and not applicable to the higher offenses of greater atrocity. *U. S. v. Flanakin*, Hempst. (U. S.) 30.

**2. State v. Lupton**, 63 N. Car. 483. See also article FINES AND COSTS IN CRIMINAL CASES, vol. 8, p. 953.

**"Prosecutor" Defined.** — Under the *Alabama* Code, § 4354, providing that if a prosecutor appears before the grand jury his name must be indorsed by the foreman on the indictment, and if no prosecutor appears the words "No prosecutor" must be indorsed thereon, a prosecutor "is one who appears before the grand jury, and has his name entered as prosecutor, and undertakes the prosecution of a particular

such statutes are directory only,<sup>1</sup> they have been held to be imperative,<sup>2</sup> and this seems to be the general rule, as the indictment is at least subject to quashal if it does not contain such indorsement when required.<sup>3</sup>

**Objection for Defect.** — In some states it is held that objection for want of a prosecutor must be taken *in limine*;<sup>4</sup> in others the

case, subject to the burdens and penalties which that office and undertaking impose. It does not include one who merely complains and makes known to the grand jury that a particular offense has been committed by a particular person, and asks that the complaint be investigated and acted upon." *Blackman v. State*, 98 Ala. 77.

One who is compelled to be an informer cannot be made prosecutor. *Wortham v. Com.*, 5 Rand. (Va.) 669.

One who is merely a witness under subpoena is not a prosecutor, though it is said that the prosecutor is one who prefers the accusation. *State v. Mil-lain*, 3 Nev. 409.

In *U. S. v. Rawlinson*, 1 Cranch (C. C.) 83, the court was of the opinion that the name of a voluntary witness ought to be written as prosecutor at the end of the indictment, but gave no direction in this regard.

**It is Only Where a Prosecutor Really Exists** that one shall be indorsed on the indictment. *King v. Lukens*, 1 Dall. (Pa.) 5.

**Indorsement of Governor.** — In *State v. English*, 1 Murph. (N. Car.) 435, it was said that a discretion resided in the prosecuting officer to indorse on an indictment as prosecutor whomsoever he might think fit, subject, however, to the interference of the court in cases where the exercise of such a power might operate injuriously to an individual; and that the practice of indorsing the governor was to be preferred, since it could not in any instance produce inconvenience to an individual, and might tend to the due execution of the laws where otherwise no individual would step forward to prosecute.

**Indorsement of Minor or Married Woman.** — The object of the statute in *Arkansas* providing for the indorsement of an indictment where the indictment is founded upon the testimony of the party upon whose property the trespass is alleged to have been committed was to discourage frivolous and malicious prosecutions by taxing the prosecutor with costs, and it was held that the spirit and purpose of the statute is bet-

ter accomplished, where the party injured is an infant or a married woman, by indorsing the name of the father or husband as prosecutor. *State v. Harrison*, 19 Ark. 565.

In *Moyers v. State*, 11 Humph. (Tenn.) 41, it was held that a married woman cannot be indorsed as prosecu-trix.

**Indorsement of Husband.** — A husband is not competent as a prosecuting witness against his wife, because the wife could not sue her husband to recover damages for false imprisonment or malicious prosecution, and the test of the competency of the prosecuting witness to be indorsed on the indictment is that the party shall be liable for costs, and also that he shall be liable to an action for false imprisonment or malicious prosecution. *State v. Tankersly*, 6 Lea (Tenn.) 583.

**Indorsement of Foreman.** — In *Missis-sippi* it was held that the foreman of the grand jury might be marked as prosecutor. *King v. State*, 5 How. (Miss.) 730.

**New Prosecutor after Nol. Pros.** — When an indictment is nol-prossed the solicitor-general has a right to put upon a new indictment the name of another and different prosecutor if, in fact, such other person is the prosecuor. *Allgood v. State*, 87 Ga. 668.

1. *State v. Hughes*, 1 Ala. 656; *State v. Briggs*, 68 Iowa 416.

2. *Towle v. State*, 3 Fla. 202.

3. The court will not compel the defendant to plead until the name of the prosecutor is indorsed. *U. S. v. Carr*, 2 Cranch (C. C.) 440. And an indictment will be quashed if it is not indorsed with the name of the prosecutor, as required by the statute. *U. S. v. Helriggle*, 3 Cranch (C. C.) 179; *U. S. v. Hollinsberry*, 3 Cranch (C. C.) 645; *U. S. v. Shackelford*, 3 Cranch (C. C.) 287; *State v. Joiner*, 19 Mo. 224; *Vezain v. People*, 40 Ill. 397.

4. The objection cannot be made after verdict, *Hayden v. Com.*, 10 B. Mon. (Ky.) 126; *Com. v. Gore*, 3 Dana (Ky.) 474; *Rodes v. State*, 10 Lea (Tenn.) 414; nor for the first time on

omission is deemed fatal to the indictment, and the objection may be taken at any time.<sup>1</sup>

**6. INDORSEMENT OF WITNESSES.** — **Statutory Requirement.** — Independently of statute, it is customary in some jurisdictions to indorse upon an indictment the names of the witnesses who testified before the grand jury,<sup>2</sup> but the practice is commonly regulated by statutory provisions.<sup>3</sup>

appeal. *Veazain v. People*, 40 Ill. 397. And in some instances the objection has been required to be made before pleading to the merits. *Winship v. People*, 51 Ill. 296.

1. *Kirk v. State*, 13 Smed. & M. (Miss.) 406; *Moore v. State*, 13 Smed. & M. (Miss.) 259; *Peter v. State*, 3 How. (Miss.) 433; *Cody v. State*, 3 How. (Miss.) 27; *McWaters v. State*, 10 Mo. 169, wherein the objection was raised for the first time on appeal.

**Indorsement after Verdict.** — The defect by reason of the omission of the indorsement of the prosecutor cannot be cured by making the indorsement after verdict, and pending a motion in arrest of judgment. *Moore v. State*, 13 Smed. & M. (Miss.) 259.

2. *Minich v. People*, 8 Colo. 445.

**3. The Purpose of Such a Requirement** is to inform the defendant who are his accusers, and the prosecutor who are the witnesses, *People v. Northey*, 77 Cal. 629; *People v. Freeland*, 6 Cal. 99; *Perry v. People*, 14 Ill. 498; and therefore it is not necessary that the defendant's name should be indorsed as a witness, because it would serve no purpose to inform the defendant that he himself was a witness as an accuser; and as to the second object of such indorsement, that refers only to the necessity of indorsing those who might be called to testify for the state, and therefore could not refer to the defendant. *People v. Northey*, 77 Cal. 629; *People v. Page*, 116 Cal. 386.

**Sufficiency — Names of Witnesses.** — Where the defendant is not surprised or misled, an incorrect or incomplete description of a witness will not affect the validity of the indictment. Thus a motion to quash was overruled where the name of a witness was indorsed as "Dr. Felker," instead of "Moses C. Felker," the defendant understanding who was designated thereby. *State v. Phelps*, 5 S. Dak. 480.

"F. Diefenbach" was held to be sufficiently near to the name "Gottlieb Diefenbach" to comply substantially

with the statute requiring the names of witnesses examined before the grand jury to be indorsed upon or inserted at the foot of the indictment. *People v. Crowley*, 56 Cal. 39.

**Defect Cured.** — Where the court instructs the jury to find for the defendant on a count in relation to which a certain witness testified before the grand jury, the fact that the name of the witness is incorrectly stated in the indorsement is not prejudicial. *State v. Craig*, 78 Iowa 641.

**Names Written by Prosecuting Attorney.** — Under a statute making it the duty of the foreman of the grand jury to note on the indictment the names of the witnesses upon whose testimony it was found, it is no objection that the names were not in fact written by the foreman, but were written by the prosecuting attorney. *Bartley v. People*, 156 Ill. 234.

**Change of Prosecuting Attorneys.** — One prosecuting attorney may indorse the names of witnesses on an indictment found during the term of his predecessor. *State v. Berkley*, 109 Mo. 665.

**Materiality of Witnesses.** — If the testimony given by a witness is not material his name need not be indorsed. *State v. Lewis*, (Iowa 1895) 65 N. W. Rep. 295; *State v. Little*, 42 Iowa 52; *State v. Hawks*, 56 Minn. 129.

It was also held in *Iowa* that it is not necessary to indorse the names of witnesses whose evidence did not in any respect contribute to the finding of the indictment, although their testimony was material. *State v. Miller*, (Iowa 1895) 64 N. W. Rep. 288.

**Deposition before Committing Magistrate.** — Under a statute providing that the names of witnesses examined before the grand jury shall be indorsed on the indictment, or inserted at the foot thereof, before it is presented to the court, the names of witnesses whose depositions have been taken by the committing magistrate and returned to the District Court and read before the grand jury must be so inserted or in-

**Indictment — How Affected by Omission.** — A failure to comply with the statute requiring the indorsement of witnesses is not generally fatal to the indictment as a pleading. Statutes making this requirement have, in some states, been held to be merely directory,<sup>1</sup> but in other states the omission may be ground for setting aside the indictment, if the objection is taken *in limine* in the proper manner.<sup>2</sup>

dorsed. *State v. Hamilton*, 13 Nev. 388.

1. *Arkansas*. — *State v. Johnson*, 33 Ark. 175.

*Indiana*. — *Short v. State*, 63 Ind. 376.

*North Carolina*. — *State v. Hollingsworth*, 100 N. Car. 535; *State v. Sheppard*, 97 N. Car. 401.

*Texas*. — *Steele v. State*, 1 Tex. 142; *Walker v. State*, 19 Tex. App. 176.

*Virginia*. — *Shelton v. Com.*, 89 Va. 450; *Com. v. Williams*, 5 Gratt. (Va.) 702; *Com. v. Dever*, 10 Leigh (Va.) 719;

*U. S. v. Mundel*, 6 Call. (Va.) 245; *Wortham v. Com.*, 5 Rand. (Va.) 669.

*West Virginia*. — *State v. Enoch*, 26 W. Va. 253; *State v. Shores*, 31 W. Va. 491.

**Indorsement Required upon Motion.** — If the names of witnesses are not indorsed it is competent for the defendant to make a motion to require the prosecuting attorney to indorse them. *Jacobs v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 110.

**Effect on Right to Continuance.** — The only consequence of the omission in the indorsement of the name of a witness who had been examined before the grand jury is that the state cannot obtain a continuance on account of his absence from the trial. *Short v. State*, 63 Ind. 376.

In *Missouri* it was held that such an omission would give to the defendant, in addition to his right to move to quash, the further right of requiring the prosecuting attorney to make out a cause for continuance upon affidavit before such a continuance could be procured. *State v. Roy*, 83 Mo. 268, *overruling State v. Nugent*, 71 Mo. 136, and *State v. Patterson*, 73 Mo. 695, in so far as they hold that the sole consequence resulting from the failure to indorse the names of witnesses on an indictment is that the state can only procure a continuance on affidavit.

**The Court May Resubmit the Indictment** to the grand jury for the purpose of having the witnesses indorsed. *State v. McNamara*, 100 Mo. 100.

In the United States Courts there is no law requiring the names of witnesses to be indorsed upon the indictment, and the failure so to indorse is only a matter of form which cannot tend to prejudice the defendant. *Fisher v. U. S.*, 1 Okla. 252.

2. **Methods Exclusive.** — Thus an objection must be made by a motion to set aside the indictment before demurrer or plea, *People v. King*, 28 Cal. 267; *People v. Symonds*, 22 Cal. 348; *People v. Lopez*, 26 Cal. 114; *State v. Hamilton*, 13 Nev. 388; *People v. Thiede*, 11 Utah 241; or by a motion to quash. *State v. Griffin*, 87 Mo. 612; *State v. Roy*, 83 Mo. 270; *State v. Nugent*, 71 Mo. 136; *Andrews v. People*, 117 Ill. 195. See also *Jillard v. Com.*, 26 Pa. St. 170.

**After Verdict** objection cannot be made. *State v. Nugent*, 71 Mo. 136; *State v. Roy*, 83 Mo. 270; *Sutton v. Com.*, 97 Ky. 308.

**On Appeal.** — The objection comes too late on appeal. *Harriman v. State*, 2 Greene (Iowa) 270; *McKinney v. People*, 7 Ill. 540, *citing Gardner v. People*, 4 Ill. 83.

**After Examination of the Witness** the objection is waived. *State v. Hurd*, (Iowa 1897) 70 N. W. Rep. 613.

**Statute Mandatory.** — Where the omission may be taken advantage of by a motion to quash, the statute requiring the indorsement is mandatory. *State v. Stevens*, 1 S. Dak. 480. But the refusal of the court to quash after plea is not an abuse of its discretion when the omitted witness is not allowed to testify. *State v. Isaacson*, (S. Dak. 1895) 65 N. W. Rep. 430.

**Names Appearing in Body of Indictment.** — When the indictment conveys on its face sufficient notice of the names of the witnesses, it is not fatal that such names are not indorsed on the indictment. *State v. McGonigle*, 14 Wash. 594.

**Indorsement of Additional Witnesses.** — The court may permit the prosecuting attorney to indorse the names of ad-

**Effect upon Evidence Offered on the Trial.**—The omission of the names of witnesses in the indorsement of an indictment will not generally operate to exclude such witnesses from testifying on the trial;<sup>1</sup> sometimes because the statute is regarded as merely directory,<sup>2</sup> and in other instances 'because the object of the indorsement, which is to notify the defendant of his accusers, may be attained by permitting the indorsement to be made after the indictment comes from the grand jury.<sup>3</sup> And in the absence of a controlling statute, even in those states requiring the names of the witnesses who testified before the grand jury to be indorsed on the indictment, other witnesses, who did not appear before the grand jury, may be examined without being so indorsed,<sup>4</sup> especially where it appears that the defendant is not

ditional witnesses upon the indictment. *State v. Doyle*, 107 Mo. 41. And this may be done pending a motion to quash on the ground that the names of witnesses who appeared before the grand jury are not indorsed upon the indictment, *State v. Patterson*, 73 Mo. 695; *State v. Roy*, 83 Mo. 270; *State v. Berkley*, 109 Mo. 665; *State v. Little*, 42 Iowa 53, in which case it appears that the indorsement of such additional names is permitted by statute.

**Evidence of Minutes.**—The minutes of the grand jury are conclusive upon the question as to what witnesses were examined before it. *State v. Little*, 42 Iowa 51; *State v. Miller*, (Iowa 1895) 64 N. W. Rep. 288.

1. *Schmaedeke v. People*, 63 Ill. App. 662.

2. *Kramer v. State*, 34 Tex. Crim. Rep. 84; *Williams v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 999.

3. **Indorsement of Motion of Prosecuting Attorney.**—Under a statute providing that upon a motion to set aside an indictment for the omission in the indorsement of the names of witnesses who appeared before the grand jury such names may be indorsed, there is no reason why the court may not permit such indorsement upon the motion of the prosecuting officer when no motion to set aside has been made. *State v. Robinson*, 47 Iowa 489. See also *Boykin v. People*, 22 Colo. 496.

**Misnomer in the Christian Name of a witness indorsed on the indictment will not prevent the state from using him on the trial where his identity was established before his testimony was heard.** *State v. Arnold*, (Iowa 1896) 67 N. W. Rep. 252.

**Failure to Object in Trial Court.**—No

objection to the testimony of a witness for the reason that he was not indorsed upon the indictment being made in the trial court, such an objection cannot thereafter be made. *State v. Schmidt*, 34 Kan. 403. And it seems that the objection, if tenable at all, should be taken when the witness is introduced. *State v. Shenkle*, 36 Kan. 43.

**Objection to the Pleading Exclusive.**—

It is also held that the right to object to an indictment, as by a motion to set aside, on account of an omission in the indorsement of names of witnesses who were examined before the grand jury, is the only remedy available for such an objection, and that therefore the omission will not preclude the state from calling the omitted witnesses on the trial. *People v. Lopez*, 26 Cal. 114; *State v. Story*, 76 Iowa 262.

4. *Colorado*.—*Wilson v. People*, 3 Colo. 329; *Kelly v. People*, 17 Colo. 130; *Boykin v. People*, 22 Colo. 496.

*Dakota*.—*Territory v. Godfrey*, 6 Dakota 46.

*Illinois*.—*Gore v. People*, 162 Ill. 259; *Kota v. People*, 136 Ill. 656; *Perteet v. People*, 70 Ill. 171; *Gardner v. People*, 4 Ill. 83; *Scott v. People*, 63 Ill. 508; *Perry v. People*, 14 Ill. 496.

*Iowa*.—*State v. Abrahams*, 6 Iowa 117; *State v. McClintock*, 8 Iowa 203.

*Missouri*.—*State v. O'Day*, 89 Mo. 561.

*Nebraska*.—*Ballard v. State*, 19 Neb. 609.

*South Dakota*.—*State v. Church*, 6 S. Dak. 89; *State v. Isaacson*, (S. Dak. 1895) 65 N. W. Rep. 430; *State v. Reddington*, 7 S. Dak. 368.

*Utah*.—*People v. Thiede*, 11 Utah 241, 159 U. S. 510.



taken by surprise, and, therefore, is not prejudiced by their introduction,<sup>1</sup> the court, in the absence of a statute requiring notice of additional witnesses, exercising a sound discretion in this regard.<sup>2</sup>

### c. INDORSEMENT OF FINDING AND SIGNATURE OF FOREMAN.

— The Necessity for the Indorsement of the finding of the grand jury upon the indictment, viz., “a true bill,” seems to rest upon the *English* practice, under which a bill was drawn and presented to the grand jury for its action before any evidence had been heard by it in respect of the matter, whereupon it heard the evidence and found the bill true, or not true, or ignored it.<sup>3</sup> But in this country the authorities are conflicting upon questions relating to the necessity of the indorsement of the finding, as well as upon the necessity of the signature of the foreman of the grand jury thereto, and the effect of the omission of either upon the validity of the indictment.<sup>4</sup> Where, however, the subject has not been regulated by statute, or the old practice of presenting the bill to the grand jury before it has heard any evidence is not in vogue, the necessity for the indorsement of the finding of the grand jury does not exist,<sup>5</sup> and in some cases it has been dispensed with,

1. *Perry v. People*, 14 Ill. 498; *Boykin v. People*, 22 Colo. 496; *Kelly v. People*, 17 Colo. 130, in which case it was held that if the defendant had asked for more time to meet additional witnesses it might have been granted to him; *State v. Steifel*, 106 Mo. 129.

2. *Gore v. People*, 162 Ill. 259; *Kota v. People*, 136 Ill. 656; *Gardner v. People*, 4 Ill. 83; *State v. Reddington*, 7 S. Dak. 368.

**Notice Required under Statute.** — Sometimes, however, statutory regulations control this subject, as where notice is required of the names of witnesses not indorsed upon the indictment, in order to make such witnesses available on the trial. *State v. Yetzer*, (Iowa 1896) 66 N. W. Rep. 737; *State v. Harlan*, (Iowa 1896) 67 N. W. Rep. 381; *State v. Jordan*, 87 Iowa 86; *State v. Craig*, 78 Iowa 638.

Under express statutory provision, a witness not examined before the grand jury may be incompetent to testify at the trial. *State v. Porter*, 74 Iowa 624.

3. “Bills, or formal accusations of crime, were drawn up and presented to the grand jury, who, after investigation, if they thought any particular accusation groundless, indorsed upon it the word *ignoramus* or the phrase ‘not found,’ or if the opposite opinion was entertained, then the bill was in-

dorsed with the words ‘a true bill.’” *State v. Magrath*, 44 N. J. L. 228.

Under this practice it was said that the indorsement on the indictment, “a true bill,” was “parcel of the indictment and the perfection of it.” *Rex v. Ford*, *Yelv.* 99.

**Where Two Defendants Are Jointly Indicted**, the indorsement “a true bill” upon the indictment applies to both defendants. *Thurmond v. State*, 55 Ga. 599.

**Finding upon Two Counts.** — If the indictment embraces two counts, the grand jury may return one *ignoramus* and the other *billa vera*. *Rex v. Fieldhouse*, 1 *Cowp.* 325.

**Finding upon Part of One Count.** — But if there is only one count in an indictment, the grand jury cannot find a part true and another part not true. It must find the whole bill true or reject the whole. *Rex v. Ford*, *Yelv.* 99; *State v. Creighton*, 1 *Nott & M. (S. Car.)* 256; *State v. Wilhite*, 11 *Humph. (Tenn.)* 602; *State v. Cowan*, 1 *Head (Tenn.)* 280, wherein it was said that the grand jury is under the control of the court, and it is the province and duty of the court to see that the finding is proper in point of law, and for this purpose the court could recommit an improper or impertinent finding.

4. *State v. Magrath*, 44 N. J. L. 230.

5. *Frisbie v. U. S.*, 157 U. S. 163,

regardless of other considerations of practice.<sup>1</sup> On the other hand, in a few courts the indorsement of the finding of the grand jury has been held to be necessary.<sup>2</sup> Both the finding of the grand jury and the signature of the foreman thereto are often required by statute,<sup>3</sup> and sometimes it is provided that the indict-

wherein the court adverts to the English practice and the necessity for the indorsement of the finding of the grand jury thereunder in the following language: "The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the indorsement 'a true bill,' or 'ignoramus,' or sometimes, in lieu of the latter, 'not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the indorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indorsement loses its essential character." To the same effect are *State v. Freeman*, 13 N. H. 489; *State v. Magrath*, 44 N. J. L. 228; *Com. v. Smyth*, 11 Cush. (Mass.) 474, wherein the signature of the foreman of the grand jury was held sufficient, notwithstanding the omission of the words "a true bill," *distinguishing* Webster's Case, 5 Me. 432, to the contrary, in that the principal reason suggested by the court in support of its decision in the latter case, viz., that the foreman, without the words "a true bill" prefixed to his signature, must be presumed thereby to express only his personal opinion and not that of the jury, should not be accepted in *Massachusetts*, where the jurors are not only sworn to keep their own counsel, but are expressly forbidden to state, or even to testify in a court of justice, how any of their number voted, or what opinion they expressed in relation to any question before them.

**Practice Advisable.**—But notwith-

standing the fact that it may not be necessary, it is said to be the usual and advisable practice to indorse and sign the indictment. *Friskie v. U. S.*, 157 U. S. 163.

**A Presentment Must Be Signed** by the grand jury, and if it is not so signed it will not be considered as a presentment, but will be taken as an indictment, and must be so pleaded to in regard to its sufficiency in form. *Gunkle v. State*, 6 Baxt. (Tenn.) 626.

1. *White v. Com.*, 29 Gratt. (Va.) 828; *Price v. Com.*, 21 Gratt. (Va.) 846, wherein the court said that the question had never before been decided in *Virginia*. But there is at least a strong dictum to the contrary in *Bradshaw v. Com.*, 16 Gratt. (Va.) 507, in which case Daniel, J., without considering the question of the right to try upon a copy of an indictment, said: "An indictment \* \* \* is nothing if it does not bear the name of the foreman of the grand jury" and the words "a true bill."

In *State v. Cox*, 6 Ired. L. (N. Car.) 446, it was held that the custom of indorsing a bill is no further material than to identify the instrument expressing the decision of the jury.

2. *Nomaque v. People*, 1 Ill. 145; *Webster's Case*, 5 Me. 432, holding that the omission of the indorsement "a true bill" is fatal to the indictment, notwithstanding it is signed by the foreman of the grand jury; *Gunkle v. State*, 6 Baxt. (Tenn.) 626, holding that a defendant should not be held to answer an indictment which does not appear to have been found by the grand jury "a true bill," and that the fact of the record showing that the paper was returned into court will not suffice to make it a true bill, because it is the duty of the grand jury to return an indictment into court whether it is found a true bill or not.

3. *Arapahoe County v. Graham*, 4 Colo. 201; *Alden v. State*, 18 Fla. 187; *Gardner v. People*, 4 Ill. 83; *Strange v. State*, 110 Ind. 354; *State v. Bowman*, 103 Ind. 69; *Cooper v. State*, 79 Ind. 206; *Johnson v. State*, 23 Ind. 32; *Com. v. Louisville, etc., R. Co.*, (Ky. 1895) 32 S. W. Rep. 164; *Com. v. Louisville*,

ment itself shall be subscribed by the foreman of the grand jury.<sup>1</sup> It is not necessary to indorse upon an indictment the nature of the offense charged, and such an indorsement is no part of the finding of the jury.<sup>2</sup>

**Signature of Foreman.**—At common law the signature of the foreman is usually regarded as formal and not necessary to the validity of the indictment,<sup>3</sup> and statutes in this regard have, in some cases, been held to be directory merely,<sup>4</sup> because the finding is merely the expression of the grand jury's conviction of the truth of the charge, which may be shown in any manner so long as it

etc., R. Co., (Ky. 1895) 32 S. W. Rep. 132; *Oliver v. Com.*, 95 Ky. 372; *State v. Morrison*, 30 La. Ann. 817.

**The Signature of the Foreman Alone** is not sufficient in the absence of the indorsement "a true bill." *State v. Buntin*, 123 Ind. 124.

1. *Hannah v. State*, 1 Tex. App. 580; *State v. Powell*, 24 Tex. 136; *Robinson v. State*, 24 Tex. App. 4; *State v. Flores*, 33 Tex. 445; *Pinson v. State*, 23 Tex. 579. But in all these cases, notwithstanding the signature of the foreman is required by the code, the requirement is practically inoperative, inasmuch as the omission of such signature is expressly excluded from the grounds of objection to indictments set out in the code.

**Sufficient Subscription.**—The signature of the foreman of the grand jury to the finding indorsed on an indictment is a sufficient subscription of the indictment. *Overshiner v. Com.*, 2 B. Mon. (Ky.) 344.

**Waiver of Objection.**—In *State v. Shippey*, 10 Minn. 223, it was held that the objection that an indictment was not signed by the foreman of the grand jury must be taken by a motion to set aside the indictment, or by demurrer, or it will be waived. It did not appear in this case that the indictment was not signed at all, but rather that it was signed under an indorsement "a true bill," and the court held that it was not necessary to decide whether the signature on the back of the indictment was sufficient.

2. *Cherry v. State*, 6 Fla. 679; *Collins v. People*, 39 Ill. 233; *State v. Valere*, 39 La. Ann. 1060; *State v. Rohfrisch*, 12 La. Ann. 382; *State v. Mason*, 32 La. Ann. 1018; *State v. Russell*, 33 La. Ann. 135 [overruling the dictum in *State v. Morrison*, 30 La. Ann. 818, to the contrary]; *Thompson v. Com.*, 20 Gratt. (Va.) 724; *State v. Heaton*, 23

W. Va. 773; *State v. Fitzpatrick*, 8 W. Va. 707; and if such an indorsement is wrong it will be rejected as surplusage. *State v. Heaton*, 23 W. Va. 773; *Collins v. People*, 39 Ill. 233; *Thompson v. Com.*, 20 Gratt. (Va.) 724.

3. *Com. v. Ripperton*, Litt. Sel. Cas. (Ky.) 194; *McGuffie v. State*, 17 Ga. 511; *State v. Creighton*, 1 Nott & M. (S. Car.) 256; *Price v. Com.*, 21 Gratt. (Va.) 859.

On the other hand, in some states, while the courts hold the indorsement "a true bill" unnecessary upon the distinction between the old practice in England and the practice in America as to finding a true bill, yet the indictments appear to be signed by the foreman of the grand jury, and the courts seem to approve decisions such as *State v. Squire*, 10 N. H. 558, requiring the signature of the foreman of the grand jury to the indictment. *State v. Freeman*, 13 N. H. 489. See also *Com. v. Smyth*, 11 Cush. (Mass.) 474; *Com. v. Stone*, 105 Mass. 469.

**Signature Usual and Advisable.**—But it is said that while the signature of the foreman is not necessary it is the usual and advisable practice. *McGuffie v. State*, 17 Ga. 511; *State v. Creighton*, 1 Nott & M. (S. Car.) 256; *Frisbie v. U. S.*, 157 U. S. 163.

4. *State v. Calhoon*, 1 Dev. & B. L. (N. Car.) 374; *State v. Mertens*, 14 Mo. 95.

**Objection Waived.**—The objection for the omission of the signature of the foreman of the grand jury and the indorsement on the indictment is waived if not made before pleading. *State v. Agnew*, 52 Ark. 275.

And in *Missouri*, while it is a ground for quashing the indictment before trial, *State v. Burgess*, 24 Mo. 381, it cannot be taken after verdict. *State v. Harris*, 73 Mo. 289; *State v. Hays*, 78 Mo. 600; *State v. Mertens*, 14 Mo. 94.

appears sufficiently to prevent misconstruction or perversion,<sup>1</sup> and the same reason has been applied in dispensing with the indorsement "a true bill."<sup>2</sup>

**Sufficiency of Indorsement.**—It is sufficient if the indorsement "a true bill" is in form a substantial representation of the finding of the jury,<sup>3</sup> and neither the position of the indorsement,<sup>4</sup> nor the relative position of the signature,<sup>5</sup> nor the manner of signing the indorsement by the foreman, will make it bad.<sup>6</sup>

1. *State v. Creighton*, 1 Nott & M. (S. Car.) 257.

2. *People v. Lawrence*, 21 Cal. 373; *Wau-kon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332; *Patterson v. Com.*, 86 Ky. 313; *Brotherton v. People*, 75 N. Y. 159.

**Contra.**—In *Louisiana* it was held that no evidence other than the indorsement could be looked to in order to show the finding of the grand jury. *State v. Morrison*, 30 La. Ann. 817; *Arapahoe County v. Graham*, 4 Colo. 201. See also *Alden v. State*, 18 Fla. 187.

**Waiver of Objection.**—An objection that an indictment found had not been indorsed as prescribed by law must be taken by motion to set aside the indictment before pleading to it, and is not a ground of demurrer. *State v. Harris*, 12 Nev. 418; nor can it be taken advantage of after verdict. *State v. Brooks*, 94 Mo. 121; *State v. Hughes*, 4 Iowa 554; and where the omission is a technical error it must be taken advantage of by motion before pleading. *People v. Lawrence*, 21 Cal. 368; *People v. Johnson*, 48 Cal. 549.

**Trial on Defective Copy.**—Where defendant was tried on a copy of a bill of indictment in lieu of the lost original, it is no ground to object to such indictment, after conviction, that the copy did not have upon it any indorsement of "true bill." Such an objection is a formal one and must be urged before trial. *Hughes v. State*, 76 Ga. 40.

3. **A Substantial Compliance with the Statute** is all that is required. *Dixon v. State*, 4 Greene (Iowa) 381.

"**True Bill.**"—The indorsement "True bill" is sufficient, omitting the article "A." *Martin v. State*, 30 Neb. 507; *State v. Elkins*, Meigs (Tenn.) 111; *State v. Davidson*, 12 Vt. 302.

"**A Bill.**"—The indorsement "A bill" is in effect an indorsement that a true bill is "found." *Sparks v. Com.*, 9 Pa. St. 354.

**A "Thru" Bill.**—Where by mistake

the indictment is indorsed "A thru bill," the misspelling of the word "true" is not fatal. *State v. Williams*, 47 La. Ann. 1609.

"**A True Gun.**" indorsed on a bill and signed by the foreman, is sufficient as against a motion in arrest of judgment. *White v. Com.*, 29 Gratt. (Va.) 824, holding, however, that no indorsement whatever is necessary in *Virginia*.

**Blank Form.**—It is not necessary that the foreman should write the form, but he may sign an indorsement printed on the indictment. *Tilly v. State*, 21 Fla. 242; or one already prepared for him. *State v. Elliott*, 98 Mo. 150.

4. **At Foot of Indictment.**—The finding may be at the foot of the indictment. *State v. Jones*, 2 Kan. App. 1; *State v. Howell*, 34 Mo. App. 86.

**On Separate Sheet.**—After verdict, the indorsement on a separate sheet of paper enveloping the indictment is sufficient evidence of the identity of the indictment passed upon by the jury. *Burgess v. Com.*, 2 Va. Cas. 483.

5. **Signature after Printed Indorsement.**—In *State v. Hogan*, 31 Mo. 342, the words "A true bill: ———, foreman of the jury," were printed, and the name of the foreman of the grand jury was appended thereto instead of preceding the words descriptive of his office, but the objection was overruled and the indictment was held not to be insufficient on that account.

**Signature Preceding Indorsement.**—So also where the signature of the foreman preceded the indorsement "A true bill," it was held error to quash the indictment. *State v. Bowman*, 103 Ind. 69.

6. **The Initials of the Christian Name of the foreman** are sufficient. *Studstill v. State*, 7 Ga. 2; *Wassels v. State*, 26 Ind. 30; *Anderson v. State*, 26 Ind. 89; *Zimmerman v. State*, 4 Ind. App. 583; *State v. Groome*, 10 Iowa 308; *State v. Folke*, 2 La. Ann. 744; *State v. Granville*, 34 La. Ann. 1088; *State v. Taggart*, 38 Me. 298; *Com. v. Gleason*, 110

**4. Conclusion of Indictment** — *a. CONTRA PACEM* — **Necessity of Such Conclusion.** — It is an old rule in the law of criminal procedure that an indictment must conclude against the peace and dignity of the government whose laws have been violated,<sup>1</sup> and the requirement of this conclusion, in words appropriate to our form of government, has at various times been incorporated into the organic law of many of the United States.<sup>2</sup> It is also sometimes expressly provided for by statute.<sup>3</sup> The rule when established by the written law is strictly applied,<sup>4</sup> and the omission thus formally to conclude an indictment is fatal,<sup>5</sup> except when the

Mass. 66; *Easterling v. State*, 35 Miss. 210; *State v. Collins*, 3 Dev. L. (N. Car.) 117.

**Omission of Addition "Foreman."** — The omission to designate the capacity of the juror signing the finding is not fatal, because the court can see from the record who the foreman is. *State v. Sopher*, 35 La. Ann. 975; *Beard v. State*, 57 Ind. 8; *Com. v. Read*, Thach. Cr. Cas. (Mass.) 180; *Whiting v. State*, 48 Ohio St. 220; *State v. Brown*, 31 Vt. 603.

**"Foreman" Misspelled.** — The misspelling of the word "foreman" as "fourman" will not make the indictment bad. *State v. Karn*, 16 La. Ann. 183.

**Addition "Of the Grand Jury."** — It is not necessary to add to the designation of the "foreman" the words "of the grand jury." *State v. Valere*, 39 La. Ann. 1060.

**Signature by Mark.** — The foreman may sign the indorsement by making his mark where there is no law requiring a grand juror to be able to write. *State v. Tinney*, 26 La. Ann. 461.

1. At common law the conclusion was *contra pacem domini regis*. *Reg. v. Lane*, 3 Salk. 191, 2 Hale P. C. 188; *Winter's Case*, Yelv. 66; *State v. Joyner*, 81 N. Car. 538.

2. *Arkansas*. — *Williams v. State*, 47 Ark. 230; *Anderson v. State*, 5 Ark. 444.

*Illinois*. — *Zarresseller v. People*, 17 Ill. 101.

*Indiana*. — *Cain v. State*, 4 Blackf. (Ind.) 512.

*Kentucky*. — *Boggs v. Com.*, (Ky. 1887) 5 S. W. Rep. 307.

*Louisiana*. — *State v. Johnson*, 35 La. Ann. 843.

*Maryland*. — *State v. Dycer*, (Md. 1897) 36 Atl. Rep. 763.

*Missouri*. — *State v. Schloss*, 93 Mo. 361.

*New Hampshire*. — *State v. Kean*, 10 N. H. 347.

*Pennsylvania*. — *Rogers v. Com.*, 5 S. & R. (Pa.) 464; *Com. v. Jackson*, 1 Grant's Cas. (Pa.) 262.

*South Carolina*. — *State v. Robinson*, 27 S. Car. 615.

*Tennessee*. — *Rice v. State*, 3 Heisk. (Tenn.) 220.

*Texas*. — *Bird v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 382.

*Virginia*. — *Brown v. Com.*, 86 Va. 466.

*West Virginia*. — *State v. McClung*, 35 W. Va. 280.

*Wisconsin*. — *Williams v. State*, 27 Wis. 402.

3. See *Holden v. State*, 1 Tex. App. 234.

4. When the constitution provides such a conclusion, the omission is for a defect which cannot be obviated by the legislature nor ignored by the courts. *Rice v. State*, 3 Heisk. (Tenn.) 220.

5. *Arkansas*. — *Anderson v. State*, 5 Ark. 444.

*Louisiana*. — *State v. Nunn*, 29 La. Ann. 589.

*Missouri*. — *State v. Lopez*, 19 Mo. 254; *State v. Pemberton*, 30 Mo. 376.

*Tennessee*. — *Rice v. State*, 3 Heisk. (Tenn.) 221.

*Texas*. — *Holden v. State*, 1 Tex. App. 234; *State v. Durst*, 7 Tex. 74; *Cox v. State*, 8 Tex. App. 254; *State v. Sims*, 43 Tex. 521.

*Virginia*. — *Early v. Com.*, 86 Va. 921; *Thompson v. Com.*, 20 Gratt. (Va.) 724; *Com. v. Carney*, 4 Gratt. (Va.) 546.

*West Virginia*. — *Lemons v. State*, 4 W. Va. 755.

*Wisconsin*. — *Williams v. State*, 27 Wis. 402.

*United States*. — *U. S. v. Crittenden*, Hempst. (U. S.) 61; *U. S. v. Lemmons*, Hempst. (U. S.) 62.

**In Absence of Constitutional Provision.** — In *Anderson v. State*, 5 Ark. 444, in

necessity is obviated by statutes not inconsistent with the organic law.<sup>1</sup>

**Sufficiency of Conclusion.** — In this country the conclusion is usually "against the peace and dignity of the state,"<sup>2</sup> and although the phraseology differs somewhat in the different states, substantial conformity to this expression has generally been considered sufficient.<sup>3</sup> And while it is said that the conclusion "against the

discussing the effect of the constitutional provision requiring the conclusion "against the peace and dignity of the state of Arkansas," Sebastian, J., said: "This form derives no new consideration from its being found in the constitution; such would have been the rule by the law without its insertion therein. It was only declaratory and in affirmance of an old principle, and not a creation of a new one."

**Objection on Appeal.** — An objection may be taken for the first time on appeal. *State v. Pemberton*, 30 Mo. 376; *State v. Lopez*, 19 Mo. 254; *State v. Sims*, 43 Tex. 521; *State v. McClung*, 35 W. Va. 280.

**Statutory Offense.** — Where the offense is against the statute, it should nevertheless be laid *contra pacem*, because every offense is against the peace. This was the old rule, 2 Hale P. C. 188; 2 Hawk. P. C., c. 25, § 92, which was adopted with approval in *State v. Joyner*, 81 N. Car. 534, *overruled*, however, in *State v. Kirkman*, 104 N. Car. 911.

1. *State v. Kirkman*, 104 N. Car. 911; *State v. Peters*, 107 N. Car. 876; *State v. Dorr*, 82 Me. 341; *Frisbie v. U. S.*, 157 U. S. 160, where it was held that a conclusion "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is a conclusion of law and does not relate to the substance of the charge, and the omission is a matter of form which does not tend to the prejudice of the defendant, and may, therefore, under the provisions of the Rev. Stat. U. S., § 1025, be disregarded.

**The Rule Disapproved.** — But the rule has not universally been regarded with so much respect, and one court lamented the necessity of following it, though its hands were tied by the constitutional provision, see *Nichols v. State*, 35 Wis. 311; while another, in the absence of a constitutional provision, refused to recognize it, declaring it to be ill-founded in reason, and that

it probably found its origin "in the rhetorical flourish of some ancient and forgotten pleader," *State v. Kirkman*, 104 N. Car. 911, *overruling State v. Joyner*, 81 N. Car. 534.

2. **After Change of Territory to State.** — Where the form of government has been changed since the commission of the offense from a territorial to that of a state, it is nevertheless proper that an indictment for the offense should conclude "against the peace and dignity of the state." *Packer v. People*, 8 Colo. 363.

**After the Carving Out of One State from Another.** — In *Maine* it was held that an indictment for an offense committed before the separation from Massachusetts must charge the offense to have been committed against the peace of the state of Massachusetts. *Damon's Case*, 6 Me. 148, upon the authority of *Yelv.* 66, wherein it was held that the conclusion *contra pacem nuper reginae* was not as good as *contra pacem regis nunc*. See also *Rex v. Lookup*, 3 Burr. 1903, to the same effect.

3. *State v. Waters*, 1 Mo. App. 9.

**Adding Name of State.** — It is not necessary to add the name of the state to the conclusion "against the peace and dignity of the state." *Com. v. Young*, 7 B. Mon. (Ky.) 3; *State v. Pratt*, 44 Tex. 94. But the addition will not make the conclusion bad. *State v. Hays*, 78 Mo. 600; *State v. Pratt*, 44 Tex. 94; *Brown v. Com.*, 86 Va. 466.

**Against the Peace and Dignity of "the Same."** — When an indictment commences with the words "The state of," etc. (naming the state), it is sufficient to conclude "against the peace and dignity of the same." *State v. Johnson*, *Walk.* (Miss.) 392; *State v. Washington*, 1 Bay (S. Car.) 120.

"Against the peace and dignity of the same state *aforesaid*," instead of "against the peace and dignity of the state" is good, as the words italicized may be regarded as surplusage. *State v. Robinson*, 27 S. Car. 615.

So the conclusion "against the peace

form of the statute" would indicate that the prosecution is for a statutory offense and not for an offense at common law,<sup>1</sup> yet where the indictment concludes *contra pacem*, the additional conclusion *contra formam*,<sup>2</sup> as well as other words which may be added to the conclusion, may be regarded as forming no part thereof and may be rejected as surplusage, leaving the conclusion as at common law;<sup>3</sup> though it is also said that the conclusion

and dignity of the people of the state of Illinois" is a sufficient compliance with the constitution, which provides that all prosecutions shall be carried on "in the name and by the authority of the people of the state of Illinois," and conclude "against the peace and dignity of the same;" and it is not necessary to comply literally with the provision. *Zarresseller v. People*, 17 Ill. 104.

Where the constitution directs that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania," and conclude "against the peace and dignity of the same," an objection that the indictment concluded "against the peace and dignity of the commonwealth" was overruled as frivolous. *Rogers v. Com.*, 5 S. & R. (Pa.) 464; *State v. Johnson*, 35 La. Ann. 842; *State v. Anthony*, 1 McCord L. (S. Car.) 285.

**Omission of "Aforesaid."** — "Against the peace and dignity of the commonwealth" is sufficient without adding the words "aforesaid" or "of Kentucky." *Com. v. Young*, 7 B. Mon. (Ky.) 3.

**"Our Said State."** — "Against the peace and dignity of our said state" is a sufficient compliance with the constitutional requirement that the indictment shall conclude "against the peace and dignity of the state." *State v. Kean*, 10 N. H. 347.

**"People of the State."** — The people of the state and the state are the same, and the constitutional provision requiring the indictment to conclude "against the peace and dignity of the state" is complied with by a conclusion "against the peace and dignity of the people of the state." *Anderson v. State*, 5 Ark. 444.

**Omission of "Dignity."** — In *Williams v. State*, 27 Wis. 402, it was held that the conclusion "against the peace of the state of Wisconsin," instead of "against the peace and dignity," etc., was not sufficient. The same opinion was expressed in *Cain v. State*, 4

*Blackf. (Ind.)* 512, where, however, it was said that the words prescribed by the constitution were merely formal, and the court permitted the prosecuting officer to amend the conclusion in that respect.

**Misspelling.** — In *Bird v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 382, it was held that a conclusion in which the word "against" was spelled "ainst" was fatally defective. But "aganist" was held sufficient. *Hudson v. State*, 10 Tex. App. 215.

**Contrary to All the Authorities Above Cited**, it was held in *West Virginia* that the indictment should conclude in the exact words of the constitutional provision, and upon this ground the conclusion "against the peace and dignity of the state of W. Virginia" is not a sufficient compliance with the provision that the indictment shall conclude "against the peace and dignity of the state of West Virginia." *Lemons v. State*, 4 W. Va. 755.

1. *Paris v. People*, 27 Ill. 74.

2. *Kentucky*. — *Gregory v. Com.*, 2 Dana (Ky.) 417.

*Maryland*. — *Davis v. State*, 3 Har. & J. (Md.) 154.

*Massachusetts*. — *Com. v. Reynolds*, 14 Gray (Mass.) 87.

*Missouri*. — *State v. Reakey*, 1 Mo. App. 6; *State v. Schloss*, 93 Mo. 361.

*New Hampshire*. — *State v. Buckman*, 8 N. H. 203; *State v. Straw*, 42 N. H. 393.

*New Jersey*. — *Cruiser v. State*, 18 N. J. L. 206.

*New York*. — *Syracuse, etc., Plank Road Co. v. People*, 66 Barb. (N. Y.) 25; *People v. Conger*, 1 Wheel. Cr. Cas. (N. Y. Ct. Sess.) 448.

*Pennsylvania*. — *Respublica v. Newell*, 3 Yeates (Pa.) 413.

*South Carolina*. — *State v. Wimberly*, 3 McCord L. (S. Car.) 190.

*England*. — *Rex v. Mathews*, 5 T. R. 162, *Nolan* 202; 2 Hawk. P. C. 251, § 115; *Rex v. Dickenson*, 1 Saund. 135, note 3.

3. *Richardson v. State*, 66 Md. 205;

*contra formam statuti* can be rejected only where the offense is not within the purview of any statute.<sup>1</sup>

**b. CONTRA FORMAM—Necessity of Conclusion.**—An indictment for a statutory offense should conclude: "Against the form of the statute."<sup>2</sup> But this rule has been confined to cases where the statute creates an offense which did not exist at common law; if it only directs a mode of punishment different from that at common law it may conclude: "Against the peace and dignity," etc.<sup>3</sup> And in some jurisdictions the conclusion *contra formam* is deemed an unnecessary formality<sup>4</sup> under the statutes there prevailing.<sup>5</sup>

**Conclusion to Several Counts.**—In some jurisdictions it has been held that each count in an indictment must have the proper con-

State *v.* Johnson, 37 Minn. 493; Rowlett *v.* State, 23 Tex. App. 191; Adams *v.* State, (Tex. App. 1890) 13 S. W. Rep. 1009.

1. Gregory *v.* Com., 2 Dana (Ky.) 417; Com. *v.* Hoxey, 16 Mass. 385; State *v.* Gove, 34 N. H. 517. See *infra*, X. 2. *d. Effect of Conclusion "Against Statute."*

**Instruction to Jury.**—Where the indictment concludes against the statute, the court need not, upon request, instruct the jury whether the indictment is good or bad at common law. State *v.* Hart, 34 Me. 36.

2. Fuller *v.* State, 1 Blackf. (Ind.) 63; McCullough *v.* Com., Hard. (Ky.) 102; Com. *v.* Springfield, 7 Mass. 9; Com. *v.* Stockbridge, 11 Mass. 279; Com. *v.* Northampton, 2 Mass. 116; Com. *v.* Cooley, 10 Pick. (Mass.) 37; People *v.* Cook, 2 Park. Cr. Rep. (Warren Oyer & T. Ct.) 12; Warner *v.* Com., 1 Pa. St. 154; Reg. *v.* Radcliffe, 2 Moo. C. C. 68.

The conclusion *contra pacem* charges only a common-law offense. State *v.* Evans, 7 Gill. & J. (Md.) 290.

**After Verdict.**—Where this conclusion is necessary, its omission is a good objection after verdict. Com. *v.* Northampton, 2 Mass. 117.

**The Origin of the Requirement** is found in the fact that courts formerly accepted this conclusion as a compliance with the law requiring statutes to be set out. State *v.* Smith, 63 N. Car. 235. See *infra*, X. 2. *h. Pleading Statute.*

3. Hudson *v.* State, 1 Blackf. (Ind.) 317; Fuller *v.* State, 1 Blackf. (Ind.) 63; State *v.* Evans, 7 Gill. & J. (Md.) 290; O'Connell *v.* State, 6 Minn. 279; State *v.* Gove, 34 N. H. 517; People *v.* Enoch, 13 Wend. (N. Y.) 159; State *v.* Ratts, 63

N. Car. 503; Com. *v.* Scarle, 2 Binn. (Pa.) 332; State *v.* Gray, 14 Rich. L. (S. Car.) 174; U. S. *v.* Norris, 1 Cranch (C. C.) 411; U. S. *v.* Dixon, 1 Cranch (C. C.) 414; U. S. *v.* McLaughlin, 1 Cranch (C. C.) 444.

If a statute makes that an offense which was not an offense at common law, or alters the description of a common-law offense, as by making a misdemeanor a felony, the indictment must conclude "against the form of the statute." Rex *v.* Dickenson, 1 Saund. 135, note 3.

**Provincial Statute as Act of Assembly.**—In State *v.* Turnage, 2 Nott & M. (S. Car.) 158, it was held that an indictment under a statute passed when South Carolina was a province was good with the conclusion "contrary to the Act of the General Assembly of the said state."

**English Act Adopted by Statute.**—As to the proper conclusion of an indictment for an offense contrary to an act of Parliament expressly made of force by a state statute, see State *v.* Sanford, 1 Nott & M. (S. Car.) 512; State *v.* Holley, 1 Brev. (S. Car.) 35.

4. Frisbie *v.* U. S., 157 U. S. 160. See also State *v.* Stroud, (Iowa 1896) 68 N. W. Rep. 450, holding that such a conclusion is not necessary.

5. Brown *v.* State, 13 Ark. 96; Com. *v.* Kennedy, 15 B. Mon. (Ky.) 532; State *v.* Dorr, 82 Me. 341; State *v.* Evans, 7 Gill. & J. (Md.) 290; Smith *v.* State, 58 Miss. 871; State *v.* Peters, 107 N. Car. 876; State *v.* Kirkman, 104 N. Car. 911; Rice *v.* State, 3 Heisk. (Tenn.) 221; Castro *v.* Reg., L. R. 6 App. 229; 50 L. J. Q. B. 497, 44 L. T. 350, 29 W. R. 669, 45 J. P. 452, 14 Cox C. C. 546.



clusion,<sup>1</sup> while in others one conclusion to the indictment has been held sufficient.<sup>2</sup>

**Sufficiency of Conclusion.** — But strict adherence to any particular form of words is not required<sup>3</sup> in concluding against the form of the statute, and words which clearly and fully import a violation of the statute have always been sufficient.<sup>4</sup>

1. *Williams v. State*, 47 Ark. 230; *State v. Hazle*, 20 Ark. 156; *State v. Cadle*, 19 Ark. 613; *State v. Soule*, 20 Me. 19; *State v. Pemberton*, 30 Mo. 376; *State v. Clevenger*, 25 Mo. App. 655; *State v. Strickland*, 10 S. Car. 191; *Early v. Com.*, 86 Va. 921; *Com. v. Carney*, 4 Gratt. (Va.) 546; *Thompson v. Com.*, 20 Gratt. (Va.) 724; *State v. McClung*, 35 W. Va. 280.

**Conviction on Good Count.** — An indictment contained three counts. Under the first two counts the prisoner was acquitted. These two counts closed without alleging that the offense charged was committed "against the peace and dignity of the state of Ohio." The third count, under which the prisoner was convicted, was not defective in this respect, and no evidence having been introduced against the prisoner under those counts which were incompetent, it was held that the defect in them could not operate against the good count. *Ridenour v. State*, 38 Ohio St. 273; *Early v. Com.*, 86 Va. 921.

**After Different Specifications in One Count.** — It is not necessary that the conclusion against the peace, etc., should be appended to each specification, where several are set out for the purpose of affecting the punishment. *Boggs v. Com.*, (Ky. 1887) 5 S. W. Rep. 307, where the indictment specified several former convictions of felony.

2. *McGuire v. State*, 37 Ala. 161; *Rice v. State*, 3 Heisk. (Tenn.) 220, holding that the rule that each count must be complete in itself refers to the description of the offense, and not to the formal conclusion. *Stebbins v. State*, 31 Tex. Crim. Rep. 294.

**Principal and Accessory.** — Where one count is a count against the principal and the other is against the accessory, one conclusion is held sufficient. *Nichols v. State*, 35 Wis. 308; *State v. Travis*, 39 La. Ann. 356.

3. See also *supra*, V. 4. a. *Contra Pacem*.

4. There is no particular magic in the conclusion "against the form of the 'statute,' for other words may be used

which might serve the same purpose." *State v. Smith*, 63 N. Car. 236.

But in *Com. v. Stockbridge*, 11 Mass. 279, while the court remarked that it might be going too far to say that no other form of words can be devised which would be equivalent to *contra formam statuti*, it nevertheless proceeded to hold that the conclusion "against the law in such case provided" is not a sufficient equivalent to the conclusion "against the form of the statute," as the equivalent words must clearly refer to the statute as the foundation of the suit.

**Instances of Sufficient Conclusions.** — Against the "force" of the statute. *State v. Davis*, 80 N. Car. 389.

"Contrary to the statute." *State v. Newton*, 42 Vt. 538.

"Against the peace and the statute." *Com. v. Caldwell*, 14 Mass. 330.

Against the "Act of Assembly," instead of "statute." *State v. Tribatt*, 10 Ired. L. (N. Car.) 151.

"Contrary to the true intent and meaning of the Act of Congress of the United States," etc. *U. S. v. Smith*, 2 Mason (U. S.) 143.

**Omission of Name of State.** — "Contrary to the form of the statute in such case made and provided" is sufficient without naming the state, because no other statute but that in the state is intended. *State v. Karn*, 16 La. Ann. 183.

**The Statutory Form Is Sufficient.** — *Camp v. State*, 25 Ga. 689. But the exact position of the words need not be observed, as where the allegation of a former conviction precedes instead of follows the conclusion *contra formam*. *State v. O'Brien*, 64 Cal. 53.

**Surplusage.** — Additional matters forming no part of the indictment will not affect the conclusion *contra formam*, but such matters may be rejected as surplusage. *U. S. v. Lehman*, 39 Fed. Rep. 768.

**Misspelling.** — A judgment will not be arrested because the indictment concluded against the form of the "statue" instead of "statute," since

**Plural or Singular Conclusion.** — If an offense is created by one statute and the punishment is prescribed by another, the conclusion, it is said, should be against the form of the *statutes*; <sup>1</sup> and it was formerly held that when there were two independent acts the conclusion should be in the plural, <sup>2</sup> but later authorities hold otherwise. <sup>3</sup> Where one statute simply continues another in force, explaining it, or changes its effect or penalty, the conclusion is against the form of the *statute*. <sup>4</sup> It is also held that a plural conclusion will not be bad though there is only one statute. <sup>5</sup>

**5. Signing or Countersigning by Prosecuting Attorney** — *a. NECESSITY.* — At Common Law the signature of the prosecuting officer

the defendant is not thereby misled, *State v. Smith*, 63 N. Car. 237; and so where the word "statute" was spelled "state," it was held that judgment could not be arrested, but that such a formal objection must be urged by a motion to quash or demurrer before the swearing of the jury. *State v. Boudreaux*, 14 La. Ann. 88.

1. *King v. State*, 2 Ind. 523; *State v. Moses*, 7 Blackf. (Ind.) 244; *Tevis v. State*, 8 Blackf. (Ind.) 303; *State v. Casel*, 2 Har. & G. (Md.) 410; *State v. Pool*, 2 Dev. L. (N. Car.) 202; *State v. Jim*, 3 Murph. (N. Car.) 3; *State v. Muse*, 4 Dev. & B. L. (N. Car.) 321; *Hale P. C.* 773; 3 Bac. Abr. 571, tit. Indictment.

**Acts of Same Session.** — An indictment founded upon two chapters of the statutes of the same year may conclude in the singular, as all the acts passed at the same session of the legislature are considered one statute. *State v. Bell*, 3 Ired. L. (N. Car.) 506.

**Larger Embracing Lesser Offense.** — In an indictment for one statutory offense which includes a lesser offense, it is said that the conclusion in the singular is the only proper conclusion. *State v. Stouderman*, 6 La. Ann. 289.

2. 1 Chitty Crim. Law 291.

3. *State v. Willbor*, 1 R. I. 199; *State v. Robbins*, 1 Strobh. L. (S. Car.) 355; *State v. Dayton*, 23 N. J. L. 49; *U. S. v. Gibert*, 2 Sumn. (U. S.) 88; *Rex v. Collins*, 2 Leach, C. C. 827; *Toptclif v. Waller*, 3 Dyer 346b; 1 Chitty Crim. Law, p. 291.

4. *Bennett v. State*, 3 Ind. 167; *King v. State*, 2 Ind. 523; *Strong v. State*, 1 Blackf. (Ind.) 193; *State v. Agudo*, 5 La. Ann. 186; *Butman's Case*, 8 Me. 113; *Morrison v. Witham*, 10 Me. 421; *State v. Berry*, 9 N. J. L. 377; *Kane v. People*, 8 Wend. (N. Y.) 203; *State v. Robbins*, 1 Strobh. L. (S. Car.) 355;

*Rex v. Morgan*, 2 Stra. 1066; *Andrew v. Lewkner*, Yelv. 116.

But the contrary has also been held. *Reg. v. Adams*, C. & M. 299, 41 E. C. L. 167, holding that if one statute declares an offense and awards punishment therefor, and by a subsequent act the punishment is changed, the conclusion should be in the plural.

5. *Townley v. State*, 18 N. J. L. 311; *Carter v. State*, 2 Ind. 617; *U. S. v. Gibert*, 2 Sumn. (U. S.) 88; *U. S. v. Trout*, 4 Biss. (U. S.) 105. *Contra*, *State v. Sandy*, 3 Ired. L. (N. Car.) 570; *State v. Abernathy*, Busb. L. (N. Car.) 428.

**Contra Statut.** — "Formerly it was necessary to set out at length the statute, or statutes, if more than one, upon which an indictment was founded, in order that the party might be informed of the law against which it was alleged that he had offended. This particularity being attended with much inconvenience, and rendering the proceedings very cumbersome, the conclusion '*contra formam statuti*,' or '*contra formam statutorum*' if the indictment was founded upon more than one statute, was received as a sufficient compliance with the law instead of the long recital. But as many prosecutions still failed because of the conclusion '*contra formam statuti*' when it should have been '*statutorum*,' and vice versa, the courts permitted the device of concluding '*contra formam statuti*,' and would construe the abbreviation to be *statuti* or *statutorum* in order to fit the case." *State v. Smith*, 63 N. Car. 235; *Rex v. Spiller*, 2 Show. 207, though it is said that this easy mode of evasion became of no effect by operation of the statutes requiring indictments to be in English and prohibiting abbreviations. 1 Chitty Crim. Law (5th Am. ed.) 292, citing Statutes 4 Geo. II., c. 26; 6 Geo. II., c. 6.

was not necessary to the validity of an indictment, and this is the rule in the United States in those jurisdictions where innovations have not been made by statute.<sup>1</sup> But it is said to be a formality in criminal procedure which, from its long use, it would be well to follow.<sup>2</sup>

**By Statute.** — In some states, however, express statutory provision has been made for the signature of indictments by the appropriate prosecuting officers.<sup>3</sup>

1. *Alabama*. — *Ward v. State*, 22 Ala. 16; *Harrall v. State*, 26 Ala. 52.

*Arkansas*. — *Anderson v. State*, 5 Ark. 444.

*California*. — *People v. Ashnauer*, 47 Cal. 100.

*Iowa*. — *State v. Kovolosky*, 92 Iowa 498.

*Kentucky*. — *Sims v. Com.*, (Ky. 1890) 13 S. W. Rep. 1079.

*Louisiana*. — *State v. Crenshaw*, 45 La. Ann. 496.

*Maine*. — *State v. Reed*, 67 Me. 128.

*Massachusetts*. — *Com. v. Stone*, 105 Mass. 469.

*Mississippi*. — *Keithler v. State*, 10 Smed. & M. (Miss.) 192.

*Nevada*. — *State v. Salge*, 2 Nev. 322.

*New Hampshire*. — *State v. Farrar*, 41 N. H. 60.

*Utah*. — *People v. Lyman*, 2 Utah 30.

*Virginia*. — *Brown v. Com.*, 86 Va. 466.

*United States*. — *In re Lane*, 135 U. S. 443; *U. S. v. McAvoy*, 4 Blatchf. (U. S.) 418, wherein the indictment was found pending a vacancy in the office of district attorney by reason of his death, and upon arraignment of the defendant by the successor of the deceased district attorney, the defendant pleaded and thereafter went to trial, and it was held that the signature of the district attorney constituted no part of the indictment, and that its only purpose was to show to the court that the officer was prosecuting the offender in pursuance of the duty imposed upon him by statute in that regard, which sufficiently appeared by his arraigning the prisoner on the indictment found.

**Contra.** — *Teas v. State*, 7 Humph. (Tenn.) 174; *State v. Lockett*, 3 Heisk. (Tenn.) 274; *Staggs v. State*, 3 Humph. (Tenn.) 373; *Hite v. State*, 9 Yerg. (Tenn.) 202; *Foute v. State*, 3 Hayw. (Tenn.) 98.

**The Reason of the Rule**, as sometimes stated, is that if the signature of the prosecuting officer were required this condition to the validity of an indict-

ment would place the grand jury entirely under the control of the prosecuting officer. *Brown v. Com.*, 86 Va. 466; *State v. Reed*, 67 Me. 129.

**A Presentment** must be signed by the grand jury. *Gunkle v. State*, 6 Baxt. (Tenn.) 626.

**Space for Signature in Statutory Form.** — The fact that a form of indictment set out in the code provides a space for the signature of the prosecuting officer does not make such a signature a necessary part of the indictment, because it is not specifically required. *State v. Ruby*, 61 Iowa 86; *State v. Wilmoth*, 63 Iowa 380.

2. *Com. v. Stone*, 105 Mass. 469; *Keithler v. State*, 10 Smed. & M. (Miss.) 192; *State v. Farrar*, 41 N. H. 59.

**Universality of Custom Not Controlling.** — In *State v. Reed*, 67 Me. 129, it was held that countersigning an indictment by the prosecuting officer was not necessary to the validity of the indictment, notwithstanding the custom had been so universal in that state that the court could recall no other instance of its omission, and however much it might regret a discontinuance of the former practice.

3. *Missouri*. — *State v. Kinney*, 81 Mo. 102; *State v. Bruce*, 77 Mo. 194, holding that an indictment without the signature of the prosecuting attorney is a nullity, although before the statute such signature was not necessary. *Thomas v. State*, 6 Mo. 457.

*Indiana*. — *Heacock v. State*, 42 Ind. 393, holding that an indictment without such signature should be quashed, and referring to *M'Gregg v. State*, 4 Blackf. (Ind.) 101, which held a contrary view, in these words: "The statute at that time may not have been like our present one, which positively requires that the indictment shall be signed by the prosecuting attorney." That case, however, appears to have been decided, not upon any statute, but upon the common-law rule. *Vanderkarr v. State*, 51 Ind. 93.

**b. SUFFICIENCY OF SIGNATURE — Designation of Official Capacity.** — An inaccurate or incomplete designation of the capacity of the officer signing an indictment is not usually fatal, as the court will judicially know from an inspection of the signature whether the person represented thereby is the officer whose function it is to represent the government.<sup>1</sup>

**Signature by Deputy or Pro Tem. Officer.** — And the indictment may be signed by a deputy or *pro tem.* officer who has authority to perform the functions of the regular prosecuting attorney.<sup>2</sup>

But whether the failure of the prosecuting attorney to sign an indictment will constitute such a defect as would tend to prejudice the substantial rights of the defendant upon the merits of the cause is still an open question. *Hamilton v. State*, 103 Ind. 96.

In *Kansas*, under an act abolishing the office of district attorney and creating that of county attorney, but continuing in office the officers then serving, an indictment signed by the district attorney as such after the passage of the act was held to be properly signed. *Craft v. State*, 3 Kan. 477.

In *Louisiana* the defect of omission is waived unless taken advantage of by motion to quash a demurrer. *State v. Crenshaw*, 45 La. Ann. 496.

**Printed or Typewritten Signature.** — It is sufficient if the name and title of the officer at the bottom of the indictment are printed, *Hamilton v. State*, 103 Ind. 96; or typewritten, *Miller v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 391.

**Initials of Christian Name.** — Signing by the surname in full and the Christian name by its initials is sufficient. *Vanderkarr v. State*, 51 Ind. 93.

**Surplusage.** — The name of the prosecuting attorney appearing to be subscribed to the indictment, the fact that such signature is preceded by the word "attest" does not make it bad, as that word is mere surplusage and may be rejected. *State v. Hilsabeck*, 132 Mo. 348.

1. This is true not only in those jurisdictions where the signature of the prosecuting officer is necessary, *State v. Myer*, 85 Tenn. 205 [virtually overruling *Teas v. State*, 7 Humph. (Tenn.) 174]; *Foute v. State*, 3 Hayw. (Tenn.) 98; *State v. Evans*, 8 Humph. (Tenn.) 110; *State v. Kinney*, 81 Mo. 102; but in those where no such signature is necessary the courts have sometimes come to the same conclusion. *People v. Ashnauer*, 47 Cal. 100; *State v. Salge*,

2 Nev. 322; *State v. Kovolosky*, 92 Iowa 498.

**Omission of Official Title.** — An indictment was signed with no official title attached to the signature, and the court said that it could have no doubt that the person whose name appeared to the indictment was the same man that it knew to be attorney-general or district attorney for that district, and that his signature to the paper was made in the performance of his official duty as such officer. *Currey v. State*, 7 Baxt. (Tenn.) 156.

**Designation of District of County.** — A district attorney's signature to an indictment need not show for what district he is attorney, if any signature is necessary. *Com. v. Beaman*, 8 Gray (Mass.) 497; *State v. Evans*, 8 Humph. (Tenn.) 110; *State v. Brown*, 8 Humph. (Tenn.) 93; *State v. Tannahill*, 4 Kan. 117, wherein the officer was designated as county attorney for a county other than the one in which the indictment was found; and it appearing that he was in fact the county attorney for the county in which the indictment was found, it was held that it was error to quash the indictment.

2. *People v. Etting*, 99 Cal. 577; *State v. Hayes*, 16 Mo. App. 560; *State v. Moxley*, 102 Mo. 374; *Shafer v. State*, 18 Ind. 444; *Hamilton v. State*, 103 Ind. 99; *Stout v. State*, 93 Ind. 151; *Wrockledge v. State*, 1 Iowa 167; *Territory v. Harding*, 6 Mont. 323; *Territory v. Layne*, 7 Mont. 227.

**The Signature of the Deputy Alone** was held sufficient though it was said to be the better practice that the name of the principal be signed by the deputy. *Knight v. State*, 84 Ind. 73.

And even conceding that the district attorney had no authority to appoint a deputy, it was held that there was no doubt that he could authorize another person to draw up an indictment and sign his (the district attorney's) name to it, and therefore an objection that an

## VI. FILING OF INFORMATION — 1. By Whom Filed — In General. —

In the *United States* a criminal information is sometimes deemed to be such as in *England* was presented by the attorney-general,<sup>1</sup> in the absence of statutes changing its character, and is filed by the officer, whatever his title, who exercises the function of prosecuting attorney for the county,<sup>2</sup> and without leave of court.<sup>3</sup> But the practice is variously regulated in the several jurisdictions,

indictment was signed "Harding, district attorney, by Grass, deputy," was held untenable. *State v. Harris*, 12 Nev. 419.

In *Ohio* it was contended that an indictment was insufficient on account of the signature by the assistant prosecuting attorney at the end of it, but the court held that it was by no means clear that an indictment found to be a true bill by the grand jury and properly indorsed by its foreman need be signed at the end by any law officer of the state, and however that might be, such an omission was a defect in form merely. *Rifle-maker v. State*, 25 Ohio St. 397.

**Pro Tem. Officer.** — Where an indictment purports to be signed by the district attorney *pro tem.*, it is not ground for error that it was not signed by one authorized to act as district attorney, in the absence of a showing on the record that the person was not so authorized, and the court below having recognized the official character of the person so signing the indictment, it will be presumed that he was duly and legally appointed. *Eppes v. State*, 10 Tex. 474.

Even if it were essential that an indictment should have the signature of the prosecuting officer, still, it is not necessary that the absence of the attorney-general must be suggested in order that it may be signed by the solicitor-general, and the court will take notice of the absence of the attorney-general, and that the solicitor acted in his place. This was held without deciding that the signature of the prosecuting officer was indispensable, although it was said to be customary and proper. *State v. Farrar*, 41 N. H. 59.

**Presence of Regular Officer.** — Where the record disclosed that the district attorney, who resided in a different parish, had probably reached the parish and was *en route* to the parish seat when the indictment was signed and returned into court by the *pro tempore* officer, but that he had not reached the

court house, and the *pro tempore* officer was not aware of his presence in the parish at the time, it was held that the authority granted to *pro tempore* district attorneys under the statute was sufficiently broad to cover the case. *State v. Vance*, 32 La. Ann. 1178.

1. *State v. White*, 55 Mo. App. 362; *State v. Ransberger*, 42 Mo. App. 471, 106 Mo. 135; *State v. Keena*, 64 Conn. 215.

In *England* the right to file an information belongs to the attorney-general, and with his discretion the court will not interfere, *Rex v. Phillips*, 4 Burr. 2090; *Rex v. Phillips*, 3 Burr. 1564; and if the office of attorney-general is vacant, the solicitor-general may file the information, *Rex v. Wilkes*, 4 Burr. 2527.

2. *State v. Keena*, 64 Conn. 212; *State v. Cole*, 38 La. Ann. 843; *State v. Huddleston*, 75 Mo. 667; *State v. Sebecca*, 76 Mo. 55; *State v. Ransberger*, 42 Mo. App. 471; *State v. Dover*, 9 N. H. 468.

**An Assistant district attorney** may file an information. *People v. Turner*, 85 Cal. 432; *People v. Trombley*, 62 Mich. 279; *State v. Ryder*, 36 La. Ann. 294.

**De Facto Assistant.** — An information signed and presented by a *de facto* assistant district attorney, who is recognized as assistant by the district attorney and acts under his direction, is good. *People v. Turner*, 85 Cal. 432.

**Absence of Regular Officer.** — In the absence of the attorney-general the solicitor is the proper officer to sign and present an information. *State v. Ingalls*, 59 N. H. 89.

**A District Attorney Pro Tem.** may file an information, and a failure to aver in the information the reason for the action by such an officer is no ground for arresting judgment, but such an objection must be made by demurrer or motion to quash before trial. *State v. Robacker*, 31 La. Ann. 651.

3. *State v. Ransberger*, 42 Mo. App. 471; *State v. Dover*, 9 N. H. 468; *King v. State*, 17 Fla. 187.

so that in many of them an affidavit, or complaint,<sup>1</sup> or leave of court first obtained<sup>2</sup> is necessary to support an information.

**Necessity of Official Information.** — The affidavit upon which an information may be predicated is not sufficient to warrant a prosecution and conviction, but an official information must be filed thereon.<sup>3</sup>

**2. Preliminary Examination.** — By constitution or statute<sup>4</sup> a preliminary examination is sometimes a condition precedent to the authority to file an information,<sup>5</sup> unless the person who com-

1. See *infra*, VI. 3. *Verification, Affidavit, or Complaint.*

2. *State v. Smith*, 12 Mont. 378; *Walker v. People*, 22 Colo. 415; *U. S. v. Smith*, 40 Fed. Rep. 755; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275.

**Extent of Judicial Discretion.** — In *Louisiana*, under a statute providing that "prosecutions for offenses not capital may be by information with the consent of the court first obtained," it was held that except in extreme cases the court could not withhold its consent to that mode of prosecution. Thus it was held that the district judge cannot refuse leave to file an information upon the ground that the statute under which the prosecution is instituted is unconstitutional. *State v. Judge*, 33 La. Ann. 1222; *State v. Cole*, 38 La. Ann. 843.

**Revocation of Leave.** — Where leave is granted it is said that it cannot be revoked. *State v. Ross*, 14 La. Ann. 364. But the discretion of the court has been extended to cover this power in extreme cases, as well as to the refusal to grant leave in the first instance. Thus where a county attorney oppressively, maliciously, or otherwise illegally and unjustly attempts to harass a citizen by filing an information against him, the court may, either upon its own motion or upon a proper showing, deny or suspend its leave to file a charge until an inquiry can be made into the reasons for the official act of the prosecuting attorney. *State v. Cain*, 16 Mont. 562; *State v. Brett*, 16 Mont. 360.

**Sufficient Showing of Leave Granted.** — A minute entry that the district attorney comes "into open court \* \* \* and, with leave of the court, files the following bills," etc., fairly imports that leave of the court was first obtained. *State v. Cox*, 33 La. Ann. 1056. So where the record shows that the court ordered the information to be filed leave is sufficiently shown, since

courts are supposed to consent to that which they order. *State v. Robacker*, 31 La. Ann. 651.

3. *Gould v. People*, 89 Ill. 216; *Butler v. State*, 113 Ind. 5; *Hoover v. State*, 110 Ind. 349; *State v. First*, 82 Ind. 81; *Jackson v. State*, 4 Kan. 150; *State v. Huddleston*, 75 Mo. 667; *State v. Sebecca*, 76 Mo. 55; *Prewitt v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 924; *Johnson v. State*, 17 Tex. App. 230; *Thompson v. State*, 15 Tex. App. 39; *Proffit v. State*, 12 Tex. App. 233; *Casey v. State*, 5 Tex. App. 463; *Deon v. State*, 3 Tex. App. 436.

4. An examination is not a necessary prerequisite to the filing of an information except where by constitution or statute the right to file an information is dependent thereon. *Holt v. People*, 23 Colo. 1, *citing State v. Anderson*, 30 La. Ann. 557; *State v. Brett*, 16 Mont. 360; *State v. Sureties of Krohne*, (Wyoming 1893) 34 Pac. Rep. 3. See in this connection the succeeding sections, VI. 3. as to *Verification, Affidavit, or Complaint.*

5. *Kalloch v. Superior Ct.*, 56 Cal. 229; *People v. McCurdy*, 68 Cal. 576; *State v. Woods*, 49 Kan. 237; *In re Eddy*, 40 Kan. 592; *People v. Evans*, 72 Mich. 367; *Morrissey v. People*, 11 Mich. 327; *People v. Jones*, 24 Mich. 215; *Hamilton v. People*, 29 Mich. 173; *O'Hara v. People*, 41 Mich. 623; *Sneed v. People*, 38 Mich. 248; *Byrnes v. People*, 37 Mich. 515; *Stuart v. People*, 42 Mich. 257; *Turner v. People*, 33 Mich. 364; *Miller v. State*, 29 Neb. 437. See, generally, article PRELIMINARY HEARING.

**Where the Information Is Filed on the Same Day as the Commitment,** it will be presumed that the information was filed subsequent to the commitment. *People v. McCurdy*, 68 Cal. 576.

**Substantial Compliance.** — If the charge in the information is substantially the same as that in the preliminary examination, the plea of a want of prelim-

mits the crime withdraws from the jurisdiction of the court and thus becomes a fugitive from justice and precludes a preliminary examination,<sup>1</sup> or waives his privilege in that regard.<sup>2</sup>

**3. Verification, Affidavit, or Complaint**—*a. WHEN NECESSARY.*—The necessity for a verification of an information by the prosecuting officer or other persons, or the independent affidavit or complaint as the basis of such information, is generally regulated by statute. In some jurisdictions, however, the common-law practice prevails, under which the official oath of the prosecuting attorney is alone required.<sup>3</sup> In others it is required by statute that the information be verified by the prosecuting attorney or

inary examination will be unavailing. *Cowan v. State*, 22 Neb. 519.

**Lost Papers.**—If the record shows a sufficient complaint and warrant, and an examination before the magistrate who issued the warrant, and that several witnesses were examined in behalf of the people, and the justice makes a commitment in which he states that the crime charged has been committed and that there is probable cause to believe the respondent guilty, a sufficient examination is shown for the foundation of an information where the original papers are lost; and proof of the loss of the papers showing the foregoing facts is competent and sufficient in resisting a motion to quash. *People v. Coffman*, 59 Mich. 6.

**Several Counts.**—A motion to quash the whole information because of the want of a preliminary examination as to some of the counts therein should not be granted, but the motion should be confined to those counts which are not supported by the examination. *Hamilton v. People*, 29 Mich. 173.

**Substitute for Presentment by Jury.**—The examination of persons charged with offenses not cognizable by a justice of the peace is said to be designed to take the place of the presentment by the grand jury. *Yaner v. People*, 34 Mich. 286.

1. *In re Eddy*, 40 Kan. 592; *State v. Woods*, 49 Kan. 237; *People v. Kuhn*, 67 Mich. 465; *Miller v. State*, 29 Neb. 437.

2. *Stuart v. People*, 42 Mich. 257; *Sneed v. People*, 38 Mich. 248; *Byrnes v. People*, 37 Mich. 515. *Contra*, *Kallock v. Superior Ct.*, 56 Cal. 229.

**By Pleading to an Information** the want of a preliminary examination is waived. *Jennings v. State*, 13 Kan. 90.

Noncompliance with the law in the

arrest and preliminary examination must be taken advantage of by motion to quash before pleading to the information. *State v. Clark*, (Idaho 1894) 35 Pac. Rep. 710; *State v. Collins*, (Idaho 1894) 38 Pac. Rep. 38; *State v. McCaffery*, 16 Mont. 33.

It has been held that a defendant cannot for the first time in the court in which he is held to answer raise objection either of form or substance to the complaint or warrant under which he was arrested, when called upon to plead to the information. *People v. Dolan*, 96 Cal. 315; *State v. Stoffel*, 48 Kan. 364; *State v. Longton*, 35 Kan. 375; *Redmond v. State*, 12 Kan. 172; *State v. Reedy*, 44 Kan. 190; *People v. Haley*, 48 Mich. 496; *People v. Dowd*, 44 Mich. 488; *Alderman v. State*, 24 Neb. 97. See further, *infra*, X. 5. *Variance Between Information or Indictment and Affidavit or Complaint.*

3. *Gallagher v. People*, 120 Ill. 179; *Obermark v. People*, 24 Ill. App. 259; *Long v. People*, 135 Ill. 435; *Territory v. Cutinola*, 4 N. Mex. 160; *State v. White*, 55 Mo. App. 362, wherein is shown the difference at common law between an information upon the official authority of the attorney-general and one upon the instigation of a private individual, in that the former was filed upon the official oath of the attorney-general, and the latter by the coroner or master of the crown in the king's name, though at the relation and upon the affidavit of a private person, *citing Black. Com.* 308, 309; *Rex v. Robinson*, 1 W. Bl. 541; *Reg. v. Jones*, 1 Stra. 704, and the court said that the prosecuting attorney in *Missouri* performs the duties of the attorney-general or solicitor-general, as well as those of coroner or crown officer; *Information v. Jager*, 29 S. Car. 438.

other person,<sup>1</sup> or supported by the separate affidavit or complaint of a third person,<sup>2</sup> and such affidavit is sometimes considered absolutely essential for the support of an information, under constitutional provisions against seizures of the person without probable cause supported by oath or affirmation.<sup>3</sup>

*b. SUFFICIENCY* — (1) *In General* — **Substantially Charging an Offense.** — Under the *English* practice, when an information was presented by a private person it was said that the court would only grant leave to file it upon an affidavit which would be legal evidence to support an indictment before the grand jury,<sup>4</sup> and in the *United States* it has been held that the affidavit should substantially charge the defendant with the commission of an offense,<sup>5</sup> although

1. *State v. Spencer*, 43 Kan. 119; *State v. Bennett*, 102 Mo. 356; *State v. Armstrong*, 106 Mo. 395; *State v. Bragg*, 63 Mo. App. 22; *State v. O'Connor*, 58 Mo. App. 457.

2. *Swiney v. State*, 119 Ind. 478; *Carpenter v. State*, 14 Ind. 109; *Thornberry v. State*, 3 Tex. App. 37; *Davis v. State*, 2 Tex. App. 185; *Dishongh v. State*, 4 Tex. App. 158; *Casey v. State*, 5 Tex. App. 463; *Deon v. State*, 3 Tex. App. 436; *White v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 391; *Dominquez v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 973; *Wadgymar v. State*, 21 Tex. App. 459.

*In Illinois*, where the information may be founded upon the official oath of the prosecuting attorney, if the information is presented by any person other than such attorney it must be verified by the affidavit of such person. See *Gallagher v. People*, 120 Ill. 179; *Long v. People*, 135 Ill. 435.

*In Georgia* "the county court may proceed to try the prisoner for a misdemeanor on written accusation based upon affidavit, unless the prisoner in writing demands indictment by a grand jury. No express waiver of indictment is necessary. Code, §§ 297, 299." *Smith v. State*, 63 Ga. 168; *Dickson v. State*, 62 Ga. 587.

*In Virginia*, for a long series of years, by a practice unknown to the common law, presentments have been allowed to stand as the foundation for an information in cases of misdemeanor, or the commonwealth's attorney has been allowed, by express statute, to file an information upon a complaint in writing, verified by the oath of competent witnesses. *Wilson v. Com.*, 87 Va. 94; *Com. v. Barrett*, 9 Leigh (Va.) 665; *Com. v. Christian*, 7 Gratt. (Va.)

631; *Com. v. Ayres*, 6 Gratt. (Va.) 668; *Bishop v. Com.*, 13 Gratt. (Va.) 785.

**Affidavit of County Attorney.** — There must be a legal affidavit as the basis of an information. Under the statute in *Texas* requiring the affidavit of a credible witness, it is not competent for the county attorney to make the affidavit himself upon information and belief, although it is said that if the county attorney is the sole witness to the violation of the law, he would be authorized to make the affidavit, but where the affidavit itself shows that he derives his knowledge from another party, the affidavit should be made by that party. *Daniels v. State*, 2 Tex. App. 358.

3. *Lustig v. People*, 18 Colo. 217; *State v. Gleason*, 32 Kan. 245; *Eichenlaub v. State*, 36 Ohio St. 142; *Thornberry v. State*, 3 Tex. App. 37; *State v. Boulter*, (Wyoming 1895) 39 Pac. Rep. 883.

4. *Rex v. Willet*, 6 T. R. 294.

5. *State v. White*, 55 Mo. App. 362; *State v. Cornell*, 45 Mo. App. 94; *State v. Davidson*, 46 Mo. App. 9.

*In Virginia*, when the information is filed upon the presentment of a grand jury, the presentment must show that an offense has been committed. *Bishop v. Com.*, 13 Gratt. (Va.) 785.

**A Bad Affidavit Will Not Support an Information** which otherwise would be sufficient. *State v. Burnett*, 119 Ind. 393; *Engle v. State*, 97 Ind. 122; *Brunson v. State*, 97 Ind. 96; *State v. Beebe*, 83 Ind. 173; *State v. Cuppy*, 50 Ind. 291; *Luther v. State*, 27 Ind. 47; *State v. Gartrell*, 14 Ind. 280; *State v. Downs*, 7 Ind. 237; *Strader v. State*, 92 Ind. 377, holding that an affidavit should be as certain as an indictment; but see *Dickson v. State*, 62 Ga. 587, wherein it was held that an affidavit in



mere informalities will be disregarded.<sup>1</sup>

**"Information and Belief."**—The sufficiency of the verification, affidavit, or complaint is also governed by the particular requirements of the statutes,<sup>2</sup> and while it is said that the affidavit may properly be made upon information and belief,<sup>3</sup> in some instances this seems to be confined to cases where the verification is by the prosecuting attorney,<sup>4</sup> especially when it is not intended as the foundation for the arrest of the accused person, which is often the point upon which the sufficiency of such a verification turns.<sup>5</sup>

(2) *By Whom Made.*—The affidavit upon which an information is based must be made by a witness competent to testify against

support of an accusation may charge the offense in general and generic terms; thus it may charge simple larceny, with no further description, and the property stolen need not be mentioned or described, nor its value stated, nor the owner named.

**Bad Grammatical Construction** in an affidavit upon which an accusation is based will not vitiate the accusation. *Dickson v. State*, 62 Ga. 589.

**Venue.**—It has been held that although the information lays the venue correctly, it will not be supported by an affidavit in which the venue is not laid. *Smith v. State*, 3 Tex. App. 549; *Rice v. State*, 15 Ind. App. 427. But, as in the information itself, the venue may be laid in the affidavit by reference to the place stated in the commencement. *Hawkins v. State*, 136 Ind. 630.

**1. In Name and by Authority of State.**—The affidavit upon which an information is based need not begin "In the name and by the authority of the state." *Johnson v. State*, 31 Tex. Crim. Rep. 464.

**Title.**—The affidavit is usually made before there is a suit pending, and when there is no title to give to it. Hence the statute requiring an information or indictment to contain the title of the action and the name of the court to which it is presented does not apply to affidavits supporting informations. *Hawkins v. State*, 136 Ind. 630. See also *White v. State*, 28 Neb. 341.

**2.** *Hall v. State*, 32 Tex. Crim. Rep. 594; *Brown v. State*, 11 Tex. App. 451; *Clark v. State*, 23 Tex. App. 260; *Dodson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 754.

**3.** *Franklin v. State*, 85 Ind. 99; *Toops v. State*, 92 Ind. 14; *State v. Ellison*, 14 Ind. 380.

**4.** *State v. Montgomery*, 8 Kan. 351;

*State v. Nulf*, 15 Kan. 404; *State v. Bennett*, 102 Mo. 356; *State v. Armstrong*, 106 Mo. 395; *State v. Hayward*, 83 Mo. 299; *State v. Storts*, (Mo. 1886) 1 S. W. Rep. 288; *State v. Graham*, 46 Mo. App. 527; *State v. Ransberger*, 106 Mo. 135.

**Verification by Private Person.**—The presumption will be indulged that a private person verifying an information had actual knowledge, if it does not appear that the verification was made otherwise than upon actual knowledge. *State v. Lund*, 51 Kan. 1.

**5. Colorado.**—*Brown v. People*, 20 Colo. 161; *Lustig v. People*, 18 Colo. 217; *White v. People*, 8 Colo. App. 289.

**Kansas.**—*State v. Gleason*, 32 Kan. 245; *State v. Stoffel*, 48 Kan. 364; *State v. Druitt*, 42 Kan. 469; *State v. Cropper*, 4 Kan. App. 245.

**Michigan.**—*Swart v. Kimball*, 43 Mich. 451 [*distinguishing* *Washburn v. People*, 10 Mich. 372]; *Mentor v. People*, 30 Mich. 91.

**North Dakota.**—*State v. Hazledahl*, 2 N. Dak. 521.

**Wyoming.**—*State v. Boulter*, (Wyoming 1895) 39 Pac. Rep. 883.

**United States.**—*U. S. v. Polite*, 35 Fed. Rep. 58; *U. S. v. Tureaud*, 20 Fed. Rep. 621; *U. S. v. Smith*, 40 Fed. Rep. 755; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275.

**Conversely**, it has been held that the positive verification of an information is sufficient to justify the issuance of a warrant, without any previous finding of probable cause. *State v. Brooks*, 33 Kan. 708. See also *Walker v. People*, 22 Colo. 415.

**Nature of Verification when Not for Arrest.**—Where sufficient affidavit for the arrest has been made, the verification of the information is merely to insure good faith and is said to be no substantial part thereof. *Hammond*

the defendant,<sup>1</sup> but it is not necessary that the name of the affiant be set out in the body of the affidavit or complaint.<sup>2</sup>

(3) *Before Whom Made.* — The affidavit, complaint, or verification must be made before an officer having authority to administer such an oath.<sup>3</sup>

*c. THE JURAT.* — The affidavit upon which an information is founded must appear to have been properly sworn to, and this must be shown by the jurat<sup>4</sup> signed by the officer before whom the affidavit is made.<sup>5</sup>

*v. State, 3 Wash. 174; Swart v. Kimball, 43 Mich. 451; Washburn v. People, 10 Mich. 372.*

**Waiver of Objection.** — Objection to the verification of an information comes too late if not made before the jury is sworn. *Lambert v. People, 29 Mich. 71; People v. Jones, 24 Mich. 215; State v. Osborn, 54 Kan. 473; or before the giving of bail. State v. Barr, 54 Kan. 230; State v. Ellvin, 51 Kan. 784.*

**Assigning Specific Cause.** — If a party desires to object to the verification of an information in a case where it is not entirely unverified, he must specifically assign for cause the insufficiency of the verification. *Hawkins v. State, 126 Ind. 296.*

1. *Thomas v. State, 14 Tex. App. 70.* See also *State v. O'Connor, 58 Mo. App. 457; Rex v. Willet, 6 T. R. 294.*

2. *Beller v. State, 90 Ind. 449; Upton v. State, 33 Tex. Crim. Rep. 231; Malz v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 267.*

**The Designation of the Wrong Person in the body of the complaint will not affect it, the signature thereto controlling.** *Malz v. State, (Tex. Crim. App. 1896) 34 S. W. Rep. 267.*

**Designation of Official Capacity.** — Where a deputy prosecuting attorney has authority to verify an information, it is no valid objection that he is designated as the prosecuting attorney in the body of the complaint. *Hammond v. State, 3 Wash. 171.*

3. *Davis v. State, 31 Neb. 248.* See, generally, article AFFIDAVITS, vol. I, p. 328.

**Affidavit Made in Another County.** — The county attorney of one county has no authority to use the affidavit made before the county attorney of another county as the basis of an information. *Thomas v. State, (Tex. Crim. App. 1897) 38 S. W. Rep. 1011.*

**Waiver of Objection.** — An objection that an information is verified before the law partner of the prosecuting at-

torney, if tenable at any stage of the proceedings, is waived by pleading to the information and proceeding with the trial. *People v. Gardner, 62 Mich. 311.*

Objection because an information was sworn to before a notary public, instead of before a magistrate, was held to be waived if not made before verdict. *Davis v. State, 31 Neb. 248; Hodgkins v. State, 36 Neb. 160.* See also *Hammond v. State, 3 Wash. 171.*

4. *Swiney v. State, 119 Ind. 478; Dishongh v. State, 4 Tex. App. 158.*

**Substantial Sufficiency.** — "Sworn to and subscribed in my presence" is good without inserting the words "before me" after "sworn to." *State v. Smith, 38 Kan. 194.*

5. *Neiman v. State, 29 Tex. App. 360; Morris v. State, 2 Tex. App. 503; Robertson v. State, 25 Tex. App. 529; Mican v. State, (Tex. App. 1892) 19 S. W. Rep. 762.*

**Initials of Christian Name.** — The signature of the clerk to the jurat by the initials of his Christian name is sufficient. *Rice v. People, 15 Mich. 9.*

**Official Character.** — The jurat to a verification of an information was signed by the clerk, but he failed to attach his title of office thereto. An objection on this ground not taken before trial and conviction was held to be waived. *People v. Murphy, 56 Mich. 546; Brooster v. State, 15 Ind. 190.*

**Abbreviation.** — "J. P." sufficiently indicates "justice of the peace." *Hawkins v. State, 136 Ind. 630.*

**Signature by Deputy Clerk.** — When the information is verified before a deputy clerk he may sign his own name officially, or that of the clerk by him as deputy. *State v. Rosener, 8 Wash. 42; State v. Devine, 6 Wash. 587; State v. White, 12 Wash. 417.*

**Judicial Notice of Clerk's Signature.** — It will be presumed that the trial court knew the signature of its clerk. *Hipes*

**4. When Filed** — *a. GENERALLY.* — As hereinafter shown, the time when an information may be filed is in some cases the controlling feature of the right to prosecute by information.<sup>1</sup> But where the right exists, and in the absence of a statute restricting it to a certain term, it is said that there is nothing to prevent the filing as soon as it may be convenient,<sup>2</sup> though whether an information may be filed in vacation or must be filed in term time is often controlled by statutory practice.<sup>3</sup>

*v. State*, 73 Ind. 39; *Mountjoy v. State*, 78 Ind. 174.

**Omission of Seal.** — An affidavit without the seal of the officer to the jurat is not sufficient to require arrest of the judgment or reversal, *Qualter v. State*, 120 Ind. 92; *Mountjoy v. State*, 78 Ind. 174; *Rosenstein v. State*, 9 Ind. App. 292; though a notary's seal cannot be omitted under a statute having special reference to the acts of notaries and requiring their seals to authentications by them. *Miller v. State*, 122 Ind. 356; *Rosenstein v. State*, 9 Ind. App. 292.

**Supplying Signature and Seal Before Trial.** — In *State v. Adams*, 20 Kan. 311, it was held that the signature and seal of the clerk to the verification of an information might be added before the jury is called.

**Clerical Error in Jurat.** — It is permissible for the state to show a clerical error as to the date in the jurat to a complaint upon which an information is based. *Allen v. State*, (Tex. App. 1890) 13 S. W. Rep. 999.

1. See *infra*, VI. 4. *c. Relation to Sitting or Action of Grand Jury.*

**Period After Commitment Prescribed.** — Under a statute providing that, except for good cause shown, a prosecution shall be dismissed when a person has been held to answer for a public offense if an indictment is not found or an information filed against him within thirty days (*People v. Morino*, 85 Cal. 516), it is enough for the defendant to show that the time fixed by the statute has expired, and if there is any good cause for not having filed an information the prosecution must show it. The mere fact that the papers were not returned by the committing magistrate does not constitute good cause, *People v. Wickham*, 113 Cal. 283; but it is not necessary that the papers should be returned before an information can be filed. *People v. Ah Sing*, 95 Cal. 658.

**Waiver.** — In *Montana* it was held, under a statute similar to that in California above alluded to, that an objec-

tion on the ground that the information was not filed in time is waived if not made before trial by motion to set aside. *State v. Smith*, 12 Mont. 378.

**Filing of Affidavit and Information.** — The filing of the affidavit or complaint must always be considered with reference to the statutory practice prevailing. Thus in *Texas* it is provided by statute that the complaint must be filed with the information. *Wilson v. State*, 27 Tex. App. 47; but the information and affidavit being found together, an indorsement of the filing of the information sufficiently shows that the information was based upon the affidavit. *Stinson v. State*, 5 Tex. App. 31. So where the affidavit is filed without an indorsement thereon, it sufficiently appears that it was filed with the information when the clerk certifies that it is on file in his office among the papers in the particular case. *State v. Elliott*, 41 Tex. 225. See also *Noble v. People*, 23 Colo. 9.

In *Missouri*, if the information is based upon a complaint delivered to the prosecuting attorney, the complaint must accompany the information. *State v. White*, 55 Mo. App. 356.

In *Indiana* the information and affidavit may be filed at the same time. *Hoover v. State*, 110 Ind. 353; *State v. De Long*, 88 Ind. 316; *State v. Lauderman*, 89 Ind. 600.

2. *People v. Mason*, 63 Mich. 510; *People v. Haley*, 48 Mich. 495, where it was said that if a defendant gives bail the time of filing an information might possibly raise a question as to the time when the sureties are obliged to have him in court to answer, but the information could not be bad on that account.

3. In *Florida* the law does not authorize the filing of an information in vacation which shall have the effect of setting the process of the court in motion for the arrest of a person charged. *Sims v. State*, 26 Fla. 97.

In *Illinois*, where the offices of county

**b. IN OPEN COURT.**—An information is filed with the clerk and need not be filed in open court.<sup>1</sup>

**c. RELATION TO SITTING OR ACTION OF GRAND JURY**—**In General.**—An information may be filed, in the absence of statute, without reference to the sitting of the grand jury at the time.<sup>2</sup>

and probate judge were vested in one person, it was held that the filing of an information with the county clerk during a probate term, or with the judge at such term, was a filing in the County Court in vacation within the sanction of the statute. *Burns v. People*, 45 Ill. App. 70.

**In Indiana** an information for a misdemeanor may be filed in term time or vacation, though it is otherwise in the case of a felony, in which case a motion to quash will raise the question. *Hoover v. State*, 110 Ind. 352. But under the statute providing that an information may be filed when the grand jury has been discharged for the term and the court is in session, the court need not be actually sitting or convened. *Stefani v. State*, 124 Ind. 8; *Masterson v. State*, 144 Ind. 240. To the same effect, see *State v. Derkum*, 27 Mo. App. 628.

**In Kansas** an information for a misdemeanor may be filed in term time or in vacation; for a felony a preliminary examination is necessary, unless the accused is a fugitive from justice. *In re Eddy*, 40 Kan. 592; *State v. Babbitt*, 32 Kan. 253.

**In Louisiana** the Act of 1880, logically arranged, "authorizes the holding of the District Courts at terms other than regular jury terms, and empowers the judge to order a special jury for the trial of all criminal cases where the penalty is not necessarily imprisonment at hard labor or death. \* \* \* In the trial of cases provided for, the district attorney is authorized to file informations in the office of the clerk of the District Court, which said filing shall be as valid as if made in open court." *State v. Jackson*, 45 La. Ann. 975.

**In Nebraska**, under the provisions of Laws 1885, c. 108, the requirement that "all informations shall be filed during term," etc., is mandatory, and an information for a felony is void if filed in vacation. *In re Vogland*, 48 Neb. 37.

1. *Stefani v. State*, 124 Ind. 3; *State v. Matthews*, 129 Ind. 282; *State v. Duggins*, (Ind. 1896) 45 N. E. Rep. 603; *State v. Derkum*, 27 Mo. App. 628;

*Raspberry v. State*, 1 Tex. App. 666; *State v. Corbit*, 42 Tex. 88, wherein it is held that even if it be admitted that an information cannot be presented, within the meaning of the code, unless the court is in session, yet it would be too technical an application of the rule to say that an information otherwise sufficient should be quashed merely because it has been filed with the clerk previous to the meeting of the court. The information should be treated as presented when it is brought to the attention of the court and is then recognized by the district attorney as an information on which he desires to prosecute the defendant for the offense therein charged, and if any action be taken upon the supposition of its previous presentation, this might be set aside and held for nought.

**In Florida** it is said that the uniform practice has been to file the information in open court. *Sims v. State*, 26 Fla. 97.

**A Record Entry** may be proper, but it is not absolutely necessary, the file mark of the clerk being sufficient. *State v. Matthews*, 129 Ind. 281; *State v. Duggins*, (Ind. 1896) 45 N. E. Rep. 603.

**Indorsement.**—The information itself, with the indorsements thereon, is a part of the record. *Hoover v. State*, 110 Ind. 352; *State v. Derkum*, 27 Mo. App. 628.

**Indorsement Referring to Affidavit.**—The affidavit being required to be filed as a part of the information, an indorsement on the back of the information, "Filed the 5th day of May, A. D. 1878. A. Cameron, clerk," was held to relate to both instruments. *Stinson v. State*, 5 Tex. App. 31.

2. **While Grand Jury in Session.**—*State v. Cole*, 38 La. Ann. 843.

**After Investigation by Grand Jury.**—An information may be filed notwithstanding that the grand jury of the county had, at the same term of the court, before the filing of the information, investigated the charges and failed to find a bill of indictment. *State v. Whipple*, 57 Vt. 637; *State v. Ross*, 14 La. Ann. 364.

But under the statutory practice in some states the opportunity to present an accusation to the grand jury,<sup>1</sup> or the investigation of a charge by the grand jury,<sup>2</sup> may preclude the right to file an information.<sup>3</sup>

**After Quashal or Nol. Pros. of Indictment.**—An information may be filed after the quashal<sup>4</sup> or nol. pros. of an indictment.<sup>5</sup>

**5. Second or New Information.**—The pendency of one information,<sup>6</sup> or the dismissal of an information for want of a preliminary examination,<sup>7</sup> or the quashing of an indictment,<sup>8</sup> will not be a bar to the filing of another information; and where one information is quashed, the court does not lose jurisdiction of the

**Pending Indictment.**—*State v. Stewart*, 47 La. Ann. 410.

**When No Grand Jury Is Summoned.**—In *Wisconsin* it was held that the statute requiring a grand jury to be summoned for each term, unless the judge orders otherwise, did not affect the right to file an information; and the failure to summon a grand jury, though no order of the judge had been made to that effect, would not be an available objection to an information filed at such term. *Baker v. State*, 80 Wis. 416.

1. *State v. Boswell*, 104 Ind. 547.

2. *Richards v. State*, 22 Neb. 145.

**3. Custody or Bail, Etc.**—Thus statutes sometimes provide that an information will lie where the person is in custody on a charge of felony and no grand jury is in session, *Heanley v. State*, 74 Ind. 102; or where the person is in custody or on bail, and the court is in session, and the grand jury is not in session or has been discharged. *State v. Drake*, 125 Ind. 367; *Kennegar v. State*, 120 Ind. 177; *Stefani v. State*, 124 Ind. 3; *Masterson v. State*, 144 Ind. 240; *Hammond v. State*, 3 Wash. 171. See *infra*, VII. 2. *Allegation of Jurisdictional Matters*.

**Strict Construction of Statute.**—In *State v. Boswell*, 104 Ind. 541, it was held that where a party was recognized to appear at a certain term, at which term the grand jury convened and were discharged without acting upon the matter of complaint against the accused, the prosecutor cannot proceed for a felony by information; that the legislature did not intend that an information would lie in all cases except murder and treason, absolutely, but that the statute permitting prosecution by information in such cases being in derogation of the common law must be strictly construed, and that the grand jury having convened after the accused

had been recognized, the prosecution must be by indictment.

4. *Hoover v. State*, 110 Ind. 351; *Dye v. State*, 130 Ind. 87; *Alderman v. State*, 24 Neb. 97; *U. S. v. Nagle*, 17 Blatchf. (U. S.) 258.

But this right, too, may, under statute, depend upon the absence or previous discharge of the grand jury. *Dye v. State*, 130 Ind. 87.

5. *Reg. v. Mitchel*, 3 Cox C. C. 93.

6. *State v. Keena*, 64 Conn. 214.

**Filing in Duplicate.**—In *Rice v. People*, 15 Mich. 14, it appeared that in order to protect the people against the consequences resulting from loss, the prosecuting attorney placed duplicate informations on file, as was his custom in other cases. It was held that there cannot be two informations properly on file in any case at the same time, and that if the prosecuting officer adopts such a practice he must be prepared to support his case upon either, and that the contention by the prosecuting attorney that the information copied into the record by the clerk was the one of the two copies filed by him which incorrectly charged the offense, while the trial was in fact had upon the other copy, which correctly charged the offense, could not be entertained, and that it did not rest with the prosecuting attorney to say which should be considered the record in the case, and that the return filed in the Supreme Court was the proper record upon which argument must be made.

7. *Kallock v. Superior Ct.*, 56 Cal. 229.

8. *State v. Cooper*, 96 Ind. 332, wherein it was held that the action of the court in quashing an indictment could not be questioned in the Supreme Court after the filing of an information for the same offense, the filing of the information entirely superseding the indictment.

prisoner, but the complaint and other papers which were the foundation of the first information may serve as the basis of another.<sup>1</sup>

**6. Supplying Lost Information by Copy.** — When an information is lost or destroyed, the prosecuting attorney may substitute a copy, upon which the defendant may be tried.<sup>2</sup>

**VII. THE INFORMATION** — **1. General Matters of Form.** — No special form of information is required, but it is said that in its general structure it is similar to an indictment, omitting the formal commencement and conclusion,<sup>3</sup> though the conclusion is, in fact, often the same in this country.<sup>4</sup> While the form of informations is frequently regulated by statutes, there have been adjudications upon objections respecting the title,<sup>5</sup> the com-

**1.** *People v. Kilvington*, (Cal. 1894) 36 Pac. Rep. 13; *People v. Lane*, 101 Cal. 513; *State v. Terrebonne*, 45 La. Ann. 25; *Mentor v. People*, 30 Mich. 91; *Goode v. State*, 2 Tex. App. 520; *State v. Williams*, 13 Wash. 335. See also *infra*, XXI. 3. *f. Effect of Quashal.*

**Re-arrest.** — In *State v. Stern*, 4 Mo. App. 385, wherein an information was filed leaving the name of the accused blank, upon which a warrant was issued, and the defendant upon his arraignment moved for dismissal, and the motion being overruled, the prosecuting attorney filed a new information upon which the defendant was convicted, it was held that the first information was a nullity, and that the defendant, being entitled to a discharge thereon, could not be held on a second information. See also *Turner v. State*, 21 Tex. App. 198.

On the other hand, it is held that if the accused is in actual custody, an information may be filed, although the information or process upon which he was originally arrested may have been defective or irregular, and he may be held for that purpose. *Rowland v. State*, 126 Ind. 517.

**Withdrawal of First Information.** — The prosecutor may withdraw an information and file a new one. *State v. Gile*, 8 Wash. 12.

**Upon Reversal and Remand.** — Upon a decision against the information by the Supreme Court for defects therein, it is held that the prosecution will not be dismissed, but the cause will be remanded in order that a new information may be filed upon the good complaint. *Wood v. State*, 27 Tex. App. 538; *Orr v. State*, 25 Tex. App. 453; *Smith v. State*, 25 Tex. App. 454. And in such a case the trial court can make an order

permitting the filing of a new information without another preliminary examination. *State v. Hasledahl*, 3 N. Dak. 36.

**2.** *Long v. People*, 135 Ill. 435; *State v. Plowman*, 28 Kan. 569; *State v. Thomas*, 39 La. Ann. 318; *Huff v. State*, 23 Tex. App. 291.

**Identity of Copy.** — The copy supplied should be a copy of the identical information which is lost, and where the copy supplied was by mistake numbered differently from the docket number of the cause, it was held that the mistake should be corrected either upon motion of the prosecuting attorney in the trial court or by the court upon its own motion. *Stiff v. State*, 21 Tex. App. 255. But where nothing appears to the contrary, it is too late to object for the first time on appeal that the court below erred in allowing a copy to be filed without sufficient proof of its correctness. *Long v. People*, 135 Ill. 435.

**3.** *King v. State*, 17 Fla. 186. See *infra*, X. 1. *a. Application of Same Rules to Both.*

**In Georgia** "the requisites of the accusation are only that it shall be in the name of the state and signed by the prosecutor, and that it shall distinctly set forth the nature of the offense charged, the time and place of its commission, the person by whom committed, and the fact that it is based upon an affidavit, referring thereto (Code, § 299)." *Smith v. State*, 63 Ga. 168; *Dickson v. State*, 62 Ga. 587.

**4.** See *infra*, VII. 4. *Conclusion.*

**5.** *Malone v. State*, 14 Ind. 219, holding that a defect in the title is not ground for quashal.

**Name of County.** — A statement of the title of the court to which the information is presented is sufficient with-

mencement,<sup>1</sup> and other matters not involving substantial averments in the information.<sup>2</sup>

**In Name and by Authority of State.** — Under the general requirement in this country an information, like an indictment, should be carried on in the name and by the authority of the state,<sup>3</sup> and, as in the case of an indictment, this may appear otherwise than by an express allegation in the information itself.<sup>4</sup>

out naming the county. *State v. Mathis*, 21 Ind. 278.

**Title of Cause and Name of Court.** — In *Indiana* an objection that the affidavit and information do not contain the title of the cause and the name of the court is not good, because cured by the statute which provides that no information or indictment shall be quashed or set aside for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant upon the merits. *Rivers v. State*, 144 Ind. 16.

In *North Dakota* this defect was adverted to, under a statute requiring indictments to contain the title of the action, specifying the names of the parties, the court saying that "informations are to be tested, as near as may be, by the statutes regulating indictments," but the effect of the defect in the information in question was not determined, the information having been held bad on other grounds. *State v. Hazledahl*, 2 N. Dak. 521.

In *Texas*, under a statutory requirement that an information "shall appear to have been presented in a court having jurisdiction of the offense set forth," it was held that this fact must be shown by an affirmative allegation. *Bowen v. State*, 28 Tex. App. 498.

In *South Dakota* an objection to the omission of the name of the court in the caption or commencement is waived by going to trial. *State v. Brennan*, 2 S. Dak. 384.

**1. Sufficient Indication of Official Information.** — The word "affiant" being used where the words "prosecuting attorney" should be employed, it was held that this was not a ground for arresting judgment, it appearing from the whole information taken together that the charge was preferred by the proper officer. *Billings v. State*, 107 Ind. 57; *Sturm v. State*, 74 Ind. 280, to the same effect, but indicating that the objection might have been good on a motion to quash.

So where the information begins in the name of the prosecuting attorney and concludes with a prayer by him

and is signed by him, the fact that the second count of the information commences "Frank Barnett [the prosecuting witness] further swears," etc., could not injure the defendant, and is a mere informality; those words do not necessarily mean that the information is not the official statement of the prosecuting attorney. *Fisher v. State*, 2 Ind. App. 367.

In *State v. Looker*, 54 Kan. 228, an information began, after the formal part, as follows: "Now, therefore, I, Samuel S. Smith, county attorney," etc. The second and third counts, instead of giving the name and office of the county attorney, proceeded as follows: "And I do further give the court to understand," etc. This was held not to be a substantial objection, the information being signed and verified by the county attorney.

**2. The Use of the Word "Information"** in the body of the information itself is not necessary to the validity of the pleading. *People v. Baker*, 100 Cal. 189.

**Counts Connected by Wafers.** — When several counts of an information are connected by wafers it is sufficient. *State v. McLane*, 4 La. Ann. 435.

**Unauthorized Alteration — Erasure.** — An information was filed against several defendants, and after arraignment and withdrawal of the information as to one of the defendants, some person connected with the court erased the name of the defendant as to whom the information had been withdrawn by drawing a black line through the same. It was held that while this was a dangerous practice, and if it had not appeared clearly what the alterations were the consequence might have been serious, yet as the alteration clearly appeared, and could not have prejudiced the accused in respect to a substantial right, it was no ground for reversal. *People v. Carroll*, 92 Cal. 570.

**3.** *Gould v. People*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274; *State v. Hazledahl*, 2 N. Dak. 521.

**4.** *Snodgrass v. State*, 13 Ind. 292;

**2. Allegation of Jurisdictional Matters.**— Under statutes providing certain conditions as prerequisite to the right to prosecute by information, it is generally held that the existence of such conditions need not be alleged in the information itself.<sup>1</sup>

**3. Indorsement of Witnesses — Necessity for Indorsement.**— It is not necessary that the names of the witnesses shall be indorsed on the information unless it is so required by statutes,<sup>2</sup> which have been enacted in many states.<sup>3</sup> But the court may permit the indorsement of additional names after the information is filed,<sup>4</sup> and even after the trial has begun, where it appears that the

*Alderman v. State*, 24 Neb. 97; *State v. Hazledahl*, 2 N. Dak. 521; *State v. Devine*, 6 Wash. 587. *Contra*, *Saine v. State*, 14 Tex. App. 144. See also *Parris v. People*, 76 Ill. 274; *Gould v. People*, 89 Ill. 216.

1. *People v. Shubrick*, 57 Cal. 565; *State v. Geer*, 48 Kan. 752; *State v. Finley*, 6 Kan. 366; *State v. Barnett*, 3 Kan. 250; *State v. De Serrant*, 33 La. Ann. 979; *Washburn v. People*, 10 Mich. 372; *Weisbrodt v. State*, 50 Ohio St. 192; *State v. Anderson*, 5 Wash. 350; *State v. Munson*, 7 Wash. 239; *Peterson v. State*, 45 Wis. 541.

**By Express Statute** it is sometimes provided that such matters need not be alleged, *State v. Duggins*, (Ind. 1896) 45 N. E. Rep. 603; *Wright v. State*, 144 Ind. 210; *Nichols v. State*, 127 Ind. 413; *State v. Frain*, 82 Ind. 532; *Hodge v. State*, 85 Ind. 563; *Elder v. State*, 96 Ind. 162; *Powers v. State*, 87 Ind. 102; though before the statute a different rule obtained in *Indiana*.

**Presumption of Jurisdiction.**— Where the trial court is one of general jurisdiction, its authority to entertain a prosecution by information will be presumed, although the record does not show the existence of the conditions under which an information is allowed. *Nichols v. State*, 127 Ind. 413.

2. *People v. Sherman*, (Cal. 1893) 32 Pac. Rep. 879; *Bartlett v. State*, 28 Ohio St. 671, wherein it was objected to the information that the name of the prosecuting witness was not indorsed thereon, and it was held that while this was a requirement under the statute as to indictments, it did not appear to be necessary in regard to informations. In the case of indictments it is desirable to have the prosecuting witness indorsed, so as to make him responsible for the costs and prevent frivolous prosecution, but when an information is presented by the public

prosecutor this is sufficient guaranty of the *bona fides* of the transaction.

**3. Sufficiency — Change of Name by Marriage.**— Where the name of a female witness is changed by reason of her marriage, before the filing of the information, it is no objection that her maiden name is indorsed on the information. *State v. Labertew*, 55 Kan. 674.

**Initials of Christian Name.**— The designation of a witness by surname and initials of Christian name is a sufficient compliance with the statute requiring the indorsement of the names of witnesses upon an information. *Perry v. State*, 44 Neb. 414; *Basye v. State*, 45 Neb. 261.

**Mistake in Middle Initial.**— Where the county attorney, in attempting to place the name of "J. M. S." upon an information, by mistake wrote it "J. W. S.," there being no uncertainty or misapprehension as to who was meant, it was not error to allow J. M. S. to testify. *State v. Blackman*, 32 Kan. 616.

**Dying Declarations.**— The provisions of a statute requiring the names of witnesses to be indorsed upon an information do not apply to dying declarations. *People v. Beverly*, (Mich. 1896) 66 N. W. Rep. 379; *State v. Kent*, 5 N. Dak. 516.

**Name Misspelled.**— The fact that the name of a witness who appeared and testified before the magistrate in the preliminary examination is misspelled in the indorsement on the information is not sufficient to preclude his testifying on the trial. *State v. Everitt*, 14 Wash. 574.

4. *State v. Reno*, 41 Kan. 674; *People v. Hall*, 48 Mich. 482; *People v. Isham*, (Mich. 1896) 67 N. W. Rep. 819; *People v. Burwell*, 106 Mich. 27; *State v. Holmes*, 12 Wash. 169; *State v. Townsend*, 7 Wash. 462.



defendant cannot be prejudiced, or where he is protected from the consequences of surprise.<sup>1</sup>

**Waiver of Objection.**—An objection to the introduction of a witness whose name is not indorsed on the information may be waived.<sup>2</sup>

**4. Conclusion — Contra Pacem.**—The necessity for the conclusion "against the peace and dignity of the state," to informations as well as to indictments, is ordained by constitution or statute in some jurisdictions.<sup>3</sup>

**Contra Formam.**—And the conclusion "against the form of the statute" is also usual in informations.<sup>4</sup>

**5. Signature of Prosecuting Officer.**—As hereinbefore seen, an information is presented by the public prosecutor in his official

1. *State v. Price*, 55 Kan. 606; *State v. McKinney*, 31 Kan. 570; *State v. Cook*, 30 Kan. 82; *State v. McDonald*, 57 Kan. 537; *State v. Sorter*, 52 Kan. 531; *People v. Mills*, 94 Mich. 630; *People v. Baker*, (Mich. 1897) 70 N. W. Rep. 431; *State v. Black*, 15 Mont. 143; *State v. Regan*, 8 Wash. 506.

In Nebraska it was held that after the commencement of the trial additional witnesses could not be examined over the defendant's objection. *Stevens v. State*, 19 Neb. 647; *Parks v. State*, 20 Neb. 515; *Gandy v. State*, 24 Neb. 716.

But when the case is called for trial, additional witnesses may be allowed to be indorsed if time is granted to the defendant to meet their testimony. *Johnson v. State*, 34 Neb. 257; *Rauschkolb v. State*, 46 Neb. 658. See also *State v. Regan*, 8 Wash. 506; *State v. Townsend*, 7 Wash. 462.

**Refusal of Permission — Cumulative Evidence.**—It is not error to refuse to permit the indorsement of additional witnesses when the testimony is merely cumulative. *People v. Kindra*, 102 Mich. 147.

**2. Objection After Examination Too Late.**—*People v. Harris*, 95 Mich. 87. See also *State v. Townsend*, 7 Wash. 462.

Where a Second Trial Is Had upon an information, objection cannot be made to the introduction of witnesses not indorsed on the information who had testified on the first trial without objection. *State v. Kent*, 5 N. Dak. 516.

3. *Simpson v. State*, 111 Ala. 6; *Holt v. People*, 23 Colo. 1; *Gould v. People*, 89 Ill. 217; *Parris v. People*, 76 Ill. 274; *Thompson v. State*, 15 Tex. App. 39; *Wilson v. State*, 38 Tex. 548; *Wright v. State*, (Tex. Crim. App. 1896)

35 S. W. Rep. 150; *Wood v. State*, 27 Tex. App. 538.

The omission of the conclusion was disregarded where the constitution required such a conclusion to indictments, but imposed no obligation in respect to informations. *Nichols v. State*, 35 Wis. 308.

**Substantial Compliance.**—“Against the peace and dignity of the same people of the state of Colorado” is as good as “against the peace and dignity of the same.” *Holt v. People*, 23 Colo. 1.

**One Conclusion to Several Counts.**—It is not required that each count should conclude “against the peace and dignity of the state,” but only that the information as a whole should so conclude. *Alexander v. State*, 27 Tex. App. 533.

**4. When Surplusage.**—The conclusion *contra formam statuti* is surplusage and may be disregarded when the offense proven is one at common law. *State v. Boll*, 59 Mo. 322; *Southworth v. State*, 5 Conn. 326; *Knowles v. State*, 3 Day (Conn.) 108.

**Plural Conclusion.**—An information founded upon a statute is not vitiated because it concludes *contra formam statutorum*. *Com. v. Hooper*, 5 Pick. (Mass.) 42.

**One Conclusion to Several Counts.**—Where there are several counts it has been held that the conclusion *contra formam* need not be inserted in each, but that the conclusion to the whole information is sufficient. *State v. Scott*, 48 La. Ann. 293.

**Conclusion Out of Proper Order.**—In *People v. Fowler*, 88 Cal. 136, it was held to be no good objection that the conclusion against the form of the stat-

capacity,<sup>1</sup> and it may be signed as well as presented by the deputy<sup>2</sup> or assistant,<sup>3</sup> or by the solicitor, when such an officer exists, in the absence of the attorney-general,<sup>4</sup> or by a prosecuting attorney *pro tem.*,<sup>5</sup> and an incorrect designation of the official character of the prosecutor will not invalidate the information.<sup>6</sup>

**VIII. COMPLAINT — PRESENTMENT AND INCIDENTS — 1. Jurisdiction and Procedure Statutory.** — The examination and punishment of offenses by magistrates is now generally founded upon and regulated by statutes,<sup>7</sup> which prescribe the jurisdiction of magis-

trate was misplaced in the information, being put after instead of before an allegation of prior conviction.

1. See *supra*, VI. 1. *By Whom Filed.*

**Signature After Trial Begun.** — Where the paper upon which the prosecution proceeds does not appear to be the official accusation of the prosecuting officer, the defect cannot be cured by his signature thereto during the progress of the trial. *Jackson v. State*, 4 Kan. 150.

**One Signature to Several Counts.** — An information containing many counts is sufficient if signed at the end of the last sheet, *State v. Paddock*, 24 Vt. 316; though the sheets are attached by wafers, *State v. McLane*, 4 La. Ann. 435.

**Official Authority Otherwise Appearing.** — In *Texas* an information, supported by a complaint duly sworn to and subscribed by the complainant and made a part of the information, and reciting in the body thereof that it is made by the state attorney, is sufficient, though the signature of such attorney is required by the code, another section of the code, however, providing that the absence of such a signature shall not affect the validity of the information; but it would undoubtedly be better practice for the county attorney to sign the information officially. *Raspberry v. State*, 1 Tex. App. 666; *Jones v. State*, 30 Tex. App. 426; *Arbuthnot v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 269.

2. *People v. Darr*, 61 Cal. 554; *People v. Etting*, 99 Cal. 577; *Stout v. State*, 93 Ind. 150; *Hammond v. State*, 3 Wash. 173.

3. *State v. Ryder*, 36 La. Ann. 294; *People v. Trombley*, 62 Mich. 279.

**De Facto Assistant.** — An information may be signed by a *de facto* assistant district attorney, appointed by the board of supervisors instead of by the district attorney, and will not be invalid

on that account. *People v. Turner*, 85 Cal. 432.

**Presumption as to Assistant's Authority.**

— In the absence of an affirmative showing to the contrary, it will be presumed that the officer acting as assistant prosecuting attorney, who signed an information as such, and who was recognized as such by the trial court, was properly appointed and qualified. *State v. Fitzporter*, 17 Mo. App. 271; *State v. Faulkner*, 32 La. Ann. 725.

4. *State v. Ingalls*, 59 N. H. 89.

**Accounting for Absence of Attorney-General.** — An information may be signed by the solicitor without setting forth the absence of the attorney-general. *State v. Daniels*, 44 N. H. 385, on the authority of *State v. Farrar*, 41 N. H. 53.

In *Rex v. Wilkes*, 4 Burr. 2527, it was held that the signature of the solicitor-general would be sufficient without averring a vacancy in the office of attorney-general, Lord Mansfield saying: "The attorney-general is a great officer of the law and of this court. The court take notice when the office is vacant, and by whom it is filled when full."

5. *State v. Robacker*, 31 La. Ann. 651.

6. *Baldwin v. State*, 12 Ind. 383; *Malone v. State*, 14 Ind. 219; *State v. Nulf*, 15 Kan. 404; *Wilkins v. State*, 33 Tex. Crim. Rep. 320, where the information recited that it was presented by the "Deputy Co. Atty." The act of the legislature authorized the appointment of assistant county attorneys. It was said that while it is the better practice to use the statutory words and give officers their statutory appellations, the term "deputy" as used in the information sufficiently designated the "assistant" county attorney provided for by statute.

7. *People v. Fuerst*, 13 N. Y. Misc. Rep. (Queens County Ct. Sess.) 304.

**Objection to Jurisdiction.** — Upon objection to the sufficiency of a grand

trates,<sup>1</sup> and the procedure is varied to meet the different requirements of such statutes.<sup>2</sup>

**2. Necessity in General — Oath and Jurat.** — A magistrate has no power to issue a warrant of arrest for an offense not committed *super visum*, except upon complaint, by whatever appellation such complaint may be known in the various jurisdictions, made under oath<sup>3</sup> or upon affirmation<sup>4</sup> in writing,<sup>5</sup> whether the complaint

juror's information, that it did not appear that the information was made to a justice of the peace residing in the town where the offense was committed, it was held that the objection was to the jurisdiction of the court, and was waived by a plea of not guilty, the jurisdiction being thereby admitted. *State v. Bishop*, 7 Conn. 184.

And it has been further held that the papers need not show that the magistrate was a resident of the town in which the offense was alleged to have been committed, where his jurisdiction is not limited to offenses in the town. *Com. v. Peto*, 136 Mass. 155.

**1. Construction of Statute.** — A justice of the peace who has been designated and commissioned under the statute with authority to issue warrants in criminal cases may lawfully receive the complaints upon which such warrants are issued. Since the warrants cannot be issued without complaints, authority to receive complaints is implied from the authority to issue the warrant. *Com. v. Taber*, 155 Mass. 6; *Com. v. Peto*, 136 Mass. 155.

**Special Justice — Session of Court.** — When the authority of a special justice to receive complaints and issue warrants is derived either from a statute which provides that he may do so "when the court is not in session," or from his power to hold a session of the court, the latter power existing only under special circumstances pointed out in the statutes, if the record shows that the special justice had not authority to act the complaint received by him will be dismissed. *Com. v. Connor*, 155 Mass. 134.

But the record in this regard cannot be contradicted if it does not show affirmatively that the jurisdictional facts did not exist. *Com. v. Lynn*, 154 Mass. 405; *Com. v. O'Brien*, 152 Mass. 495.

**Reason for Action of Special Justice.** — The complaint need not show the necessity for the examination of the complainant by a special justice, where the

record shows the fact. *Com. v. De Voe*, 159 Mass. 101.

**2. Minute of Filing.** — Under a statute requiring a magistrate to make a minute on the complaint, of the day, month, and year of its presentment, at the time the complaint is exhibited to him, an omission in this regard was held to be fatal to the complaint. *State v. Perkins*, 58 Vt. 722. But where the defendant is arraigned and tried before the justice a motion to quash will not be granted on appeal from a judgment of conviction, although the minutes of the magistrate do not show affirmatively that the information was filed, and the information itself is not so marked. *State v. Plummer*, 55 Mo. App. 290.

**Furnishing Copy of Complaint.** — When the defendant demands a copy of the complaint, it is a sufficient compliance with the constitution and statute thereunder if the original complaint is handed to him with leave to make a copy thereof for himself. *State v. White*, 8 Wash. 230.

**3. Eichenlaub v. State**, 36 Ohio St. 142; *Rafferty v. People*, 69 Ill. 111; *Welch v. Scott*, 5 Ired. L. (N. Car.) 72; *Conner v. Com.*, 3 Binn. (Pa.) 42; *State v. J. H.*, 1 Tyler (Vt.) 448.

**Warrant on Complaint.** — See *State v. Bryson*, 84 N. Car. 781; *State v. Jones*, 88 N. Car. 671; *Clepper v. State*, 4 Tex. 242.

**Affidavit in Support of Information.** — See *Eichenlaub v. State*, 36 Ohio St. 142.

**4. Eichenlaub v. State**, 36 Ohio St. 142; *State v. Adams*, 78 Me. 486.

**5. State v. Quigg**, 13 N. J. L. 293; *Wilcox v. Williamson*, 61 Miss. 310; *Prell v. McDonald*, 7 Kan. 426, holding that the common law required such complaint.

**Arrest Without Warrant — Necessity of Complaint.** — In *Tracy v. Williams*, 4 Conn. 107, a formal complaint charging an offense was held to be necessary, even where the arrest was authorized without a warrant and was so made.

*Contra.* — *Hobbs v. Hill*, 157 Mass.

consists of the affidavit to confer jurisdiction to issue warrants,<sup>1</sup> or of a separate complaint based upon the affidavit.<sup>2</sup> In some jurisdictions the complaint is not regarded as a pleading 'before the magistrate, but its principal function is to secure a warrant of arrest, though the defendant is tried upon the charge for which the warrant issues.<sup>3</sup>

**By Whom Administered — Jurat.** — The oath to the complaint is not, however, administered in all cases by the magistrate to whom it

556, wherein a statute providing for the arrest without a warrant of a person found in a drunken condition, and that complaint shall be made by the officer when the person arrested shall have sufficiently recovered, etc., was held not to require a written complaint.

1. *Marre v. State*, 36 Ark. 222. See generally article WARRANTS.

**Constitutional Restraint** sometimes exists against the issuance of warrants unsupported by oath. *Conner v. Com.*, 3 Binn. (Pa.) 42; *State v. J. H.*, 1 Tyler (Vt.) 448; *Matter of Blum*, 9 Misc. Rep. (N. Y. Supreme Ct.) 571; *Walker v. Cruikshank*, 2 Hill (N. Y.) 296; *State v. Gleason*, 32 Kan. 245.

2. *Wilcox v. Williamson*, 61 Miss. 310.

3. Thus, in *Arkansas*, where there were no pleadings before a justice of the peace the magistrate acts upon an affidavit charging the offense, and no complaint is necessary. *Watson v. State*, 29 Ark. 299; *Marre v. State*, 36 Ark. 222, where it is said to be usual and proper for the affidavit to state the nature of the offense.

But in *Vermont*, under a statute providing that "no sheriff or deputy sheriff shall be allowed to make any writ, declaration, complaint," etc., it was held that a grand juror's complaint was void because it was written by a deputy sheriff at the request and in the presence of the grand juror, although the deputy sheriff was at the same time the justice who signed the warrant and tried the case. *State v. Drew*, 51 Vt. 56.

**Oral Complaint — Written Examination.** — In *New York*, under the statute providing for the examination of a complainant under oath, etc., before the issuance of a warrant, it was held that a complaint need not be in writing or under oath, though the examination of the party complaining must be under oath before the warrant issues. *Matter of Boswell*, 34 How. Pr. (N. Y. Ct. Sess.) 347, holding further that the ex-

amination need not be reduced to writing except for the protection of the magistrate. *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445. But see *People v. Fuerst*, 13 N. Y. Misc. Rep. (Queens County Ct. Sess.) 304, holding that the arrest of a person as a "disorderly person" under the statute is unauthorized where the complaint is first prepared and sworn to after the defendant is taken before the magistrate under such arrest, and that a disorderly person as defined by the statute is not guilty of the commission of either a misdemeanor or a felony, and therefore the section of the Code of Criminal Procedure, allowing a peace officer to arrest a person for a crime committed or attempted in his presence, does not apply thereto.

In *Rhode Island*, under a statute providing that upon complaint being made, etc., "he shall examine the complainant under oath, or affirmation, relative thereto, and reduce the same to writing, and cause the same to be signed by the complainant," it was held to be unnecessary for the justice or clerk to write the complaint with his own hand, and that the swearing of the complainant and issuing the warrant makes the work of writing the complaint that of the justice or clerk. *State v. Guinness*, 16 R. I. 401.

**Defendant Held for Complaint in Another Court.** — Where the practice is to examine a complainant under oath for the purpose of issuing a warrant, and holding the defendant for a complaint by the complainant in another court, a written complaint in the first instance is not required. *Smith v. Hayden*, 6 Cush. (Mass.) 111. See also *Hobbs v. Hill*, 157 Mass. 556.

**Sitting in Camera.** — A statute requiring the sittings of every court to be public does not apply to a magistrate while he is entertaining an information or complaint for a warrant. *People v. Cornell*, 6 Misc. Rep. (N. Y. Supreme Ct.) 568.

is presented,<sup>1</sup> and in any event the jurat is sufficient if it substantially appears that the complaint has been presented and the oath administered according to law.<sup>2</sup> So where a complaint is

1. In *Vermont* it was held to be unnecessary that the oath of a private prosecutor should be taken before the magistrate who issued the warrant, but that it might be taken before any officer authorized to administer oaths, in this case a notary public. *State v. Freeman*, 59 Vt. 661. In *Missouri* the same ruling was made. *State v. Mullen*, 52 Mo. 430.

**Clerk of District Court.** — In *Nebraska* clerks of District Courts, being authorized by statute to administer oaths within their districts, were held to be proper officers before whom the complaint might be sworn to. *State v. Lauver*, 26 Neb. 757.

**Before Justice of the Peace.** — In *California* a complaint to be filed in a Police Court may be sworn to before a justice of the peace. *People v. Le Roy*, 65 Cal. 613.

In *Massachusetts* it was held that the fact that a Police Court had exclusive jurisdiction over certain offenses did not prevent the justice of the peace receiving complaints for those offenses, and issuing warrants returnable to the Police Court. *Com. v. O'Connell*, 8 Gray (Mass.) 464.

**County Attorney or Assistant.** — In *Texas* the oath to a complaint may be taken before a county attorney. *Kelly v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 39, holding also that the appointment of an assistant county attorney would be presumed, and an oath to a complaint before him was upheld.

2. "Taken and Sworn before Me" is good over the objection that the certificate to the complaint should have been "taken and sworn to before me." *Com. v. Bennett*, 7 Allen (Mass.) 533.

"Received and Sworn To" is a sufficient jurat of the justice to a complaint, and is equivalent to an averment by him that the signature and oath were those of the complainant, as named in the complaint. *Com. v. Wallace*, 14 Gray (Mass.) 383; *Com. v. Sullivan*, 14 Gray (Mass.) 98; *Com. v. Keefe*, 7 Gray (Mass.) 332.

**Before Special Justice — Certificate of Clerk.** — The certificate of a clerk of the Police Court that the complaint was sworn to "before said court" is sufficient evidence that the complaint was duly sworn to, without stating whether

it was before a standing justice or one of the special justices. *Com. v. Wingate*, 6 Gray (Mass.) 485.

**Designation of Office.** — Where it appears from the record that the person who signed the jurat was the police judge before whom the complaint was sworn, it is no objection that the signature to the jurat does not include a designation of his official character. *Kingman v. Barry*, 40 Kan. 625.

In *Massachusetts* it was held under the statute "providing that justices of the peace have no authority to receive complaints in criminal cases" unless they are commissioned as trial justices, or hold the office of clerk or assistant clerk of a municipal court, etc., that the justice's certificate must show that he was such a person. *Com. v. Fay*, 126 Mass. 236.

**Abbreviated Signature.** — The name of the justice of the peace to the jurat may be abbreviated. *Com. v. Taber*, 155 Mass. 6.

**A Seal Is Not Necessary** to the jurat to an affidavit made before a police judge, to be used before such judge. *Rosenstein v. State*, 9 Ind. App. 290; *Com. v. De Voe*, 159 Mass. 101.

**Supplying Omission of Signature.** — In *Dunn v. Perth Amboy*, 51 N. J. L. 406, it was held that where the jurat to an oath to a complaint for the violation of an ordinance of the city of Perth Amboy was not signed until after the arrest of the defendant, and at the time the case was heard, this was not a ground of reversal, because the charter did not require the oath or attestation to be made in writing; the court seeming to draw a distinction between the requirement of an oath and the requirement of an affidavit, the former only being required in this case.

In *State v. Freeman*, 59 Vt. 661, it was held that the failure of a notary public to append a certificate of the taking of an oath before him was a defect of form and amendable.

**Date of Jurat.** — In *Ross v. State*, 9 Ind. App. 36, it was held that the jurat to an affidavit need not contain the date when the affidavit was subscribed and sworn to, the officer's act being sufficiently authenticated by his certificate of the performance of the same, and the certificate of the clerk as to the time

presented to a magistrate, and he administers the oath to the complainant, his certificate of this fact in the usual form is conclusive evidence of a compliance with the statute as to the examination of the complainant on oath.<sup>1</sup>

**3. By Whom Made.** — While a complaint is generally made by any one who has knowledge or information of the commission of an offense,<sup>2</sup> it is sometimes preferred as a pleading by the prosecuting attorney<sup>3</sup> or some other officer designated by statute to exercise that function, such as a grand juror,<sup>4</sup> and where the statute designates who shall act in this regard, the person acting must have the lawful authority contemplated by the statute.<sup>5</sup>

**4. Sufficiency of Oath.** — The complaint must be positively made, and an oath upon mere belief or suspicion is not usually

of filing might be taken to supply the omission, though convenience and good practice require that the jurat should be dated.

The date of the certificate of a magistrate may be aided by the date of the warrant issued thereon. *Com. v. Certain Intoxicating Liquors*, 128 Mass. 73.

But if the jurat certifies that the complaint or affidavit was subscribed before the date of the commission of the offense, as set out in the complaint or affidavit, a prosecution cannot be supported by it. *Jennings v. State*, 30 Tex. App. 428.

**Certificate of Affirmation.** — The magistrate's certificate that the complainant affirmed, necessarily and conclusively implies that he entertained such scruples as permitted an affirmation instead of an oath. *State v. Adams*, 78 Me. 488.

**1. Com. v. Farrell**, 8 Gray (Mass.) 464, wherein the complaint was certified by the magistrate to the Court of Common Pleas for trial.

**2. Peace Officer.** — Under the *Iowa* Code, § 175, providing that no officer shall prosecute or commence a suit for any person, a peace officer is not precluded from making a complaint as a foundation of a prosecution. *Santo v. State*, 2 Iowa 165.

**Complaint by Unauthorized Person — Effect on Appeal.** — Where a complaint is made by a private person when it could only be made by a prosecuting attorney, it will be dismissed on appeal from the judgment of the justice of the peace, and the prosecuting attorney will not be permitted to file a complaint in the appellate court. *State v. Kananan*, 94 Mo. 71.

**Credibility of Witness.** — The complaint need not allege that the com-

plainant is a credible witness. *Dodson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 754.

**3. State v. Ransberger**, 106 Mo. 135.

**4. State v. Bishop**, 7 Conn. 184; *State v. Drew*, 51 Vt. 56.

**5. Description of Officer Not Existing.** — *State v. Soragan*, 40 Vt. 452.

**Unsworn Grand Juror.** — A complaint cannot be preferred by a grand juror who has not taken the oath of office prescribed before entering upon the performance of his duties. *State v. Rollins*, 65 Vt. 608.

**Presumption of Official Oath.** — It appearing that the person who made the oath came before the justice as a grand juror, and as such made his complaint, and signed the complaint in his official capacity, it was held that the swearing to the complaint was the official act of the complainant, and the court would presume that he had taken the oath prescribed for grand jurors. *State v. Comstock*, 27 Vt. 555.

**Agent of Public Board.** — In *Com. v. Alden*, 143 Mass. 117, under a statute expressly providing that "an agent appointed to make sanitary inspections may make complaint in cases of violation of any law, ordinance, or by-law relating to the public health in a city or town," it was held that an agent of the Board of Health might make such a complaint, and that the agent need not show affirmatively that he was such agent.

**Waiver of Objection.** — It is too late to object, after pleading to the merits below, that a grand juror who signed the complaint was not legally appointed. *Smith v. State*, 19 Conn. 498; to the same effect see *Com. v. Alden*, 143 Mass. 117.

sufficient for the purpose of trial and punishment,<sup>1</sup> but under particular statutes an affidavit upon information and belief has in some cases been held sufficient.<sup>2</sup>

**Complaint for Recovery of Penalty.** — Where, by statute, an action of debt is provided for the recovery of a penalty, a complaint thereunder need not be under oath.<sup>3</sup>

**5. Matters of Form** — *a.* **TITLE AND ADDRESS.** — A complaint usually runs in the name of the state,<sup>4</sup> and is addressed to the

1. *State v. Hobbs*, 39 Me. 212, holding that the verification to a complaint "according to the best of his knowledge and belief" is sufficient [*distinguishing* *Com. v. Phillips*, 16 Pick. (Mass.) 213, where the verification alleged that there was "probable cause to suspect," etc., which was held to be insufficient for the purpose of trial and punishment, though perhaps sufficient for binding over]; *People v. Heffron*, 53 Mich. 530; *Matter of Blum*, 9 Misc. Rep. (N. Y. Supreme Ct.) 571. See *Swart v. Rickard*, 148 N. Y. 268, *distinguishing* *Blodgett v. Race*, 18 Hun (N. Y.) 132.

**Positive Charge in Body of Complaint** — **Effect.** — In *Brown v. State*, 16 Neb. 659, the complaint concluded, "and this deponent says he verily believes" the defendant to be guilty of the facts charged, and it was objected that the complaint was not sworn to in positive form, and was therefore insufficient. The court held that the objection might have force if it were not for the fact that in the charging part of the complaint it was positively stated that at the time and place alleged the defendant "then and there did," etc. The objectionable language was simply redundant, and in no way affected the body of the complaint.

**False Oath Conferring Jurisdiction.** — Where a complaint charges an offense in direct and positive terms, and not upon information and belief, it is said to confer jurisdiction, and proof upon the trial that the complainant did not have personal knowledge of the facts will not be effectual to oust such jurisdiction. *State v. Graffmuller*, 26 Minn. 6; *People v. Schottey*, 66 Mich. 708.

**Improper Oath** — **Effect upon Magistrate's Costs.** — In *State v. Good*, 9 Lea (Tenn.) 240, an affidavit was made by a person who notified the justice of the peace before making it that he knew nothing of the matter of his own knowledge, and that he obtained his information from others. It was held that the

warrant was improvidently granted, and the costs of the justice of the peace could not be taxed upon the county upon discharging the accused.

**Waiver of Defective Verification.** — A plea of not guilty and trial before the justice of the peace is a waiver of a defective verification. *State v. Allison*, 44 Kan. 423. See also *State v. Longton*, 35 Kan. 375; *State v. Jockheck*, 47 Kan. 733; *Matter of Blum*, 9 Misc. Rep. (N. Y. Supreme Ct.) 571.

**Attack on Habeas Corpus.** — That a complaint is sworn to on information and belief is no reason to hold an imprisonment illegal on habeas corpus. See *In re Lewis*, 31 Kan. 71; *Matter of Blum*, 9 Misc. Rep. (N. Y. Supreme Ct.) 571.

2. *State v. Ellison*, 14 Ind. 380; *Deveny v. State*, 47 Ind. 208; *State v. Davie*, 62 Wis. 305; *State v. Tall*, 56 Wis. 577; *Clark v. State*, 23 Tex. App. 260; *Anderson v. State*, 34 Tex. Crim. Rep. 96; *Staley v. State*, (Tex. Crim. App. 1895) 29 S. W. Rep. 272.

**Information on Official Oath of Prosecuting Attorney.** — In Missouri, where, by statute, prosecution before a justice of the peace is by information filed by the prosecuting attorney, no affidavit is necessary. *State v. Ransberger*, 106 Mo. 135; *State v. Sweeney*, 56 Mo. App. 410.

3. *Ferguson v. People*, 73 Ill. 560; *Alton v. Kirsch*, 68 Ill. 261.

4. **Complaint in Police Court.** — In *Brownville v. Cook*, 4 Neb. 106, it was held that a complaint in the Police Court of a municipal corporation for violating a municipal ordinance must be conducted in the name of "the people of the state of Nebraska," and that the fact that the ordinance was limited in its operation to a certain city could make no sort of difference, because the authority which gave the ordinance vitality came from the people by an act of the legislature under which the city was organized.

**Name of County** — **Surplusage.** — If an information runs in the name of the

justice or court by which it is received.<sup>1</sup>

**b. NAME AND SIGNATURE OF COMPLAINANT.** — It does not affect the jurisdiction of the court that the name of the complainant does not appear in the body of the complaint when his name sufficiently appears by his signature to the complaint.<sup>2</sup>

**c. CONCLUSION.** — The rule requiring indictments and informations to conclude against the form of the statute has been applied to complaints, both under the statutes and under municipal ordinances.<sup>3</sup> On the other hand such a conclusion has

county as well as of the state, the name of the county may be rejected as surplusage. *State v. Murphy*, 49 Mo. App. 270.

1. *Com. v. Hoar*, 121 Mass. 375; *Com. v. Clancy*, 154 Mass. 128; *Com. v. Baker*, 155 Mass. 287.

**Surplusage in Address.** — Words of misdescription of the office of the magistrate to whom the complaint is addressed following the correct description may be rejected. *State v. Soragan*, 40 Vt. 450.

**Incorrect Address Aided by Jurat.** — In *State v. Wright*, 16 R. I. 518, a complaint was addressed to a person as justice of the District Court of a certain district, who was not, in fact, such justice of that court at the time. It was held that the court would take judicial notice of the fact that the person who signed the jurat was at the time the justice of the court to which it was directed.

**To Special Justice.** — It is proper to address a complaint to a justice, though a special justice be in fact presiding. *Com. v. Brown*, 158 Mass. 168.

**Address — Venue in Margin.** — Where an offense is alleged to have been committed in a particular city, and the complaint is addressed to a justice of the Police Court within and for the same city and county, no caption or venue in the margin is necessary. *Com. v. Quin*, 5 Gray (Mass.) 478.

2. *State v. McKinley*, 82 Iowa 445; *Com. v. Eagan*, 103 Mass. 72; *State v. Davis*, 52 Vt. 376.

**Sufficiency of Signature.** — The signature should be so placed as to indicate that the whole statement of the complaint is made by the complainant. A complaint for larceny signed by the complainant in a blank space below the description of the goods stolen, and above the charge of larceny, was held to be insufficiently subscribed, because it did not appear to be for the pur-

pose of authenticating the whole complaint. *Com. v. Barhight*, 9 Gray (Mass.) 114.

**Signature by Mark.** — Where the complainant signs his name by making his mark, this is sufficient without attesting witnesses if the complaint is accompanied by the proper certificate of the justice that the usual oath was taken. *Com. v. Sullivan*, 14 Gray (Mass.) 98.

**Variance Between Name in Body and in Signature.** — Where the complaint purports in the body thereof to be made by "Samuel W. Richardson, city marshal," etc., and is signed "S. W. Richardson," it sufficiently appears that it was signed and sworn to by the complainant, the certificate of the magistrate to whom it was addressed showing that it was received and sworn to. *Com. v. Wallace*, 14 Gray (Mass.) 382.

3. *State v. Soragan*, 40 Vt. 450; *State v. Lowder*, 85 N. Car. 565, wherein the rule was applied to the warrant of the justice of the peace, being the complaint and embracing the charge under which the defendant was to be tried.

**Violation of Municipal By-laws.** — In *Com. v. Gay*, 5 Pick. (Mass.) 44, a complaint was quashed because it did not conclude against the form of the statute, although it concluded against the form of the by-laws of the city.

In *Lewiston v. Fairfield*, 47 Me. 481, a complaint concluding against the form of the statute was held bad because it did not refer to the by-laws of the town.

**Plural Conclusion — Single Statute.** — A complaint concluding against the form of the "statutes" is good after verdict, notwithstanding it proceeds under one statute. *Com. v. Hitchings*, 5 Gray (Mass.) 482.

**Conclusion Against Superseded Statute.** — In *Jacobus v. Meskill*, 56 N. J. L. 257, a conviction was held bad because the record did not show the ground of the conviction, the complaint being for



been held to be unnecessary,<sup>1</sup> as well as the conclusion against the peace and dignity of the state.<sup>2</sup>

**d. INDORSEMENTS OF WITNESSES.**—The names of witnesses need not be indorsed on a complaint unless such requirement is made by statute.<sup>3</sup>

**6. Supplying Lost Complaint by Copy.**—When it appears that a complaint has been lost and cannot be found, it may be supplied by copy on motion of the prosecuting attorney.<sup>4</sup>

**7. On Appeal.**—On appeal from a conviction on a complaint in a magistrate's court, the defendant can be tried only for the offense of which he was convicted before the magistrate,<sup>5</sup> upon the complaint or record thereof as originally made before such magistrate, and upon which he was originally tried.<sup>6</sup>

a violation of a statute which had been superseded, and no reference being made in the complaint to the last statute.

**Common-law Offense.**—The omission of the conclusion "contrary to the form of the statute" is not fatal to the validity of a grand juror's complaint which charges a common-law offense. *State v. Holmes*, 28 Conn. 231.

1. *State v. Brown*, 14 S. Car. 383; *Downing v. State*, 66 Ga. 160; *Ex p. Mansfield*, 106 Cal. 400.

2. *State v. Miller*, 24 Conn. 519; *State v. Holmes*, 28 Conn. 231; *Thomas v. State*, 107 Ala. 61; *Curry v. State*, (Tex. Crim. App. 1893) 24 S. W. Rep. 516. But see *State v. Soragan*, 40 Vt. 450.

3. **Before Justice or on Appeal.**—It is not necessary, when a complaint is filed before a justice of the peace, nor in the District Court on appeal, unless the District Court so orders, that the names of the witnesses for the state should be indorsed thereon. *State v. Wood*, 49 Kan. 711.

**Prosecuting Witness.**—No statute requiring it, the name of the prosecuting witness need not be indorsed on the back of the information for a misdemeanor filed before a justice of the peace by the prosecuting attorney. *State v. Flowers*, 56 Mo. App. 502.

**Objection.**—If an information before a justice of the peace should contain an indorsement of the names of the state's witnesses, an objection for an omission in this regard cannot be made by objecting to the introduction of evidence, *State v. Heinze*, 45 Mo. App. 403; nor for the first time on appeal. *State v. Davidson*, 44 Mo. App. 513.

**Memorandum of Witnesses—Statute Directory.**—A statute requiring a memo-

randum of the names of witnesses to a grand juror's complaint was held to be directory, and an omission to annex the same was held to be no cause for quashing the proceeding. *State v. Hanley*, 47 Vt. 292, the first case in *Vermont* where this question was settled, though it was incidentally decided in *Downer v. Baxter*, 30 Vt. 467, and *State v. Norton*, 45 Vt. 258, in which latter case the objection was made on argument upon a demurrer, and the court held, without further discussion, that a demurrer would not reach such a question.

4. *Hubbard v. State*, (Tex. Crim. App. 1894) 24 S. W. Rep. 648; *Bays v. State*, 6 Neb. 170, in which case the substitution was made when the case was called in the District Court on appeal from the justice of the peace.

5. *Com. v. Blood*, 4 Gray (Mass.) 32; *Marre v. State*, 36 Ark. 227.

**Conviction on One Count Before Magistrate.**—Where there is a conviction on one count of a complaint before a magistrate, this is equivalent to an acquittal on the other count of the complaint, and upon an appeal from such conviction the defendant can be tried only for the offense charged in the count upon which he was convicted before the justice of the peace. *State v. Wood*, 49 Kan. 711.

**6. Certification of Complaint Sent Up.**—Where the justice of the peace sends the original complaint to the District Court without certifying it, the defendant waives objection on this account by going to trial without raising such a question. *State v. Allison*, 44 Kan. 423.

**Record Without Copy.**—In *State v. Kelley*, 47 Vt. 294 it was held that

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**IX. SERVICE OF COPY OF INDICTMENT OR INFORMATION — 1. The Right Generally.** — It is often provided by statute that the defendant shall have a copy of the indictment or information upon which he is to be tried,<sup>1</sup> either before arraignment or at a certain

if the appellant (the defendant) had deemed it material to have a copy of the original complaint filed in connection with a copy of the justice's record, he should have procured and filed it; and by pleading not guilty, and taking a trial in the County Court, he must be held to have no wider scope under his motion in arrest of judgment than he would have had under a demurrer if it had been interposed before pleading not guilty, and that the record is sufficient if it shows what the complaint was. The same ruling was made where the defendant was tried without a complaint, but upon the charge in the affidavit for arrest. *Marre v. State*, 36 Ark. 227.

**Amended Complaint.** — Where, upon an appeal from a judgment of a justice of the peace, an amended complaint verified by the county attorney is filed with leave of the court, and afterwards some of the counts thereof are stricken out and those left are re-numbered, it is no objection that the complaint was not further verified or re-filed, as the defendant was tried for the same offense for which he was convicted before the justice of the peace. *State v. Redford*, 32 Kan. 198. See also *State v. Hinkle*, 27 Kan. 308, wherein the complaint was amended in the Justice's Court without further verification, and upon an appeal from a conviction the District Court permitted a new and amended complaint to be filed, the latter being duly verified, and this action was held to be without error.

**Correction of Copy.** — Where it was suggested that the copy sent up by the magistrate contained a clerical error, the court suspended trial and allowed a true copy of the original paper, duly certified, to be filed and used, the offense in the corrected copy being the same for which the defendant was tried before; the court added, however, that if the defendant had been misled by the copy originally filed he should have asked for a postponement. *Com. v. Kelly*, 12 Gray (Mass.) 123. And see, to the same effect, *Com. v. Vincent*, 165 Mass. 18.

**1. Limitation of Right.** — The right is restricted generally to certain grades

of offense, such as felonies or capital offenses, *Parker v. People*, 13 Colo. 155; *Harris v. State*, 32 Tex. Crim. Rep. 279; *Zink v. State*, 34 Neb. 39; *State v. Briggs*, 34 La. Ann. 69; *Johnson v. State*, 94 Ala. 35; and sometimes further restricted to cases where the defendant is in actual custody. *Dawson v. State*, 29 Ark. 116. But for these matters reference should be had to the particular statutes in each state.

**United States Statutes** do not apply to territorial courts. *Thiede v. Utah*, 159 U. S. 510.

**Copy of New Indictment.** — Where a copy of a sufficient indictment is served, and thereafter the indictment is dismissed and a new one is preferred without the defendant's knowledge, he is entitled to a copy of the new indictment, though he answers "ready for trial," not having discovered that the indictment has been changed until it is read on the trial, and it is error to force him to trial under such circumstances. *Harris v. State*, 32 Tex. Crim. Rep. 279.

**After Nol. Pros. of Aggravated Circumstances.** — There is no necessity for a new service of copy of the indictment after a nolle prosequi is entered as to aggravated circumstances enlarging the crime. *State v. Evans*, 40 La. Ann. 216.

**After Continuance.** — When a copy of an indictment has once been served, and thereafter the cause is continued, no further copy need be served. *State v. Comstock*, 36 La. Ann. 308.

**New Parties Added.** — Where a second indictment is presented in which another party has been added, the defendant is entitled to a copy of the second indictment. *Stokes v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 350.

**New Witnesses Indorsed.** — When a defendant is served with a copy of an information and new witnesses are afterwards indorsed thereon, he is not entitled to service of another copy of the information, but it is sufficient if he has notice of the additional witnesses. *State v. Nordstrom*, 7 Wash. 506; *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 3. See also, *supra*, V. 3, b. *Indorsement of Witnesses*.

**Sufficiency of Service.** — Under a statute  
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time before trial, depending upon the statutory provisions in each state.<sup>1</sup>

**2. Waiver of Right.** — The right to a copy, as reserved to the defendant by statute, is a substantial one, the refusal of which will justify a reversal as error;<sup>2</sup> but it is also said that such statutes are not jurisdictional, and merely grant to the accused a privilege which he may waive, and if he pleads and goes to trial without objection he is deemed to have relinquished his privilege,<sup>3</sup> though a distinction is drawn between the provisions of

ute requiring personal service, it is not sufficient to leave a copy of the information at the domicile of the accused. *State v. Stewart*, 47 La. Ann. 426.

*Service of Copy on Counsel.* — It is the defendant who, under the statute, is entitled to the copy, and therefore there is no error in refusing another copy to defendant's counsel. *People v. Golden-son*, 76 Cal. 328. But service on defendant's counsel is sufficient where the statute so provides. *Henderson v. State*, 98 Ala. 35; *Johnson v. State*, 94 Ala. 35.

*Service of Copy by Sheriff.* — Where the statute simply provides that the accused in capital cases shall be entitled to have a copy of the indictment, etc., and is silent as to who shall furnish it, he has a right to look to the court for such copy, and it being the duty of the court to see that a copy is served by one of its officers, there can be no more proper officer than the sheriff to perform such duty. *Friar v. State*, 3 How. (Miss.) 424.

1. The defendant is entitled to the full time allowed between the service of copy and trial. *State v. Guidry*, 27 La. Ann. 206.

**Counting Sunday.** — In estimating the number of days between the day of service of copy and the trial, an intervening Sunday should be computed. *Payton v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 615.

**Waiver of Irregularity.** — A defendant, by failing to object, waives any objection he may have on account of the time when the copy was served upon him, *State v. Russell*, 33 La. Ann. 135; and if there is an irregularity in serving copy of the indictment and venire at different times, the defendant waives such irregularity by going to trial without objection. *Barnett v. State*, 83 Ala. 40.

2. *Lisle v. State*, 6 Mo. 426; *Zink v. State*, 34 Neb. 39; *Smith v. State*, 8

Ohio 297; *Woodall v. State*, 25 Tex. App. 617.

3. *Alabama.* — *Ben v. State*, 22 Ala. 11; *Driskill v. State*, 45 Ala. 21.

*Arkansas.* — *McCoy v. State*, 46 Ark. 141; *Johnson v. State*, 43 Ark. 392.

*Colorado.* — *Parker v. People*, 13 Colo. 155; *Minich v. People*, 8 Colo. 443.

*Dakota.* — *McCall v. U. S.*, 1 Dakota 320.

*Illinois.* — *Kelly v. People*, 132 Ill. 363.

*Louisiana.* — *State v. Beeder*, 44 La. Ann. 1007; *State v. Kane*, 36 La. Ann. 153; *State v. Holmes*, 7 La. Ann. 567; *State v. Jackson*, 12 La. Ann. 679; *State v. Hernandez*, 4 La. Ann. 379; *State v. Fuller*, 14 La. Ann. 678.

*Mississippi.* — *Loper v. State*, 3 How. (Miss.) 429; *State v. Johnson*, Walk. (Miss.) 392.

*Missouri.* — *Lisle v. State*, 6 Mo. 426.

*Ohio.* — *Smith v. State*, 8 Ohio 297; *Fouts v. State*, 8 Ohio St. 103.

*Texas.* — *Record v. State*, 36 Tex. 521.

*Wisconsin.* — *Peterson v. State*, 45 Wis. 541.

**The Record Need Not Show** service of copy. *Parker v. People*, 13 Colo. 155.

*Contra.* — In *Illinois* it seems that the record on appeal should show that the defendant was furnished with a copy of the indictment, and while the proceedings in one case were held to be irregular because the record failed to show this fact, it does not appear that the reversal was based upon that ground alone. *Yundt v. People*, 65 Ill. 372.

**New Indictment Without Defendant's Knowledge.** — The defendant had been served with a copy of the indictment preferred against him, and thereafter that indictment was dismissed because it was insufficient and a new indictment was preferred against him. It was held that he did not waive a copy

statutes requiring the copy to be served before arraignment and those requiring it before trial.<sup>1</sup> And while, under such provisions, a copy of the whole indictment or information should be served,<sup>2</sup> an immaterial variance is not fatal,<sup>3</sup> and the defendant may waive an insufficient copy as well as the entire failure to serve him with a copy.<sup>4</sup>

**X. CHARGING THE OFFENSE — 1. Sufficiency of Indictment or Information Generally — a. APPLICATION OF SAME RULES TO BOTH.** — Indictments and informations are tested by the same rule in so far as the substantial description of the offense is concerned.<sup>5</sup>

of the new indictment, though his first objection was made when the indictment was read on the trial, where the dismissal of the original and the finding of the new indictment were made without his knowledge, and his first notice of these proceedings was had when the indictment was read on the trial. *Harris v. State*, 32 Tex. Crim. Rep. 279.

1. Thus where the statute provides that the defendant is entitled to a copy a certain number of days before trial, he does not waive a copy by pleading upon arraignment. *State v. Howell*, 3 La. Ann. 52. *Citing U. S. v. Curtis*, 4 Mason (U. S.) 233, wherein Story, J., reviews the authorities under the English statutes and distinguishes between arraignment and trial in this respect and to the same effect; but where the statute provides for a copy before arraignment, then a variance between the copy furnished and the original must be taken advantage of before pleading. *White v. State*, 32 Tex. Crim. Rep. 625.

2. *State v. Howell*, 3 La. Ann. 50.

**Certificate of Clerk — Seal.** — In *State v. Carey*, 56 Kan. 84, it was held that the copy of an information furnished to the defendant being confessedly full and correct, the defendant could not refuse to plead thereto because the clerk had not attached the seal of the court upon the certificate, since the statute did not require a certificate, and since the court was required to give judgment without regard to technical errors not affecting the substantial rights of the defendant.

3. *State v. Valere*, 39 La. Ann. 1060; *State v. Rodrigues*, 45 La. Ann. 1040; *White v. State*, 32 Tex. Crim. Rep. 625.

4. *State v. Jackson*, 12 La. Ann. 679; *Com. v. Betton*, 5 Cush. (Mass.) 427; *State v. Green*, 66 Mo. 643, wherein it was held that the sufficiency of an in-

dictment is to be determined by the averments it contains and not by those to be found in an incorrect copy of the indictment, and therefore a motion to quash an indictment on the ground that the copy thereof charged no offense was overruled, the court saying that while it was true that the defendant was entitled under the statute to a copy of the indictment forty-eight hours before his trial, yet if an incorrect copy was furnished to him, the only effect would be to give him the right to demand a true copy and to delay the trial until it was furnished him, and if he went to trial without making such objection, he could not afterwards object on that account. *Citing State v. Jackson*, 12 La. Ann. 679.

5. *Donnelly v. People*, 11 Ill. 552; *Avery v. People*, 11 Ill. App. 332; *State v. Miles*, 4 Ind. 577; *State v. Beebe*, 83 Ind. 171; *People v. Olmstead*, 30 Mich. 431, *cited in Chapman v. People*, 39 Mich. 357; *Dillingham v. State*, 5 Ohio St. 284; *Kern v. State*, 7 Ohio St. 412; *State v. Elliott*, 41 Tex. 224; *Mervin v. People*, 26 Mich. 299, holding further that if the prosecution, in drawing an information, does not bring the case within the provisions of any statute dispensing with any degree of particularity or precision required at common law, the sufficiency of the information must be tested by the rules at common law applicable to an indictment for the particular offense.

**Information Substituted for Indictment.**

— By the substitution of an information for an indictment, the statute does not dispense with the necessity of charging the offense with such certainty as to notify the defendant of the offense with which he is charged, but the same certainty as was required in an indictment must be observed. *Parris v. People*, 76 Ill. 274.

**b. DEGREE OF CERTAINTY.** — Certainty is required in criminal pleadings in order to notify the defendant, as well as the court, of the nature of the offense charged,<sup>1</sup> and to enable the defendant to plead any judgment which may be rendered in the case as a bar to a subsequent prosecution for the same offense.<sup>2</sup> When these objects are attained it is generally sufficient,<sup>3</sup> and there need not be such categorical certainty as entirely to supersede the necessity of extraneous proof.<sup>4</sup> While the foregoing may be said to be the general rules to be applied in testing the sufficiency of an indictment or information with regard to certainty in charging the offense, yet courts often differ in their conceptions of certainty under various circumstances.<sup>5</sup>

**c. NECESSITY OF CHARGING FACTS.** — To the end that an indictment or information may serve the purposes indicated in the foregoing section it is a general rule that it must charge all

1. *Thompson v. State*, 26 Ark. 330; *State v. Nutwell*, 1 Gill (Md.) 54; *Dillingham v. State*, 5 Ohio St. 280; *Cochran v. U. S.*, 157 U. S. 290.

2. *Baker v. State*, 4 Ark. 56; *State v. McGinnis*, 126 Mo. 564; *State v. Fields*, Mart. & Y. (Tenn.) 139; *Wells v. State*, 4 Tex. App. 24; *Goode v. State*, 2 Tex. App. 520; *Rose v. State*, 1 Tex. App. 401.

3. *Cochran v. U. S.*, 157 U. S. 290 [citing *Evans v. U. S.*, 153 U. S. 584; *Batchelor v. U. S.*, 156 U. S. 426]. See also cases cited in the two preceding notes.

**Facts Unknown to Jury.** — "If a particular fact which is matter of description and not vital to the accusation cannot be ascertained, the indictment may charge that such a fact is unknown to the jury." *State v. Ferriss*, 3 Lea (Tenn.) 703; *Com. v. Noble*, 165 Mass. 15.

4. *Horan v. State*, 24 Tex. 161, wherein the court, in construing that section of the code requiring certainty in criminal pleading "such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense," said: "This is not a new rule. It is not designed that the description \* \* \* should be so minute in detail as to entirely supersede the proof of identity when the judgment is pleaded in bar of the same offense. Such a degree of certainty would often be impracticable and has never been, in the enforcement of this rule at common law, required in the higher grades of offenses. There must be such certainty only as the subject is reasonably

capable of, considering the nature of the offense and character of proof necessary to sustain it."

5. In *Rex v. Horne*, 2 Cowp. 672, De Grey, C. J., in delivering the unanimous opinion of the judges in the House of Lords, said: "But though the law requires certainty, we have no precise idea of the signification of the word, which is as indefinite in itself as any word that can be used." Cited in *Rawson v. State*, 19 Conn. 295.

In *U. S. v. Moore*, 60 Fed. Rep. 739, which was an indictment for making a false affidavit, it was held to be a fundamental rule of criminal pleading that it is not enough to set out at length the instrument and allege generally that it is false, but that the defendant is entitled to know wherein it is alleged to be false in order that he may prepare to meet the charge at the trial.

In *People v. Leonard*, 103 Cal. 200, which was an indictment against an officer of a corporation, under the Penal Code of California, for making false entries on the books of the corporation with intent to defraud, etc., the objection was made to the indictment that it did not allege wherein the entry was false, and it was held that there was no merit in the objection.

**Discretion in Determining Certainty.** — While, as a general rule, all indictments must positively aver the charge, in what case it is or is not sufficiently averred is not ascertained with precision and must be left to the legal discretion of the court. *Sherban v. Com.*, 8 Watts (Pa.) 213, citing 2 Hawk. P. C. 228.

the facts and circumstances which constitute the offense, and not mere conclusions of the pleader,<sup>1</sup> as no intendment can aid a

1. *Alabama*. — *Giles v. State*, 89 Ala. 50.

*Arkansas*. — *Thompson v. State*, 26 Ark. 330.

*California*. — *People v. Aro*, 6 Cal. 207.

*Connecticut*. — *Crandall v. State*, 10 Conn. 369; *Morse v. State*, 6 Conn. 13.

*Indiana*. — *Kiningham v. State*, 119 Ind. 332; *Markle v. State*, 3 Ind. 535; *State v. Record*, 56 Ind. 107.

*Iowa*. — *State v. Butcher*, 79 Iowa 110; *State v. Potter*, 28 Iowa 554; *State v. Wyatt*, 76 Iowa 328.

*Kentucky*. — *Com. v. Perrigo*, 3 Metc. (Ky.) 5; *Com. v. Tupman*, (Ky. 1895) 30 S. W. Rep. 661; *Mount v. Com.*, 1 Duv. (Ky.) 90.

*Maine*. — *State v. Philbrick*, 31 Me. 401; *State v. Verrill*, 54 Me. 408; *State v. Paul*, 69 Me. 215; *State v. McKenzie*, 42 Me. 392; *State v. Casey*, 45 Me. 435; *State v. Ames*, 64 Me. 386.

*Massachusetts*. — *Com. v. Arnold*, 4 Pick. (Mass.) 251; *Com. v. Bolkom*, 3 Pick. (Mass.) 281.

*Mississippi*. — *Norris v. State*, 33 Miss. 373.

*Missouri*. — *State v. McGinnis*, 126 Mo. 564; *State v. Albin*, 50 Mo. 419.

*New York*. — *People v. Pillion*, 78 Hun (N. Y.) 74; *People v. Gregg*, 59 Hun (N. Y.) 107; *People v. Allen*, 5 Den. (N. Y.) 76; *Sherwin v. People*, 100 N. Y. 351.

*Ohio*. — *Lamberton v. State*, 11 Ohio 282; *Dillingham v. State*, 5 Ohio St. 280.

*Oregon*. — *State v. Packard*, 4 Oregon 157; *State v. Perham*, 4 Oregon 188; *State v. Dougherty*, 4 Oregon 200.

*Rhode Island*. — *State v. Pirlot*, (R. I. 1897) 36 Atl. Rep. 715.

*South Carolina*. — *State v. Raines*, 3 McCord L. (S. Car.) 533; *State v. Williams*, 32 S. Car. 123.

*Tennessee*. — *Pearce v. State*, 1 Sneed (Tenn.) 65; *Kit v. State*, 11 Humph. (Tenn.) 167.

*Texas*. — *Johnson v. State*, 1 Tex. App. 151; *State v. Williams*, 14 Tex. 98.

*Washington Territory*. — *Leonard v. Territory*, 2 Wash. Ter. 381.

*Wisconsin*. — *State v. Gaffrey*, 3 Pin. (Wis.) 371.

*United States*. — *U. S. v. Mann*, 95 U. S. 580.

*England*. — *Rex v. Stevens*, 5 East 244; *Rex v. Horne*, 2 Cowp. 672.

**The Test of conformity to this rule is** whether a conviction or acquittal could be relied on as a good plea to another indictment omitting the necessary averments, *Harris v. State*, 3 Lea (Tenn.) 327; or whether the indictment is sufficient to withstand a motion in arrest of judgment. *Black v. State*, 36 Ga. 447.

**Exceptions to the Rule.** — While an indictment must charge the offense with as much certainty as the case will admit, and it is necessary in most cases to state all the essential particulars constituting the offense in detail, this rule has its exceptions, and from the very nature of the offense, when it consists not of a single act but of a series of acts as essential elements in the crime, the charge may properly be general in its character, and need not specify the details of the various distinct acts which will establish guilt, as where one is charged with being a common barrator, or a common scold, *U. S. v. Royall*, 3 Cranch (C. C.) 618; and while these two instances have sometimes been stated to be the only exceptions to the general rule, other cases which fall within the principle are also within the exception, as, for example, the keeping of a common disorderly house or common gaming house, etc., *Stratton v. Com.*, 10 Met. (Mass.) 220; *State v. Collins*, 48 Me. 217; *Rex v. Higginson*, 2 Burr. 1232; of being a common seller of spirituous liquors without a license, *Com. v. Pray*, 13 Pick. (Mass.) 359; or a common railer and brawler. *Stratton v. Com.*, 10 Met. (Mass.) 220.

**Where the Act Itself Imports the Wrong**, it is sufficient to charge it in general terms. Thus it is sufficient to charge that a person is a night-walker, because that term has a fixed meaning in the law. *State v. Dowers*, 45 N. H. 543.

**Complicated Facts.** — In *Lawson v. State*, 20 Ala. 74, wherein a man and woman were indicted for living together in fornication, the charge being that they "did live together in fornication," it was held that the offense being complicated, consisting of a repetition of acts, or being continuous in its character, not implying a single act or any given number of acts, so that it is impossible so to state them that a legal

charge where the facts and circumstances alleged do not bring the accused within the prohibition of the law;<sup>1</sup> nor can an

conclusion of guilt will result with certainty and precision, it is unnecessary to allege them and the use of the general term is sufficient; *reviewing and citing*, to the same principle, *Rex v. Higgins*, 2 East 5; *Rex v. Fuller*, 1 B. & P. 180.

**Legal Conclusions** need not be stated. *Henning v. State*, 106 Ind. 386; *State v. Stiles*, 5 La. Ann. 324.

**Presumptions of Law** need not be pleaded. *State v. Stiles*, 5 La. Ann. 324.

**Indictment for Recovery of Damages.** — Under a statute in *Massachusetts* providing for the recovery of damages for personal injuries by indictment in certain cases, the statute making the corporation liable either for the negligence of the corporation itself or for the gross negligence of its servants or agents, the averment of the negligence of the one cannot be supported by proof of the negligence of the other, as the statute expressly distinguishes between the grounds of liability. *Com. v. Boston, etc., R. Co.*, 135 Mass. 550.

**Questions Upon Erasures in Indictments** — **Province of Court.** — Where there is a question as to whether a certain word in an indictment has been erased the court should not leave it to the jury, because after a verdict there would be nothing on the face of the record by which it could be determined whether the words were or were not in the indictment, and, consequently, nothing by which it could be determined of what the accused had been convicted. *Com. v. Davis*, 11 Gray (Mass.) 9.

1. *Alabama.* — *State v. Seay*, 3 Stew. (Ala.) 130; *Giles v. State*, 89 Ala. 50.

*Arkansas.* — *State v. Hand*, 6 Ark. 165.

*Iowa.* — *State v. Hall*, 72 Iowa 525.

*Maine.* — *State v. Godfrey*, 24 Me. 232; *State v. Philbrick*, 31 Me. 401; *State v. Chapman*, 68 Me. 477.

*New Hampshire.* — *State v. Divoll*, 44 N. H. 143.

*New York.* — *People v. Olmsted*, 74 Hun (N. Y.) 323.

*Oklahoma.* — *Jewell v. Territory*, (Okla. 1896) 43 Pac. Rep. 1075.

*Oregon.* — *State v. Smith*, 11 Oregon 205.

*Pennsylvania.* — *Mears v. Com.*, 2 Grant's Cas. (Pa.) 385.

*South Carolina.* — *State v. Henderson*, 1 Rich. L. (S. Car.) 179.

*Vermont.* — *State v. Haven*, 59 Vt. 399.

*United States.* — *Pettibone v. U. S.*, 148 U. S. 197; *U. S. v. Forrest*, 3 Cranch (C. C.) 56.

**The Certainty Required at Common Law** is that everything which the pleader should have stated, and which is not expressly alleged, or by necessary implication included in what is alleged, must be presumed against him. *Foster v. State*, 19 Ohio St. 417; *Mears v. Com.*, 2 Grant's Cas. (Pa.) 385.

It must appear to the court that if the facts alleged are proved as they are stated, without any additional facts or circumstances, there can be no doubt of the illegality or criminality of the conduct charged. *State v. Parker*, 43 N. H. 85.

**Common Intent.** — It is a well-established rule of criminal law that every indictment should contain a complete description of the offense charged, that it should set forth the facts constituting the crime so that the accused may have notice of what he is to meet and so that the court may know upon conviction what crime has been committed, but the highest degree of certainty is not required; certainty to a common intent is sufficient. "No rule ought to prevail which would serve only to shield the guilty instead of protecting the innocent." *Territory v. Ashby*, 2 Mont. 92; *State v. Nutwell*, 1 Gill (Md.) 54; *Stoughton v. State*, 2 Ohio St. 564; *Whitney v. State*, 10 Ind. 404.

**Indictments Require Only the Same Certainty as Declarations**, namely, certainty to a common intent in general, and not certainty in every particular, as is required in pleading an estoppel. *Sherban v. Com.*, 8 Watts (Pa.) 213; *McCool v. State*, 23 Ind. 127; *State v. McCormack*, 2 Ind. 305.

**In Charging Misdemeanors** certainty to a common intent is sufficient, and the same strictness is not required as in indictments for felony. *Harris v. State*, 3 Lea (Tenn.) 327; *Martin v. State*, 6 Humph. (Tenn.) 206; *Taylor v. State*, 6 Humph. (Tenn.) 285; *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

**But an Offense Must Be Distinctly Charged**, and notwithstanding it be a misdemeanor, it must be so charged as to leave no doubt in the mind of the accused and the court as to the exact

indictment be supported by instructions submitting to the jury issues not raised by the pleadings.<sup>1</sup> But it is said that if the indictment is otherwise sufficient it is not material in what part thereof a necessary averment is made.<sup>2</sup>

*d. POSITIVENESS OF CHARGE.* — It is not only necessary that the facts and circumstances which constitute the offense should be set out in the indictment or information, but it must be charged that the accused did the act which renders him amenable to the law.<sup>3</sup>

*e. MATTERS OF INDUCEMENT.* — Matters which are merely inducement need not be alleged with the same particularity required in setting out material facts constituting the offense.<sup>4</sup>

*f. MATTERS OF JUDICIAL NOTICE.* — Matters of which the court will take judicial notice need not be alleged.<sup>5</sup>

offense intended thereby. *Evans v. U. S.*, 153 U. S. 587 [citing *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Hess*, 124 U. S. 483; *Pettibone v. U. S.*, 148 U. S. 197; *In re Greene*, 52 Fed. Rep. 104].

1. *State v. Hesselstine*, 130 Mo. 474.

2. *State v. Divoll*, 44 N. H. 140.

3. *Flinn v. State*, 24 Ind. 286; *Underwood v. State*, 19 Ala. 532.

"Did." — In some cases it is held that the word "did" is indispensable. *Ewing v. State*, 1 Tex. App. 362; *State v. Hutchinson*, 26 Tex. 111; *State v. Daugherty*, 30 Tex. 360; *Edmondson v. State* 41 Tex. 496; *State v. Halder*, 2 McCord L. (S. Car.) 378. And an indictment charging that the defendant "did take upon himself to," etc., was held bad upon a motion in arrest of judgment. *State v. Perry*, 2 Bailey L. (S. Car.) 17.

**Charge as Conclusion of Law.** — An information which charges that the defendant "did then and there commit the offense of wilfully," etc., "keeping a disorderly house," etc., is bad because it does not state that the defendant "did" keep such a house, but only states a conclusion of law drawn from the facts. *Tompkins v. State*, 4 Tex. App. 161; *Lasindo v. State*, 2 Tex. App. 59; *Moore v. State*, 7 Tex. App. 42.

**Intendment.** — When the word "did" is omitted in charging the offense it cannot be supplied, notwithstanding the court is enabled to perceive from its knowledge of the language that the word was omitted by accident, because it might also see that other words could be inserted which would show that no offense had been committed. *State v. Daugherty*, 30 Tex. 361. But in *State v. Edwards*, 19 Mo. 674, the

omission of the word "did" before the words defining the offense was supplied by intendment, the offense being a misdemeanor. The court distinguished *State v. Halder*, 2 McCord L. (S. Car.) 377, in that the offense charged in the latter case was a felony, and held that the strictness and rigor in construing indictments for felonies was not applied uniformly to indictments for misdemeanors, citing, in support of this holding, *State v. Whitney*, 15 Vt. 298, which case, while in accord with that in which it is cited, as far as the result of the decision is concerned, does not seem to rest upon the distinction between misdemeanors and felonies, but rather upon the theory that the mere clerical omission is not sufficient to invalidate. And in *Michigan*, where the omission of the word "did" was manifestly a clerical error, it was held not to be fatal to the information in a felony case. *People v. Duford*, 66 Mich. 91. In this connection attention may be called to the fact that while in *Texas* mere clerical errors are not sufficient to defeat an accusation, this principle is ignored in those cases which hold the necessity of charging that the accused "did" the acts constituting the crime, as indicated by the *Texas* decision above cited.

4. *State v. Mayberry*, 48 Me. 237.

5. *State v. Borroum*, 23 Miss. 481, which was an indictment for unlawfully trading with a slave in violation of an act making the buying, selling, etc., of certain articles, "or other produce or commodity," a high misdemeanor. The indictment in question was for trading with a slave in respect of cotton. Cotton was not specifically



*g.* ATTEMPT OR INTENT TO COMMIT. — An indictment or information charging an intent or attempt to commit a certain offense does not require the same particularity as a charge of the commission of the offense itself.<sup>1</sup>

*h.* SUFFICIENCY OF INARTIFICIAL LANGUAGE. — It is now generally held in pursuance of statutory provisions that a statement of the acts constituting the offense in plain, concise, and intelligible language is all that is required, so long as the defendant is not misled,<sup>2</sup> though it is said to be well to adhere to

mentioned among the articles designated in the statute. It was contended that the indictment should have alleged that the cotton was a product or commodity. It was held that the court could judicially know whether the general words used in the act embraced the specific article named in the indictment. The court is presumed to know the ordinary meaning of words, and to construe them, when used in pleading, according to that sense, and hence when the indictment stated that seventy-five pounds of cotton were purchased the offense was as sufficiently charged as if it had contained the additional averment that the same was a product or commodity. See further *State v. McDonald*, 106 Ind. 233.

**Statutory Lien.** — Under a statute creating a lien upon the products of agricultural lands leased, it is not necessary, in an indictment for removing such products in violation of the statute, to charge specially that the lessor had a lien, because, the lease being charged, the law implies the lien arising by virtue of the lease. *State v. Smith*, 106 N. Car. 654.

1. *State v. Wall*, 35 Tex. 485; *State v. Croft*, 15 Tex. 576; *Martin v. State*, 40 Tex. 20. See, generally, article ATTEMPTS, vol. 3, p. 97.

The crime which is intended to be committed need not be set forth fully and technically. *Com. v. Doherty*, 10 Cush. (Mass.) 55.

**Charge in Definition of Original Offense.** — Where a statute makes it a punishable offense to attempt to commit what was, before the statute, an offense, the indictment may describe the crime charged as an attempt to commit what is the definition of the original offense. *Camp v. State*, 3 Ga. 418.

**An Offense Must be Charged.** — An indictment charging an attempt to commit an offense must charge some act done by the defendant of such a nature as to constitute an attempt to commit

the offense mentioned in the indictment. Thus an indictment which charges that the defendant did "unlawfully and wickedly attempt to pick the pocket of one D. with intent then and there feloniously to steal, take, and carry away the goods and chattels," etc., "of the said D." was held to be insufficient because the court could not say what it was that the defendant was charged with doing. *Randolph v. Com.*, 6 S. & R. (Pa.) 398; *Com. v. Clark*, 6 Gratt. (Va.) 675; *State v. Wilson*, 30 Conn. 503. But the manner in which the attempt is made need not be shown. *People v. Bush*, 4 Hill (N. Y.) 133.

2. *Arkansas*. — *Dixon v. State*, 29 Ark. 167.

*Illinois*. — *Warriner v. People*, 74 Ill. 346; *Allen v. People*, 82 Ill. 610; *Lyons v. People*, 68 Ill. 271; *Cole v. People*, 84 Ill. 216; *Mapes v. People*, 69 Ill. 523.

*Indiana*. — *Ward v. State*, 8 Blackf. (Ind.) 101; *Woodward v. State*, 103 Ind. 127; *State v. Clark*, 3 Ind. 451; *Stinehouse v. State*, 47 Ind. 17; *Musgrave v. State*, 133 Ind. 297.

*Iowa*. — *State v. Close*, 35 Iowa 570; *State v. Watrous*, 13 Iowa 489; *State v. Hockenberry*, 30 Iowa 504; *State v. Johnson*, 26 Iowa 407; *State v. Thompson*, 19 Iowa 299.

*Kansas*. — *State v. McCord*, 8 Kan. 232; *State v. Plowman*, 28 Kan. 569.

*Kentucky*. — *Com. v. Magowan*, 1 Metc. (Ky.) 368.

*New York*. — *People v. Harris*, (Supreme Ct.) 7 N. Y. Supp. 773; *People v. Farrell*, (Supreme Ct.) 28 N. Y. St. Rep. 44; *Pontius v. People*, 82 N. Y. 339; *Phelps v. People*, 6 Hun (N. Y.) 401; *People v. Phelps*, 5 Wend. (N. Y.) 9.

*North Carolina*. — *State v. Van Doran*, 109 N. Car. 864; *State v. Hart*, 116 N. Car. 976.

*South Carolina*. — *State v. Wimberly*, 3 McCord L. (S. Car.) 190.

*Tennessee*. — *Foster v. State*, 6 Lea

approved precedents.<sup>1</sup> And clerical errors,<sup>2</sup> or bad grammatical construction,<sup>3</sup> or the misspelling of words, the meaning being

(Tenn.) 215; Logan v. State, 2 Lea (Tenn.) 222.

Texas. — Johnson v. State, 1 Tex. App. 151; State v. Moreland, 27 Tex. 726.

West Virginia. — State v. Halida, 28 W. Va. 499.

**The Constitutional Requirement** that the accused shall have his crime "fully and plainly, substantially and formally described to him," means only such particularity as may be necessary to enable him to understand the charge and prepare his defense. Com. v. Robertson, 162 Mass. 90.

**Bad Handwriting** is not a ground for quashing an indictment. State v. Morris, 43 Tex. 372; Irvin v. State, 7 Tex. App. 109; Witten v. State, 4 Tex. App. 70.

**Vi et Armis.** — Under the Statute 37 Henry VIII., c. 8, it is laid down that, however material the words *vi et armis* might have been at the common law, they shall not of necessity be put in any indictment, nor shall the parties indicted have any advantage by writ of error for want of them or like words, but the indictment lacking said words shall be adjudged effectual to all intents and purpose as if these words had been in them. Tipton v. State, 2 Yerg. (Tenn.) 542.

*At Common Law*, in an indictment for offenses which amounted to an actual disturbance of the peace and were attended with forcible injuries, such as assault and battery, the words *vi et armis* were necessary, but it would be absurd to require them in indictments for offenses not involving an actual disturbance of the peace. State v. Munger, 15 Vt. 295; State v. Kean, 10 N. H. 351; State v. Harris, 106 N. Car. 682; State v. Duncan, 6 Ired. L. (N. Car.) 236; 2 Hawk. P. C., c. 25, § 99; and adopting the distinction known in the English practice under the Statute 37 Henry VIII., above cited, it was held in *Vermont* that these words may be implied from other words in the indictment or information, and that the word "feloniously" in itself sufficiently implies *vi et armis*. Brackett v. State, 2 Tyler (Vt.) 166.

**Instigated by the Devil, etc.** — It is not necessary to allege that the defendant committed the offense "not having the fear of God before his eyes, but being

moved and seduced by the instigation of the devil." State v. Howard, 92 N. Car. 772.

**Abbreviations in Common Use**, which cannot mislead, are not objectionable. Patterson v. People, 12 Hun (N. Y.) 137. See also articles ABBREVIATIONS, vol. 1, p. 42; ENGLISH LANGUAGE, vol. 7, p. 720. But abbreviations of words used by men of science, or in the arts, will not answer without a full explanation of their meaning in ordinary language. U. S. v. Reichert, 32 Fed. Rep. 142.

1. State v. Harkin, 7 Nev. 384, where it is said that nothing is gained by a departure from the approved precedents and forms, and by adhering to them much time and labor may be saved from waste in investigating and arguing objections to indictments which do not follow approved precedents in the particular cases.

2. Grant v. State, 55 Ala. 201; Evans v. State, 58 Ark. 47; Jackson v. State, 88 Ga. 784; Ward v. State, 8 Blackf. (Ind.) 101; State v. Crawford, 66 Iowa 318; State v. Caffrey, 94 Iowa 65; State v. Ford, 38 La. Ann. 797; People v. Duford, 66 Mich. 91; State v. Shaw, 58 N. H. 74; State v. Wimberly, 3 McCord L. (S. Car.) 190; Martin v. State, 40 Tex. 21.

**The Omission of a Word** by clerical error, the meaning being plain, will not make an indictment invalid. Walter v. State, 105 Ind. 589.

3. Pond v. State, 55 Ala. 196; State v. Turlington, 102 Mo. 642; State v. Shaw, 58 N. H. 74; State v. Lee Ping Bow, 10 Oregon 27; Perdue v. Com., 96 Pa. St. 311; State v. Wimberly, 3 McCord L. (S. Car.) 190; Scales v. State, 7 Tex. App. 363; Gay v. State, 2 Tex. App. 127; Dawson v. State, 33 Tex. 491; State v. Halida, 28 W. Va. 499; Reg. v. Stokes, 1 Den. C. C. 307.

**Words of Reference** — *Relation of Pronoun to Antecedent Noun.* — There is no rule of legal or grammatical construction which necessarily requires that a pronoun shall relate to the last noun for its antecedent, but this is a matter which must be governed by the sense intended to be conveyed. Miller v. State, 107 Ind. 153; State v. Hedge, 6 Ind. 330.

*Said.* — The word "said" will not be referred to the next antecedent when

apparent,<sup>1</sup> will not make an indictment or information bad.

**i. INTERPRETATION OF LANGUAGE — TECHNICAL WORDS.** — The language of the charge is to be understood in its plain and natural sense,<sup>2</sup> except that when used in a legal and restricted sense it will be so understood.<sup>3</sup>

the plain meaning of the context does not require it. *Wilkinson v. State*, 10 Ind. 372.

**Bad Punctuation** will not vitiate an indictment. *Ward v. State*, 50 Ala. 120; *Butler v. Com.*, 81 Va. 162.

**1. California.** — *People v. Hitchcock*, 104 Cal. 482.

**Indiana.** — *Pierce v. State*, 75 Ind. 199; *Lefler v. State*, 122 Ind. 206; *Myers v. State*, 101 Ind. 379; *State v. Hedge*, 6 Ind. 330; *Wills v. State*, 4 Blackf. (Ind.) 457.

**Louisiana.** — *State v. Hornsby*, 8 Rob. (La.) 554; *State v. Given*, 32 La. Ann. 782.

**North Carolina.** — *State v. Molier*, 1 Dev. L. (N. Car.) 263.

**South Carolina.** — *State v. White*, 15 S. Car. 387; *State v. Coleman*, 8 S. Car. 237.

**Tennessee.** — *State v. Myers*, 85 Tenn. 204.

**Texas.** — *Somerville v. State*, 6 Tex. App. 433; *State v. Earp*, 41 Tex. 487; *Keller v. State*, 25 Tex. App. 325.

**Vermont.** — *State v. Lockwood*, 58 Vt. 378.

**West Virginia.** — *State v. Halida*, 28 W. Va. 499.

**Wisconsin.** — *State v. Crane*, 4 Wis. 400.

**United States.** — *Coffin v. U. S.*, 162 U. S. 664.

**2. Com. v. Wentz**, 1 Ashm. (Pa.) 269.

**Interpretation for the Court.** — Whether the name of the person in the indictment is one or another is a question for the court to decide upon inspecting the indictment itself. *Com. v. Riggs*, 14 Gray (Mass.) 377.

**Interlineation.** — If an indictment has an interlineation and a caret at the proper place where the interlined words are to come in, the court will take notice of the caret and read the indictment correctly. *Rex v. Davis*, 7 C. & P. 319, 32 E. C. L. 524. And it is also said that the court will read words interlined in an information without regard to the position of the caret, and will not allow itself to be misled by the fact that the caret is placed in a wrong position. *State v. Daniels*, 44 N. H. 385.

**3.** "In many cases the law has its technical terms, descriptive of actions or of motives, which are not generally used in any other sense; and those terms, if used in an indictment, will of course be read and understood in that legal and technical sense only. But there are other terms that have in the law a narrow and restricted sense which are in general use in the community in a much broader and looser signification. Such terms may properly constitute a part of the description of an offense in an indictment, but they must be used in connection with such qualifying language or description as will show that they are used in their technical sense and no other." *State v. Parker*, 43 N. H. 85. See also *State v. Pratt*, 14 N. H. 458; *People v. Dumar*, 106 N. Y. 510; *People v. Farrell*, (Supreme Ct.) 28 N. Y. St. Rep. 44; *People v. Dunn*, 53 Hun (N. Y.) 385; *People v. Klock*, 48 Hun (N. Y.) 277; *People v. Wise*, (Albany County Ct. Sess.) 3 N. Y. Crim. Rep. 305; *People v. Littlefield*, 5 Cal. 355; *Rex v. Stevens*, 5 East 244.

**Technical Language Exclusive.** — Sometimes the offense may be so adequately described by a general term of technical meaning that such term must be used. Thus an indictment charging the defendant with being a common slanderer or common brawler was held insufficient, as it should have charged the defendant as a common scold or common barrator in technical language, these being the only indictable offenses of that class. *U. S. v. Royall*, 3 Cranch (C. C.) 618; *Rex v. Hardwicke*, 1 Sid. 282; *Rex v. Taylor*, 2 Stra. 849; *Rex v. Cooper*, 2 Stra. 1247; *Reg. v. Foxby*, 6 Mod. 11.

**Use of Common-law Phrases.** — In *Chapman v. People*, 39 Mich. 359, it was held that the legislature had never undertaken to permit charges to be so drawn as to mislead any one concerning the offense which they purport to describe, and when a description is found in the information which uses common-law phrases, it must be assumed as intended to have its common-law interpretation.

*j.* **CHARACTERIZING THE OFFENSE.** — When the facts, acts, and circumstances are set forth with sufficient certainty, the nature of the offense need not be further characterized,<sup>1</sup> as the facts charged constitute the offense and not the appellation which the pleader may see fit to give it.<sup>2</sup>

*k.* **VIDELICET.** — The words "to wit," "as follows," "that is to say," etc., do not bind the pleader to an exact recital where it is not otherwise required,<sup>3</sup> nor, on the other hand, will they make

1. *Arkansas.* — *Butler v. State*, 34 Ark. 481.

*California.* — *People v. Cuddihy*, 54 Cal. 53.

*Iowa.* — *State v. Shaw*, 35 Iowa 575; *State v. Davis*, 41 Iowa 311; *State v. Gillett*, 92 Iowa 527.

*Minnesota.* — *State v. Howard*, (Minn. 1896) 68 N. W. Rep. 1096.

*Nevada.* — *State v. Anderson*, 3 Nev. 256.

*North Dakota.* — *State v. Marcks*, 3 N. Dak. 532, wherein it was said that the statement of the particular offense in the formal accusation preceding the stating or charging part of the information, while not necessary, is important and should not be erroneous.

*Oregon.* — *State v. Jarvis*, 18 Oregon 361.

**Characterizing Offense as Crime.** — Thus an omission of the pleader to charge, in express words, that the defendant committed a "crime," or to term the offense with which he is charged a crime, cannot change the legal effect of the facts pleaded, where they are set forth. *State v. Hinckley*, 4 Minn. 345.

**Incorrect Designation.** — The general designation of the offense in the commencement will not invalidate the indictment by reason of the fact that the offense is wrongly named, because the real charge is that set forth in the statement of the act or omission constituting the offense. *State v. Munch*, 22 Minn. 70; *State v. Howard*, (Minn. 1896) 68 N. W. Rep. 1096; *State v. Wyatt*, 76 Iowa 328.

**Grade of Offense.** — Where a statute describes a particular act or acts as a crime of a particular grade, it is not necessary in the indictment, after charging the acts, to state that they amount to a crime of the grade declared in the statute, because this is a conclusion of law from the facts alleged. *State v. Absence*, 4 Port. (Ala.) 401; *Guest v. State*, 19 Ark. 407; *State v. Harris*, 12 Nev. 418; *O'Halloran v.*

*State*, 31 Ga. 208; *State v. Baldy*, 17 Iowa 39. See article HOMICIDE, *ante*, p. 151.

In New York Code Crim. Pro., § 276, requires that the indictments shall state both the accusation of the crime and the acts whereby it was committed, and it was held that a substantial variance between the crime charged and the acts charged was fatal, *People v. Maxon*, 57 Hun (N. Y.) 367; and it was held necessary to charge the crime as well as the act constituting it, *People v. Dumar*, 106 N. Y. 505; though it has also been held in New York that the name of the crime is a mere matter of form, which may or may not be stated, and if incorrectly stated such statement does not control the character of the crime as against the allegations constituting it. *People v. Sullivan*, (Supreme Ct.) 4 N. Y. Crim. Rep. 193.

In Kentucky it was held to be necessary under the statute in that state to characterize the offense as well as to charge the facts which constituted it. *Brooks v. Com.*, 98 Ky. 143.

2. In *Evans v. People*, 12 Mich. 32, it was held that under the statute providing that "no indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved," "nor for a want of proper and formal conclusion," and other provisions of the statute concerning matters of form, "if the indictment or information contains direct and unequivocal averments of such facts (not being mere evidence) as lead immediately and of necessity to a single and inevitable conclusion, the omission to draw that conclusion expressly will not vitiate the pleading," although the information in question could not have been sustained according to the rules of the common law for the offense which it charged.

3. *Rex v. Hart*, 1 Leach C. C. 145; *Rex v. May*, 1 Leach C. C. 192.

**Time.** — It is not necessary to lay the time under a *videlicet* in order that the

a material allegation immaterial.<sup>1</sup>

1. PLEADING AND DESCRIBING WRITTEN INSTRUMENTS. — In describing written instruments in an indictment the same degree of certainty is not required in all cases. Thus in some it is sufficient to plead the legal effect of the instrument, while in others the instrument must be set out *in hæc verba*. On this subject, however, reference should be had to the specific titles wherein the pleading of written instruments is discussed.<sup>2</sup>

2. Statutory Offenses — a. RELATION OF STATUTORY FORMS TO FORMER STRICTNESS. — The rules which control the framing of indictments and informations in the United States are generally matter of statutory regulation.<sup>3</sup> But statutory provisions permitting charges to be drawn in plain language only dispense with technicalities, and not with the necessity under the former system of fully stating the offense, so that the accused may know with what he is charged, and so that a judgment may be pleaded in bar to a subsequent prosecution for the same offense.<sup>4</sup>

time subsequent to that laid in the indictment may be proved. *Brown v. State*, 11 Ohio 276; *McDade v. State*, 20 Ala. 82.

1. *State v. Grimes*, 50 Minn. 123, where the court said it was "an erroneous theory that what is alleged under a *videlicet* is never to be construed as a precise, positive averment. This may be true when what is thus pleaded is not essential in its nature, and so need not be proved as alleged. *State v. Heck*, 23 Minn. 549. But where the matter alleged under a *videlicet* is essential, entering into the substantial description of the offense, the averment is regarded as positive and direct, and traversable. It will then be treated as particularizing that which was before general, or as explaining that which was before obscure."

Time. — Where time is material it may nevertheless be laid under a *videlicet*, because when so laid it is traversable as if it had not been so laid, and will be taken as the true time intended. *State v. Murphy*, 55 Vt. 548; *State v. Freeman*, 8 Iowa 428; *Rex v. Aylett*, 1 T. R. 70.

Omission in Charge — Facts Supplied under *Videlicet*. — Where a statute prohibited the sale of intoxicating liquors in quantities less than a certain amount without a license, etc., on a charge that the defendant sold intoxicating liquors "in a quantity than one quart, to wit: one half pint," etc., it was held that as the word "less" was omitted in the charge, the following description of

quantity under the *videlicet* became material, and it must be proved as laid, and that, thus understood, the indictment was sufficient. *State v. Arbogast*, 24 Mo. 363. But this ruling was disapproved in *State v. Andrews*, 28 Mo. 18, wherein the court says that the point was not involved in the case first cited, and that the holding therein was not necessary to its decision.

2. Thus, for the certainty required in describing written instruments in indictments for forgery, see article FORGERY, vol. 9, p. 546. In like manner see the articles EMBEZZLEMENT, vol. 7, p. 410; FALSE PRETENSES, vol. 8, p. 851; LARCENY.

3. *People v. Ah Woo*, 28 Cal. 208; *People v. Mahlman*, 82 Cal. 586; *People v. Tomlinson*, 66 Cal. 344; *People v. Goggins*, 80 Cal. 229; *People v. Ribolsi*, 89 Cal. 496; *People v. Ah Sing*, 19 Cal. 598; *People v. Barnes*, 65 Cal. 16; *People v. Henry*, 77 Cal. 445; *Sage v. State*, 120 Ind. 201; *Madden v. State*, 1 Kan. 340; *Com. v. Patterson*, 2 Metc. (Ky.) 374; *State v. Gurney*, 37 Me. 149; *People v. Kerm*, 8 Utah 268. See also cases cited in the following notes.

4. *Blair v. State*, 32 Tex. 476, wherein the court, construing a statute which provided that "the offense must be set forth in plain and intelligible words," said: "It can scarcely be said that this plain and simple rule relaxes what is sometimes called the rigor of the common law; for though the forms were often verbose, diffuse, and prolix, common sense and plain language were,

**b. EFFECT OF FORM PRESCRIBED BY STATUTE.** — While the legislature may prescribe the form of an indictment, the form prescribed must apprise the accused of the offense with which he is charged,<sup>1</sup> and courts have expressly refused to recognize the validity of legislative action which tends to abridge the defendant's constitutional privilege in this respect.<sup>2</sup>

and it is to be hoped always will be, the best guides to the pleader." See further, *Thompson v. State*, 26 Ark. 330; *Leonard v. Territory*, 2 Wash. Ter. 381; *State v. Butcher*, 79 Iowa 110; *State v. Calendine*, 8 Iowa 200; *State v. Reakey*, 62 Mo. 42; *McQuoid v. People*, 8 Ill. 76; *State v. Cook*, 20 La. Ann. 145; *State v. Kennedy*, 8 Rob. (La.) 590.

**Former Rules of Procedure** not changed by or inconsistent with statutes are still in force. *State v. Kennedy*, 8 Rob. (La.) 590; *Walker v. State*, 23 Ind. 61.

**Too Great Departures Discouraged.** — In *State v. Mitchell*, 25 Mo. 421, Scott, J., in touching upon the effect of relaxing the strict rules of pleading in charging criminal offenses, delivered this forcible utterance: "There is no policy in encouraging carelessness or laxity in criminal pleadings. When any departure from the required form is tolerated, it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as a precedent and urged as a reason why there should be a greater relaxation of the rule requiring the observance of forms. In this way the courts will be led step by step to the subversion of all order in the administration of the Criminal Code. When a man is called upon to defend himself against the charge of having violated the law, it is not unreasonable that he should require the accusation against him to be in sensible language."

**Too Much Nicety.** — In *Rex v. Stevens*, 5 East 244, Lord Ellenborough said: "If the sense be clear, nice exceptions ought not to be regarded;" in respect of which Sir Matthew Hale, also, long before lamented the "unseemly niceties" required in the construction of indictments and the "over easy ear given to exceptions," whereby more offenders escape "than by their own innocence, \* \* \* to the shame of the government, to the encouragement of villainy, and to the dishonor of God." 2 Hale P. C. 193. And, indeed, it is also said that greater strictness is often insisted upon in the American courts than is actually required in the

English courts, which have abandoned to a great degree their old adherence to the technical niceties. *Martin v. State*, 40 Tex. 23.

1. This statement is manifestly supported by the authorities considered with respect to the sufficiency of charges in the language of the statute. See *infra* X. 2. c. (4) *Charge in Language of Statute — Restriction upon Rule*. See also *Caldwell v. State*, 28 Tex. App. 566; *State v. Hodgson*, 66 Vt. 134; *Riddle v. State*, 3 Heisk. (Tenn.) 406, wherein the court said: "We think there can be no reasonable doubt of, or objection to, the authority of the law-making power in the state to create new offenses, redefining or redescribing those of the common law by adding to or taking from the ingredients required by it, thereby making the offense a statutory one. And while we have appropriated by statute Sir Edward Coke's general description of murder in almost identical terms, changing them barely for adaptation to our peculiar institutions, still we have gone further, and in specific language described murder in the first degree, thereby totally abrogating the use of such descriptive forms of the common law, and of other states, as are not preserved by our statute, and making it necessary only to describe the crime in the words of the statute, or in words of equivalent or more comprehensive import."

2. *Alabama.* — *Henry v. State*, 33 Ala. 397.

*Indiana.* — *McLaughlin v. State*, 45 Ind. 338.

*Kentucky.* — *Conner v. Com.*, 13 Bush (Ky.) 714.

*Maine.* — *State v. Mace*, 76 Me. 64; *State v. Learned*, 47 Me. 426.

*Mississippi.* — *Murphy v. State*, 28 Miss. 654, where the defendant was indicted under an act to suppress trade and barter with slaves, and it was held that an indictment framed in the general manner indicated in the section of the statute relating thereto would be invalid, because not sufficiently specific in charging the offense to apprise the

c. LANGUAGE OF STATUTE — (1) *General Rules.* — While it is essential that all the facts constituting an offense must be so stated as to bring the defendant precisely within the law,<sup>1</sup> it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it, the offense may be sufficiently charged in the language of the statute.<sup>2</sup> In some

defendant of the nature or cause of accusation against him under his constitutional right.

*Missouri.* — See *State v. Fancher*, 71 Mo. 460, where Sherwood, C. J., reviewed the authorities upon the question of the sufficiency of an indictment charging the offense in the language of the statute, under the Constitution of Missouri, and upheld the indictment in the particular case, which was under the statute providing against obtaining money by false pretenses. But in *State v. Clay*, 100 Mo. 582, the same learned judge, after another elaborate discussion, denied the validity of an indictment based upon the same statute, upon the ground that it was in violation of the Constitution in failing to inform the accused of the nature and cause of the accusation. In other words, that court, when the former case was decided, thought that the terms of the act under consideration sufficiently defined the offense under the Constitution, whereas, upon the subsequent consideration of the question, it was of a different opinion. This last case was followed in *State v. Terry*, 109 Mo. 601, but even in this case one of the judges dissented. Thus it would seem that the sufficiency of an indictment based upon a statute, as well as the authority of the legislature to prescribe the form of an indictment in any particular case, would depend upon the construction which the court might place upon the form prescribed by the statute in respect to its sufficiency in defining the particular offense in question.

*Nevada.* — *State v. O'Flaherty*, 7 Nev. 157.

*Texas.* — Under an act providing a penalty for the sale of spirituous liquors without first obtaining a license it was held that the legislature did not have the power to dispense with the allegation in the indictment or information that the sale was made "without first having obtained a license therefor," because that is the gist of the offense and the indictment is one step in the prosecution "in the due course of the law of the land," under the constitu-

tional provision that no citizen shall be deprived, etc., except by due course of the law of the land. *Hewitt v. State*, 25 Tex. 722; *State v. Wilburn*, 25 Tex. 738.

1. *Florida.* — *Snowden v. State*, 17 Fla. 388.

*Indiana.* — *Bates v. State*, 31 Ind. 72; *State v. Wright*, 52 Ind. 307.

*Iowa.* — *State v. Allen*, 32 Iowa 491.

*Kentucky.* — *Com. v. Turner*, 8 Bush (Ky.) 1.

*Louisiana.* — *State v. Read*, 6 La. Ann. 227; *State v. Pratt*, 10 La. Ann. 191; *State v. Delerno*, 11 La. Ann. 648; *State v. Williams*, 37 La. Ann. 776; *State v. Jackson*, 43 La. Ann. 183.

*Maine.* — *State v. McKenzie*, 42 Me. 392; *State v. Collins*, 48 Me. 217.

*Michigan.* — *Koster v. People*, 8 Mich. 431; *Enders v. People*, 20 Mich. 233; *People v. Olmstead*, 30 Mich. 431; *Hall v. People*, 43 Mich. 417.

*New York.* — *Phelps v. People*, 72 N. Y. 334.

*North Carolina.* — *State v. Bagwell*, 107 N. Car. 859.

*Virginia.* — *Bailey v. Com.*, 78 Va. 19.

*United States.* — *Evans v. U. S.*, 153 U. S. 587; *Pettibone v. U. S.*, 148 U. S. 197.

**Repeal of Statute After Conviction.** — If a section of the statutes is repealed after conviction, this cannot cure the defect in the indictment by reason of the fact that the offense is not sufficiently charged under the statute. *Sage v. State*, 120 Ind. 204.

2. This rule is so well known and universally accepted as hardly to require citation of authorities to support it; and while the reader will find the statement well fortified with cases under the treatment of each specific offense in the criminal law in this work, the following cases announcing the general proposition, as stated in the text, are selected from the great mass for reference in connection with variations of the principle hereinafter to be stated.

*Alabama.* — *Turnipseed v. State*, 6 Ala. 664; *Williams v. State*, 15 Ala. 260; *Batre v. State*, 18 Ala. 122; *Anthony v.*

cases, it has been held that the exact language of the statute must be used in charging an offense which is defined by statute,<sup>1</sup>

State, 29 Ala. 27; State v. Brown, 4 Port. (Ala.) 410; State v. Duncan, 9 Port. (Ala.) 262; State v. Briley, 8 Port. (Ala.) 474.

*Arkansas.* — Moffatt v. State, 11 Ark. 169; Medlock v. State, 18 Ark. 363; Lemon v. State, 19 Ark. 171; State v. Collins, 19 Ark. 587; State v. Hoover, 31 Ark. 677; State v. Snyder, 41 Ark. 226; State v. Lewis, (Ark. 1886) 2 S. W. Rep. 183.

*California.* — People v. Garcia, 25 Cal. 531; People v. Martin, 32 Cal. 91; People v. White, 34 Cal. 183; People v. Burke, 34 Cal. 661; People v. Marseiler, 70 Cal. 98; People v. Cronin, 34 Cal. 191.

*Colorado.* — Cohen v. People, 7 Colo. 274.

*Connecticut.* — Whiting v. State, 14 Conn. 491; State v. Bierce, 27 Conn. 319.

*Georgia.* — Camp v. State, 3 Ga. 417; Studstill v. State, 7 Ga. 2; Cook v. State, 11 Ga. 53; State v. Calvin, R. M. Charl. (Ga.) 151; Sweeney v. State, 16 Ga. 467; Ricks v. State, 16 Ga. 603; Hester v. State, 17 Ga. 130; Sharp v. State, 17 Ga. 290; Hines v. State, 26 Ga. 614; Thomas v. State, 69 Ga. 747.

*Illinois.* — Baysinger v. People, 115 Ill. 419; Chambers v. People, 5 Ill. 351; Mohler v. People, 24 Ill. 26; Lyons v. People, 68 Ill. 271.

*Indiana.* — Shinn v. State, 68 Ind. 423; Malone v. State, 14 Ind. 219; State v. Giles, 125 Ind. 126; Eastman v. State, 109 Ind. 278; State v. Bougher, 3 Blackf. (Ind.) 307.

*Iowa.* — State v. Seamons, 1 Greene (Iowa) 418; State v. Brewer, 53 Iowa 735; Romp v. State, 3 Greene (Iowa) 276; State v. Curran, 51 Iowa 112; Buckley v. State, 2 Greene (Iowa) 162.

*Kansas.* — State v. Foster, 30 Kan. 365.

*Kentucky.* — Com. v. Cook, 13 B. Mon. (Ky.) 149; Com. v. Tanner, 5 Bush (Ky.) 316.

*Louisiana.* — State v. Benjamin, 7 La. Ann. 47; State v. Holmes, 40 La. Ann. 170; State v. Desroche, 47 La. Ann. 651; State v. Tisdale, 39 La. Ann. 476; State v. Taylor, 44 La. Ann. 967.

*Maryland.* — U. S. v. Vickery, 1 Har. & J. (Md.) 427; Parkinson v. State, 14 Md. 184.

*Massachusetts.* — Com. v. Dyer, 128 Mass. 71; Com. v. Raymond, 97 Mass. 567; Com. v. Barrett, 108 Mass. 302; Com. v. Malloy, 119 Mass. 347.

*Michigan.* — People v. Kent, 1 Dougl. (Mich.) 42; Rice v. People, 15 Mich. 9.

*Minnesota.* — State v. Johnson, 37 Minn. 493.

*Missouri.* — Simmons v. State, 12 Mo. 268; State v. Lackland, 12 Mo. 278; State v. Kesslering, 12 Mo. 565; State v. Austin, 12 Mo. 576; State v. Hereford, 13 Mo. 3; State v. Madden, 81 Mo. 421; State v. Ramsey, 52 Mo. App. 668; State v. Parker, 39 Mo. App. 116; State v. Brumley, 53 Mo. App. 126; State v. Dooley, 121 Mo. 591.

*New Hampshire.* — State v. Abbott, 31 N. H. 434; State v. Rust, 35 N. H. 438; State v. Thornton, 63 N. H. 115.

*New Jersey.* — State v. Thatcher, 35 N. J. L. 445.

*New York.* — People v. West, 106 N. Y. 293; Phelps v. People, 72 N. Y. 334; People v. King, 110 N. Y. 418; People v. Weldon, 111 N. Y. 574; People v. Burns, 53 Hun (N. Y.) 274; People v. Taylor, 3 Den. (N. Y.) 91; People v. Borges, 6 Abb. Pr. (N. Y. Gen. Sess.) 132; People v. Kelly, (Supreme Ct.) 3 N. Y. Crim. Rep. 272; People v. Smith, (New York County Gen. Sess.) 6 N. Y. Crim. Rep. 472; People v. Farrell, (Supreme Ct.) 28 N. Y. St. Rep. 44; People v. West, 106 N. Y. 293; People v. Quinn, (Supreme Ct.) 18 N. Y. Supp. 569; People v. Barber, 74 Hun (N. Y.) 368.

*North Carolina.* — State v. Stanton, 1 Ired. L. (N. Car.) 427.

*Oregon.* — State v. Carr, 6 Oregon 133; State v. Ah Sam, 14 Oregon 347.

*Texas.* — McFain v. State, 41 Tex. 385; State v. Warren, 13 Tex. 45; State v. Ake, 9 Tex. 323; Bigby v. State, 5 Tex. App. 101; Antle v. State, 6 Tex. App. 202.

*Vermont.* — State v. Daley, 41 Vt. 564; State v. Cook, 38 Vt. 439.

*Washington.* — State v. Turner, 10 Wash. 94, quoting with approval 6 Am. and Eng. Encyc. of Law 496; State v. Reis, 9 Wash. 329.

*Wyoming.* — *In re* MacDonald, (Wyoming 1893) 33 Pac. Rep. 18.

*United States.* — U. S. v. Britton, 107 U. S. 655; U. S. v. Gooding, 12 Wheat. (U. S.) 460; U. S. v. Mills, 7 Pet. (U. S.) 138; U. S. v. Lancaster, 2 McLean (U. S.) 431; U. S. v. Wilson, 1 Baldw. (U. S.) 78.

1. Eubanks v. State, 17 Ala. 183; La-Vaù v. State, 40 Ala. 44; State v. Sted-



but the prevailing doctrine is that although every ingredient of the offense described must be set out,<sup>1</sup> it is not necessary to use the exact language of the statute, words of equivalent import being sufficient, and it is enough substantially to charge the offense denounced in the statute.<sup>2</sup> It is said, however, to be the

man, 7 Port. (Ala.) 495; *Moore v. State*, 16 Ala. 411; *People v. Van Pelt*, 4 How. Pr. (N. Y.) 36; *Hamilton v. Com.*, 3 P. & W. (Pa.) 142; *State v. Henderson*, 1 Rich. L. (S. Car.) 179; *State v. Cheatwood*, 2 Hill L. (S. Car.) 459; *State v. Welch*, 37 Wis. 196.

In *Alabama* it was held that an indictment under the statute for keeping a tenpin alley without a license should aver that the defendant "was engaged in the business or employment of keeping," etc., and that the simple averment that the defendant "did keep" such an establishment was insufficient; for one may keep a tenpin alley without being engaged in keeping the same as a business or avocation. *Eubanks v. State*, 17 Ala. 183.

1. This must be done by following the language of the statute or using words of equivalent import. *State v. Allen*, 32 Iowa 491; *Fouts v. State*, 4 Greene (Iowa) 500; *Reddan v. State*, 4 Greene (Iowa) 137; *State v. Pratt*, 10 La. Ann. 191; *State v. Stiles*, 5 La. Ann. 324; *State v. Griffin*, 89 Mo. 49; *State v. Riffe*, 10 W. Va. 794.

Where the statute provided against inflicting a wound "less than mayhem," it was held that the offense was not sufficiently charged unless the indictment alleged that the wound inflicted was "less than mayhem." *State v. Jackson*, 43 La. Ann. 183.

And a count charging a defendant with running a horse on a public road "so as to interrupt travelers" was held to be bad because it did not allege that the running was done so as to interrupt travelers "thereon." *State v. Fleetwood*, 16 Mo. 448.

2. *Alabama*. — *State v. Bullock*, 13 Ala. 416; *Ben v. State*, 22 Ala. 9; *Giles v. State*, 88 Ala. 230; *Holland v. State*, 3 Port. (Ala.) 292.

*California*. — *People v. Thompson*, 4 Cal. 238; *People v. Rodriguez*, 10 Cal. 50.

*Florida*. — *Humphreys v. State*, 17 Fla. 381; *Tilly v. State*, 21 Fla. 242.

*Illinois*. — *Morton v. People*, 47 Ill. 468.

*Indiana*. — *State v. Murphy*, 21 Ind. 441; *State v. Walls*, 54 Ind. 561; *State*

*v. Gilbert*, 21 Ind. 474; *Malone v. State*, 14 Ind. 219; *Shepler v. State*, 114 Ind. 194; *Dolan v. State*, 122 Ind. 141; *Benham v. State*, 116 Ind. 112; *Chandler v. State*, 141 Ind. 106; *State v. Noel*, 5 Blackf. (Ind.) 548.

*Iowa*. — *Munson v. State*, 4 Greene (Iowa) 483; *Fouts v. State*, 4 Greene (Iowa) 500; *State v. Conlee*, 25 Iowa 237; *State v. Devine*, 4 Iowa 443; *State v. Smith*, 46 Iowa 670; *State v. Middleton*, 11 Iowa 246; *Buckley v. State*, 2 Greene (Iowa) 162.

*Kansas*. — *State v. McGaffin*, 36 Kan. 315; *State v. Foster*, 30 Kan. 365; *State v. White*, 14 Kan. 538.

*Kentucky*. — *Taylor v. Com.*, 3 Bush (Ky.) 509.

*Louisiana*. — *State v. Eames*, 39 La. Ann. 986; *State v. Smith*, 5 La. Ann. 340; *State v. Hood*, 6 La. Ann. 179; *State v. Pratt*, 10 La. Ann. 191; *State v. Hendry*, 10 La. Ann. 207; *State v. Butman*, 15 La. Ann. 166; *State v. Henry*, 47 La. Ann. 1587.

*Maine*. — *State v. Hussey*, 60 Me. 410; *State v. Robbins*, 66 Me. 324.

*Michigan*. — *Rice v. People*, 15 Mich. 18.

*Mississippi*. — *Woods v. State*, 67 Miss. 575; *Kline v. State*, 44 Miss. 317.

*Missouri*. — *State v. Fleetwood*, 16 Mo. 448; *State v. Ragan*, 22 Mo. 459; *State v. Watson*, 65 Mo. 115; *State v. DeLay*, 30 Mo. App. 357; *State v. Emerich*, 87 Mo. 110.

*Nebraska*. — *Whitman v. State*, 17 Neb. 224.

*Nevada*. — *State v. Anderson*, 3 Nev. 256; *People v. Logan*, 1 Nev. 110.

*New Hampshire*. — *State v. King*, (N. H. 1892) 34 Atl. Rep. 461.

*New Jersey*. — *State v. Hickman*, 8 N. J. L. 299; *State v. Thatcher*, 35 N. J. L. 445.

*New York*. — *People v. Whedon*, (Supreme Ct.) 2 N. Y. Crim. Rep. 320; *People v. Buddensieck*, (Supreme Ct.) 4 N. Y. Crim. Rep. 252; *People v. Dimick*, (Super. Ct.) 5 N. Y. Crim. Rep. 187; *Matter of Gray*, (Albany County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 306; *Tully v. People*, 67 N. Y. 15; *People v. Jaehne*, 103 N. Y. 182; *Frazer v. People*, 54 Barb. (N. Y.) 306.

more usual and the safer practice to pursue the exact language of the statute, because it is not likely that more apt and appropriate expressions can be employed to convey the meaning of the legislature than the words which the legislature itself employed for that purpose.<sup>1</sup>

(2) *Generic Followed by Specific Terms.*—Where the statute defining an offense uses a generic term which is followed by a more definite description of the offense, it is not sufficient in charging the offense to use the generic term, but the specific expressions following it must be employed.<sup>2</sup>

(3) *Addition of Averments Not Required by Statute.*—Where an indictment charges an offense in the language of the statute, the addition of averments which are not required by the statute will not affect the validity of the charge, but may be rejected as

*Ohio.*—Poage *v.* State, 3 Ohio St. 234.

*Pennsylvania.*—Jillard *v.* Com., 26 Pa. St. 170.

*South Carolina.*—State *v.* Vill, 2 Brev. (S. Car.) 262; Butler *v.* State, 3 McCord L. (S. Car.) 383.

*Tennessee.*—Peek *v.* State, 2 Humph. (Tenn.) 78; Budd *v.* State, 3 Humph. (Tenn.) 483; State *v.* Pennington, 3 Head (Tenn.) 119.

*Texas.*—State *v.* Lange, 22 Tex. 591; Fowler *v.* State, 38 Tex. 559; Mathews *v.* State, 36 Tex. 675; Blackwell *v.* State, 30 Tex. App. 416; Caldwell *v.* State, 2 Tex. App. 53.

*Vermont.*—State *v.* Little, 1 Vt. 331; State *v.* Abbott, 20 Vt. 537.

*Virginia.*—Com. *v.* Young, 15 Gratt. (Va.) 664.

*West Virginia.*—State *v.* McDonald, 9 W. Va. 456.

*United States.*—U. S. *v.* Bachelder, 2 Gall. (U. S.) 15; U. S. *v.* Scott, 74 Fed. Rep. 213; U. S. *v.* Wilson, 29 Fed. Rep. 286.

**Charge Under Two Statutes.**—Where the pleader attempts to draft an indictment under one section of a statute and blunders into another, the indictment may still charge an offense by rejecting the surplusage, and the indictment will then be good; but it will be bad if, after rejecting the surplusage, there is still not enough left to make a valid indictment under the statute which the pleader had in view. State *v.* Seward, 42 Mo. 206; State *v.* Emerich, 87 Mo. 116, to the last proposition.

Where the crime and penalty fixed in one section of a statute are different from those fixed in another section, an indictment which is framed in such

language as not to inform the defendant under which section he is charged is bad. State *v.* Messenger, 58 N. H. 348; State *v.* Leavitt, 63 N. H. 381.

It is also held that if the charge under one section includes an offense under another, a conviction may be had under either. State *v.* Burwell, 34 Kan. 316.

**More Extensive Language Required.**—While words of equivalent import to those used in the statute may be used in the indictment, they must be of the same import, or they must have a more extensive signification than the statutory words and include their meaning. State *v.* Wupperman, 13 Tex. 34; Peek *v.* State, 2 Humph. (Tenn.) 85; State *v.* Lynch, 88 Me. 195; People *v.* Gregg, 59 Hun (N. Y.) 107; Tully *v.* People, 67 N. Y. 15; State *v.* Robbins, 66 Me. 324.

1. Dolan *v.* State, 122 Ind. 143; Francis *v.* State, 21 Tex. 286; Juaraqui *v.* State, 28 Tex. 626; Barthelow *v.* State, 26 Tex. 176; State *v.* Odam, 2 Lea (Tenn.) 221; State *v.* Riffe, 10 W. Va. 794.

2. State *v.* Plunket, 2 Stew. (Ala.) 11; Bush *v.* State, 18 Ala. 416; State *v.* Raiford, 7 Port. (Ala.) 104; State *v.* Casey, 45 Me. 435; Territory *v.* Carland, 6 Mont. 16; State *v.* West, 10 Tex. 555; Rex *v.* Beany, R. & R. 416.

**Particular Description in Separate Section.**—Where the offense is prohibited in general terms in one section of the statute and a penalty prescribed, and in another section, entirely distinct, there is a particular description of the elements which shall constitute the offense, it has been said that there is no reason why the indictment should

surplusage,<sup>1</sup> provided they do not take the case out of the statute.<sup>2</sup>

(4) *Charge in Language of Statute — Restrictions upon Rule.* — The rule that an offense must be charged in the language of the statute defining it presupposes that the statute creating the offense is a valid exercise of legislative authority,<sup>3</sup> and depends upon the manner in which the offense is defined in the statute, because, if the statute does not sufficiently set out the facts which constitute the offense so that the defendant may have notice of that with which he is charged, then a more particular statement of the facts than is contained in the statute becomes necessary.<sup>4</sup> And where a mere generic term is used,<sup>5</sup> or where

contain anything more than the general description. *State v. Casey*, 45 Me. 436.

1. *Snell v. People*, 29 Ill. App. 470; *Com. v. Dyer*, 128 Mass. 71; *McNamee v. People*, 31 Mich. 475; *State v. Fleetwood*, 16 Mo. 448; *State v. Morse*, 55 Mo. App. 332; *Harris v. State*, 14 Lea (Tenn.) 488; *State v. Hall*, 26 W. Va. 236.

A prisoner cannot be damnified by that which throws no new burden on him, and if it makes any difference at all, it only calls for more proof on the part of the prosecution. *McNamee v. People*, 31 Mich. 475.

2. **If the Additional Averments Are Repugnant** to those made under the statute, and show a case not within the statute, the indictment is bad on demurrer. *State v. Mahan*, 2 Ala. 341.

3. *People v. West*, 106 N. Y. 295.

4. This is apparent from the cases which are cited in support of the general rule that the charge is sufficient in the language of the statute (see, *supra*, X. 2. c. (1) *General Rules*), as well as from the following authorities:

*Alabama*. — *Worrell v. State*, 12 Ala. 732; *Williams v. State*, 15 Ala. 260; *Batre v. State*, 18 Ala. 122.

*Arkansas*. — *State v. Graham*, 38 Ark. 521.

*Iowa*. — *State v. Brandt*, 41 Iowa 593.

*Kansas*. — *State v. Gavigan*, 36 Kan. 327.

*Kentucky*. — *Com. v. Stout*, 7 B. Mon. (Ky.) 249; *Com. v. Cook*, 13 B. Mon. (Ky.) 149; *Com. v. Milby*, (Ky. 1894) 24 S. W. Rep. 625.

*Massachusetts*. — *Com. v. Chase*, 125 Mass. 203.

*Mississippi*. — *Jesse v. State*, 28 Miss. 100; *Sarah v. State*, 28 Miss. 267; *Murphy v. State*, 28 Miss. 637; *Har-*

*ington v. State*, 54 Miss. 493; *Finch v. State*, 64 Miss. 461.

*Missouri*. — *State v. Bennett*, (Mo. 1889) 11 S. W. Rep. 264; *State v. Krueger*, 134 Mo. 262.

*New York*. — *People v. Gleason*, 75 Hun (N. Y.) 572; *People v. Pillion*, 78 Hun (N. Y.) 74; *People v. Wilber*, 4 Park Cr. Rep. (Genesee Sess.) 19.

*Ohio*. — *Dillingham v. State*, 5 Ohio St. 284.

*Texas*. — *State v. Campbell*, 29 Tex. 45.

*United States*. — *Cannon v. U. S.*, 116 U. S. 55; *U. S. v. Hess*, 124 U. S. 483; *Evans v. U. S.*, 153 U. S. 584; *U. S. v. Patterson*, 55 Fed. Rep. 605; *U. S. v. Brazeau*, 78 Fed. Rep. 464.

**Violation of Designated Statute.** — A general charge of the violation of the whole of any particular statute, without specifications, is not sufficient. *Kliffield v. State*, 4 How. (Miss.) 306.

**Technical Legal Term.** — In *State v. Briley*, 8 Port. (Ala.) 474, it was said that the only exception known to exist to the general rule that all the law requires is a description of the offense in the words of the statute creating it is where a statute makes use of a technical term known to the law; as burglary, robbery, and the like. But in *Turnipseed v. State*, 6 Ala. 666, it was said that this language was not to be understood as an expression of an abstract opinion of universal application, but must be taken in reference to the case then before the court, and it was held not sufficient to pursue the words of the statute, unless by doing so the fact of which the offense consists is fully, directly, and expressly alleged. *Citing State v. Brown*, 4 Port. (Ala.) 413.

5. *Boyd v. Com.*, 77 Va. 55; *Brewer*

the words of the statute by their generality may embrace cases which fall within the terms, but not within the spirit or meaning thereof, the specific facts must be alleged to bring the defendant precisely within the inhibition of the law.<sup>1</sup>

*d. EFFECT OF CONCLUSION "AGAINST STATUTE."*—When the charge does not bring the act within the prohibition of the statute, the general allegation in conclusion that it is against the form of the statute will not serve to aid the charge in that regard.<sup>2</sup>

*e. COMMON-LAW OFFENSE UNDER STATUTE.*—Where an act provides for the punishment of a common-law crime, without defining the crime itself, the crime is left as it stood at common law, and is so charged in the indictment.<sup>3</sup> Where the code simply follows the common law upon a penal subject, there is no reason why an indictment for the offense in the form adopted and sanctioned by the common law is not sufficient.<sup>4</sup>

*v. State*, 5 Tex. App. 249; *State v. West*, 10 Tex. 553.

1. *State v. Bierce*, 27 Conn. 319; *Strope v. State*, 120 Ind. 562; *Schmidt v. State*, 78 Ind. 41; *State v. Read*, 6 La. Ann. 227; *State v. Goulding*, 44 N. H. 287; *Com. v. Filburn*, 119 Mass. 297; *Com. v. Barrett*, 108 Mass. 303; *Com. v. Slack*, 19 Pick. (Mass.) 307, wherein it was held that under the statute making it an offense to "knowingly or wilfully dig up, remove, or convey away \* \* \* any human body," the removal of such a body was not a crime unless the removal was for the purpose of dissection, and the indictment must so charge, although the statute did not so express it except by making clear in another section that such was the limitation of the enactment.

**Statutes In Pari Materia.**—Where the words of the statute may by their generality embrace cases falling within its general terms but not within its meaning or spirit, the offense intended to be made penal is ascertained by a reference to the context and to other statutes *in pari materia*, and the indictment must allege all facts necessary to bring the case within the meaning of the legislature. *Com. v. Barrett*, 108 Mass. 303.

2. *Stevens v. State*, 18 Fla. 904; *State v. Stroud*, (Iowa 1896) 68 N. W. Rep. 450; *State v. Casey*, 45 Me. 435; *People v. Olmstead*, 30 Mich. 431; *State v. Helm*, 6 Mo. 263; *State v. Barrett*, 42 N. H. 470.

**Insufficient Charge in Terms of Statute.**

—It is not always sufficient to pursue the words of the statute, unless in so doing the matter wherein the offense consists is fully, directly, and expressly alleged without the least uncertainty or ambiguity, and the averment of *contra formam statuti* will not aid an indictment defective in not charging with sufficient precision an offense legally punishable. *State v. Seay*, 3 Stew. (Ala.) 131, citing 3 Bac. Abr. 370; *Com. v. Morse*, 2 Mass. 128.

3. *State v. Absence*, 4 Port. (Ala.) 401; *Guest v. State*, 19 Ark. 407; *Cochrane v. State*, 6 Md. 400. See also *State v. Twogood*, 7 Iowa 252, and *supra*, V. 4. *Conclusion of Indictment.*

4. *Roberts v. State*, 21 Ark. 184; *McCann v. State*, 13 Smed. & M. (Miss.) 471; *State v. Rose*, 32 Mo. 561; *State v. Conroy*, 97 N. Y. 62; *Sutcliffe v. State*, 18 Ohio 469; *Evans v. State*, 25 Tex. Supp. 305; *Wall v. State*, 18 Tex. 682; *Leschi v. Territory*, 1 Wash. Ter. 13.

**Indictment Must Be Good in One or Other Form.**—It is unnecessary to use both the common-law and the statutory form, but the indictment must be good as to one or the other, *Nichols v. State*, 46 Miss. 286; and in some cases it is held that the common-law indictment would be good under the statute. *Roberts v. State*, 21 Ark. 184; *People v. Conroy*, 97 N. Y. 62; *Sutcliffe v. State*, 18 Ohio 469.

**Following the Statute.**—Though an offense be one at common law, if it is defined by statute it may properly be said to be one of statutory creation, and the indictment is sufficient if it follows

*f.* **FORMER OFFENSE OR CONVICTION — INCREASED PUNISHMENT.** — Where a greater punishment may be inflicted for a second or subsequent violation of a penal law than for the first, the fact that the offense is a second or subsequent violation must be directly averred in the information or indictment to justify the increased punishment,<sup>1</sup> else it will not be considered as an offense for which the increased punishment can be inflicted, but will be deemed to be the first offense.<sup>2</sup>

the statute: *Mason v. State*, 42 Ala. 545; *State v. Ellington*, (Idaho 1895) 43 Pac. Rep. 60; *Riddle v. State*, 3 Heisk. (Tenn.) 406.

1. *Wilde v. Com.*, 2 Met. (Mass.) 408; *People v. Buck*, (Mich. 1896) 67 N. W. Rep. 982; *People v. Youngs*, 1 Cal. (N. Y.) 37; *People v. Price*, (Albany County Ct. Sess.) 6 N. Y. Crim. Rep. 141; *Larney v. Cleveland*, 34 Ohio St. 599.

**Constitutionality of Statutes.** — Statutes in various states increasing the punishment for offenses committed after one conviction for the same offense have been upheld as not repugnant to the constitutional provision that no person shall be twice put in jeopardy for the same offense. *People v. Stanley*, 47 Cal. 113; *Ross's Case*, 2 Pick. (Mass.) 170; *Plumbly v. Com.*, 2 Met. (Mass.) 413; *Rand v. Com.*, 9 Gratt. (Va.) 742.

**Allegation of Evidence.** — It is proper to allege in the indictment the evidence which would establish that the crime charged in the indictment was a second offense. *People v. Bosworth*, 64 Hun (N. Y.) 72.

**First Offense Not an Offense under Code.** — In *People v. Raymond*, 96 N. Y. 39, it was held that the contention that "no offense can be considered a second offense under the Penal Code unless it appears that the first offense charged is a crime under such code by reason of section 719, and the first offense here was before the code went into operation, is a contention without adequate foundation. The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal which the law takes into consideration when prescribing punishment for the second offense. That only is punished."

2. *People v. Cook*, 45 Hun (N. Y.) 37. *Contra*, *State v. Smith*, 8 Rich. L. (S. Car.) 460, where it was held that

the former conviction was a matter of record and therefore need not be alleged.

In *Louisiana* it was held that previous convictions should not be charged in the information, as they are not essential ingredients of the offense charged; that the court, after conviction of the particular offense charged, has a right to know whether or not the accused was previously convicted of the offense, of which he may be informed by the state, or the court may, upon its own suggestion, act upon the existence of such facts after verdict; but that in either case the defendant should have an opportunity to show cause why the fact of such previous conviction should not be brought to the knowledge of the court for the purpose of enabling it to inflict the increased punishment, in which case the defendant might show a pardon or other good cause. *State v. Hudson*, 32 La. Ann. 1053.

**Sufficiency of Averment — Conviction.** — Former conviction must be alleged when it is relied upon for increased punishment, *Long v. State*, 36 Tex. 6; *Garvey v. Com.*, 8 Gray (Mass.) 382; and this has been held necessary even where the statute did not require it, *People v. Buck*, (Mich. 1896) 67 N. W. Rep. 982.

**Record of Former Conviction.** — The provision of the General Laws of *New Hampshire* that the record of a former conviction need not be set forth particularly in an indictment for a second offense, and that it shall be sufficient to allege briefly that such person has been convicted of a violation of any provision of the act, implies that there must be a statement of record, if it is relied on with a view of charging the defendant with a higher penalty. The defendant is entitled to a description that will enable him to find the record so as to apply for a correction or reversal, and to make preparation for the

*g.* **ALTERNATIVE CHARGE — USE OF DISJUNCTIVE.** — Where the means of committing an offense are expressed in the disjunctive, or where several acts taken together make one offense, though only one need be shown, they must be charged with the conjunction, and an alternate charge is not sufficient, unless the terms connected by the disjunctive in the statute are synonymous.<sup>1</sup>

*h.* **PLEADING STATUTE.** — It is sufficient here simply to state the rule that an indictment under a public statute need not recite

trial of the question whether he is the convict; and an averment in the indictment giving him no information of the time, court, or county in which the indictment was rendered is insufficient. *State v. Adams*, 64 N. H. 440; *State v. Small*, 64 N. H. 491, *citing* *Tuttle v. Com.*, 2 Gray (Mass.) 505.

*Averment of Discharge or Pardon.* — Under a statute providing that "if any person, convicted of any offense punishable by imprisonment in a state prison, shall be discharged, either upon being pardoned or upon the expiration of his sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished," it must be alleged that the defendant was pardoned or otherwise discharged. *Wood v. People*, 53 N. Y. 511; *Stevens v. People*, 1 Hill (N. Y.) 261; *Gibson v. People*, 5 Hun (N. Y.) 542, wherein it was held that the allegation in the indictment, "having been duly discharged and remitted of such judgment and conviction," was sufficient, the court saying: "If the allegation were simply that the defendant 'had been duly discharged,' there would be much force in the reasoning that it was defective. For, under that allegation, a discharge might have occurred through an arrest or reversal of judgment, or upon habeas corpus, as well as upon the expiration of the sentence; and the defendant could well say he had the right to know what was alleged against him in that behalf. But the allegation in this case is more, 'duly discharged and remitted of such judgment and conviction.' The word 'duly' means 'in a proper way,' or 'regularly,' or 'according to law.'"

*Pardon.* — An allegation that a discharge was in consequence of a pardon is sufficient. *Evans v. Com.*, 3 Met. (Mass.) 453.

**Jurisdiction of First Offense.** — It has been held that the charge of a former

conviction must show that the court in which it was had was one of competent jurisdiction. *People v. Cook*, 2 Park. Cr. Rep. (Warren Oyer & T. Ct.) 12; *People v. Powers*, 6 N. Y. 50. But this has been held to be a matter of form which, after the second conviction, cannot be made a ground of objection on appeal. *People v. Powers*, 6 N. Y. 50.

**Failure of Proof — Good Charge for One Offense.** — Where an indictment is drawn with a view to subjecting the defendant to additional punishment by reason of the fact that he had previously been convicted of the same offense, it will not invalidate the indictment itself if the former conviction cannot be shown, or if a former conviction which was not legal is shown, but the indictment will still be good for the offense charged therein without reference to the former conviction. *State v. Thornton*, 63 N. H. 115 [*citing* *State v. Blaisdell*, 33 N. H. 388; *State v. Keneston*, 59 N. H. 36; *Com. v. Timothy*, 8 Gray (Mass.) 480; *Com. v. Anthes*, 12 Gray (Mass.) 29; *Com. v. Dean*, 14 Gray (Mass.) 99; *Com. v. Chappel*, 116 Mass. 7].

**Improper Charge of Conviction.** — In *Good v. State*, 61 Ind. 71, it was held that in an indictment for grand larceny it is improper to charge former conviction of petit larceny, because, under the statute, a former conviction of petit larceny can only be used to enhance the punishment in a case where the defendant is again charged with petit larceny, but that if the indictment contains a valid charge of grand larceny, a motion to quash the entire indictment on account of the improper charge of a former conviction of petit larceny should be overruled, though the court might have granted a motion to quash so much of the indictment as charged such former conviction.

1. See *infra*, XVII. 7. *Conjunctive and Disjunctive Averments.*

or specially refer to it, the conclusion against the form of the statute serving that purpose,<sup>1</sup> leaving a more complete treatment of this subject to its appropriate title.<sup>2</sup>

**3. Intent or Knowledge—***a.* **INTENT GENERALLY.**—It is a universal rule that when the criminality of an act depends upon its intent or object that intent must be specified, else no crime will be charged.<sup>3</sup> But the allegation may be made in general terms,<sup>4</sup> and if the purpose forms no part of the offense, or if the

1. *Crabb v. State*, 88 Ga. 584; *Knight v. State*, 88 Ga. 590; *Zumhoff v. State*, 4 Greene (Iowa) 526; *Rawlings v. State*, 2 Md. 201; *Com. v. Hoye*, 11 Gray (Mass.) 462; *People v. Stockham*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 424; *People v. Reed*, 47 Barb. (N. Y.) 235; *State v. Cobb*, 1 Dev. & B. L. (N. Car.) 115; *Webb v. State*, 11 Lea (Tenn.) 665; *U. S. v. Rhodes*, 1 Abb. (U. S.) 28. See *supra*, V. 4. *b. Contra Formam.*

2. See article STATUTES.

3. *Alabama*.—*Beasley v. State*, 18 Ala. 535.

*Arkansas*.—*Gabe v. State*, 6 Ark. 519.

*Florida*.—*Ross v. State*, 15 Fla. 59.

*Indiana*.—*State v. Freeman*, 6 Blackf. (Ind.) 248.

*Massachusetts*.—*Com. v. Slack*, 19 Pick. (Mass.) 304; *Com. v. Morse*, 2 Mass. 128.

*Minnesota*.—*State v. Ullman*, 5 Minn. 13.

*Mississippi*.—*Morman v. State*, 24 Miss. 54.

*Missouri*.—*State v. McCollum*, 44 Mo. 344; *State v. Ragsdale*, 59 Mo. App. 590.

*New York*.—*People v. Cooper*, (Oswego Oyer & T. Ct.) 3 N. Y. Crim. Rep. 118.

*Ohio*.—*Drake v. State*, 19 Ohio St. 211.

*Tennessee*.—*Vaughn v. State*, 3 Coldw. (Tenn.) 102.

*Texas*.—*Johnson v. State*, 1 Tex. App. 151.

*United States*.—*Evans v. U. S.*, 153 U. S. 584.

*England*.—*Rex v. Philipps*, 6 East 464.

Thus an indictment against an insolvent debtor for fraudulently concealing his estate (under the statute), which charged the concealment of the property with intent to defraud a certain creditor and others, without alleging in the words of the act that he did this "thereby to secure the same, or

to receive or expect any profit, benefit, or advantage thereby," was held to be bad. *Respublica v. Tryer*, 3 Yeates (Pa.) 451.

"**Fraudulently.**"—Where an act is made an offense when "fraudulently" done, it must be so charged. *Duff v. Com.*, 92 Va. 769; *State v. Beach*, (Ind. 1896) 43 N. E. Rep. 949.

**Language of Statute.**—Where the statute makes intent a necessary ingredient of the offense it must be alleged in the words of the statute. *State v. Elborn*, 27 Md. 498.

**Legal Deduction Not Sufficient.**—When the intent is an ingredient of the offense it must be charged directly; and not merely as a legal deduction in the conclusion of the indictment. *Drake v. State*, 19 Ohio St. 211.

**General Reference to Statute.**—Under an act providing that the owners of land may take up animals found trespassing thereon, which act contained many provisions, and further providing that if a person take up and drive animals from land not his own for the purpose of taking advantage of the provisions of said act he shall be guilty of a felony, an indictment which charged that the defendant took up and drove animals from lands not his own for the purpose of taking advantage of the act (designating the act by title and date of passage) was held fatally defective, because such an indictment must allege the wrongful intent with which the animals were taken up and driven away, or, in other words, the particular provision of the act which the person intended to take advantage of; the court saying that, as the act contained many provisions, "it is scarcely conceivable that a person would take up animals for the purpose of 'taking advantage' of all of those provisions." *People v. Martin*, 52 Cal. 202. To the same effect see *State v. Thompson*, 44 Iowa 399.

4. *People v. Leonard*, 103 Cal. 200; *Evans v. U. S.*, 153 U. S. 584.

act itself is expressly condemned, whatever the purpose may be, it is not necessary to allege the intent.<sup>1</sup>

*b. WILFULLY, MALICIOUSLY, ETC.* — Where the statute makes an act an offense if it is done wilfully, maliciously, or in some other way indicating intent, it must be charged to have been so done.<sup>2</sup>

*c. FELONIOUSLY* — **General Rule.** — However little apparent reason there may be for adhering to the technical language of the common law in framing indictments, it is still the general rule that it is necessary to the validity of an indictment for a felony that the acts be charged to have been feloniously done, whether the act was a felony at common law or not;<sup>3</sup> and the same

An allegation of intent in the prefatory part of the indictment is sufficient. *Rex v. Philipps*, 6 East 464.

1. *Harding v. People*, 10 Colo. 394; *Com. v. Stout*, 7 B. Mon. (Ky.) 249; *State v. McCollum*, 44 Mo. 344; *People v. Walbridge*, 6 Cow. (N. Y.) 512; *State v. West*, 10 Tex. 555; *Rex v. Philipps*, 6 East 464. See to the same effect *Smart v. White*, 73 Me. 332.

2. *State v. Roberts*, 3 Brev. (S. Car.) 139.

But where the word "wilful" is used only in the title of the act, an indictment may follow the language of the statute and omit the word "wilful." *State v. McDaniel*, 45 La. Ann. 686.

**Sufficiency of Equivalent Expressions.** — Where the code makes an act wilfully done an offense, the charge must be that it was wilfully done, and a presentment charging that the act was unlawfully done is not sufficient, because the word "unlawfully" is not synonymous with "wilfully." *State v. Townsell*, 3 Heisk. (Tenn.) 7; *Morrow v. State*, 10 Humph. (Tenn.) 120; *Com. v. Turner*, 8 Bush. (Ky.) 1; *State v. Hussey*, 60 Me. 411. *Contra*, *Com. v. Stewart*, 12 Pa. Co. Ct. Rep. 151.

Under a statute prescribing the penalty for "wilfully and maliciously" throwing down any fence, etc., the charge was that the defendant did the act complained of "unlawfully, maliciously, and wantonly." The indictment was quashed in the court below because it omitted the word "wilfully," substituting therefor the words "unlawfully" and "wantonly." The Supreme Court held that the substantial description of the offense under the statute is all that is required, and said that the act charged could only be "unlawful" by being done in violation of the statute, for by that alone

it is made an offense, and that the indictment was sufficient. *State v. Pennington*, 3 Head (Tenn.) 120. See also *State v. Brown*, 41 La. Ann. 345.

Where the word "maliciously" is used in a statute providing punishment for burglary, in charging the offense the use of the words "feloniously, wilfully, and burglariously" instead of "wilfully and maliciously" is sufficient, as by the use of the word "maliciously" in the statute the legislature did not intend that malice towards the owner should become an element in the intent. *Shotwell v. State*, 43 Ark. 347.

But admitting the better rule to be that equivalent words may be used instead of the precise language of the statute, the prohibition against "wilfully and maliciously" doing an act was held not charged by the words "feloniously and unlawfully," nor by the words "feloniously, unlawfully, and wilfully." *State v. Gove*, 34 N. H. 516. In *Pennsylvania*, however, the word "feloniously" was held to include "maliciously." *Com. v. Carson*, 166 Pa. St. 183.

"Unlawfully and maliciously" are not sufficient when the statute uses the words "wilfully and maliciously." *State v. Hussey*, 60 Me. 410; *State v. Delue*, 1 Chand. (Wis.) 166. But the word "maliciously" was held to include the term "wilfully" where the statute did not use both the words "wilfully and maliciously," but used only the word "wilfully." *State v. Robbins*, 66 Me. 324. See also *Funderburk v. State*, (Miss. 1897) 21 So. Rep. 658, holding that malice includes wilfulness.

3. *Arkansas*. — *Mott v. State*, 29 Ark. 147; *State v. Eldridge*, 12 Ark. 608; *Edwards v. State*, 25 Ark. 444.



doctrine has been applied where a felony is charged in an information.<sup>1</sup>

**Offense Described by Statute.** — But it has been held that if a statute describes an offense without using the word "felonious" it is not necessary to allege in the indictment that the acts were done feloniously, and the language of the statute will suffice,<sup>2</sup> though

*Delaware.* — *State v. Brister*, 1 *Houst. Cr. Cas. (Del.)* 150.

*Kentucky.* — *Hall v. Com.*, (Ky. 1894) 26 *S. W. Rep.* 8.

*Mississippi.* — *Wile v. State*, 60 *Miss. 261*; *Bowler v. State*, 41 *Miss.* 570.

*Missouri.* — *State v. Walker*, 98 *Mo.* 95; *State v. Murdock*, 9 *Mo.* 739; *State v. Gilbert*, 24 *Mo.* 380; *State v. Clayton*, 100 *Mo.* 516; *State v. Deffenbacher*, 51 *Mo.* 27; *State v. Hang Tong*, 115 *Mo.* 389.

*North Carolina.* — *State v. Wilson*, 116 *N. Car.* 979; *State v. Skidmore*, 109 *N. Car.* 795; *State v. Shaw*, 117 *N. Car.* 764; *State v. Bryan*, 112 *N. Car.* 848; *State v. Caldwell*, 112 *N. Car.* 854; *State v. Scott*, 72 *N. Car.* 461; *State v. Purdie*, 67 *N. Car.* 25.

*Pennsylvania.* — *Mears v. Com.*, 2 *Grant's Cas. (Pa.)* 385.

*Texas.* — *Cain v. State*, 18 *Tex.* 389.

*Virginia.* — *Randall v. Com.*, 24 *Gratt. (Va.)* 644.

*West Virginia.* — *State v. Whitt*, 39 *W. Va.* 468.

*Wisconsin.* — *Kilkelly v. State*, 43 *Wis.* 604.

**Contra.** — In *Tennessee* the courts have finally refused to recognize the necessity of the use of the word "feloniously." *Northington v. State*, 14 *Lea (Tenn.)* 424; *Williams v. State*, 3 *Heisk. (Tenn.)* 376; *Riddle v. State*, 3 *Heisk. (Tenn.)* 401.

In *New Hampshire* the same ruling was made as in *Tennessee*. *State v. Felch*, 58 *N. H.* 1.

In *Michigan* the necessity of using the word is obviated by express statute. *Durand v. People*, 47 *Mich.* 332.

In *Massachusetts* the stat. 1852, c. 37, § 3, provided that no indictment shall be quashed or deemed invalid by reason of the omission of the words "felonious" or "feloniously." *Com. v. Jackson*, 15 *Gray (Mass.)* 188.

**Exception to the Rule.** — While it is true that if an offense which was a misdemeanor only at common law be raised by statute to a felony without more the indictment should show that the act was done feloniously, yet, under a statute which provided that

"all indictments for offenses inhibited thereby, and which are offenses at the common law, shall be good if the offense is charged or described according to the common law," etc., it was held that the indictment need not charge that the act was done feloniously. *Beasley v. State*, 18 *Ala.* 535; *Peek v. State*, 2 *Humph. (Tenn.)* 83; *Butler v. State*, 22 *Ala.* 44.

**Sufficiency.** — Every felonious act must be charged to have been done feloniously, but this requirement is satisfied if the act is charged to have been done feloniously without charging that the consequence of the acts was accomplished with a felonious intent. Thus, if an assault is alleged to have been feloniously made, the wound which was the consequence of the blow must have been made with felonious intent. *State v. Davis*, 29 *Mo.* 396; *State v. McCaffery*, 16 *Mont.* 33; *State v. Owen*, 1 *Murph. (N. Car.)* 452; *St. Clair v. U. S.*, 154 *U. S.* 134.

**"Felonious" Applied to Intent and Not to Act.** — In *Fairlee v. People*, 11 *Ill.* 5, it was said that while the precedents for indictments for murder charge the act as well as the intent to have been felonious, the court was not prepared to say that where the intent with which the act was done is charged to have been felonious it is also necessary to aver that the act itself was felonious, and that it was inclined to the opinion that an act, apparently lawful in itself, when done with a felonious intent becomes thereby unlawful.

1. *Sovine v. State*, 85 *Ind.* 576.

2. *State v. Absence*, 4 *Port. (Ala.)* 401; and that in such a case the language of the statute may be pursued, see *Cohen v. People*, 7 *Colo.* 275; *People v. Olivera*, 7 *Cal.* 404, where *Murray, C. J.*, said that if the question had not already been decided by the court he would hold the allegation necessary; *Miller v. People*, 3 *Ill.* 236; *Wagner v. State*, 43 *Neb.* 1; *U. S. v. Staats*, 8 *How. (U. S.)* 41; *Bannon v. U. S.*, 156 *U. S.* 464; *U. S. v. McAvoy*, 4 *Blatchf. (U. S.)* 418; *U. S. v. Herbert*, 5 *Cranch (C. C.)* 87.

authorities to the contrary are not wanting.<sup>1</sup>

**Charging Misdemeanor.** — The charge that an offense was feloniously committed will not vitiate the indictment, notwithstanding the offense is only a misdemeanor.<sup>2</sup>

1. *State v. Flint*, 33 La. Ann. 1288; *Wile v. State*, 60 Miss. 261; *Reg. v. Gray*, 10 Jur. N. S. 160.

In *Kentucky* it was held in one case that the omission of the word "feloniously" was not fatal, *Jane v. Com.*, 3 Metc. (Ky.) 18; but that decision afterwards came under the consideration of the Court of Appeals in *Kaelin v. Com.*, 84 Ky. 365, and the court said: "In that case the indictment was for murder, but the word 'feloniously' was omitted. All of the other material allegations, however, were made. There was no demurrer to the indictment. After the trial and conviction of the defendant she moved to arrest the judgment, which motion was overruled by the trial court. She appealed from that ruling to this court. This court did not hold that the word 'feloniously' was not a necessary averment in the indictment, but simply held that this court, under the Criminal Code of Practice then in force, could not reverse the judgment of the lower court in overruling the motion in arrest of the judgment of conviction, because the substantial rights of the appellant on the merits were not prejudiced by overruling the motion. The 129th section of that code provided that 'no indictment is insufficient, nor can the trial judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits.' The provision *supra* of the old code was left out of the present code of practice, nor is there any similar provision contained therein; so the case of *Jane v. Com.*, 3 Metc. (Ky.) 18, is not now an authority controlling the present question. Besides, in this case there was a demurrer entered to the indictment, which, unlike the motion in arrest of judgment under the old code, wherein the merits of the case entered into the consideration of the motion, goes directly to the legal sufficiency of the indictment." See also *Hall v. Com.*, (Ky. 1894) 26 S. W. Rep. 8.

A Reasonable Distinction is drawn in an Arkansas case, where it was held that if the term "felonious" is used

in a statute in the sense of the law, to denote the actual crime, it is then the felonious intent which becomes an essential ingredient and must be alleged, though it is otherwise where it is no part of the crime, but is simply descriptive of the punishment, in which latter case it is sufficient to charge the offense in the words of the statute. *State v. Eldridge*, 12 Ark. 608.

2. *State v. Sparks*, 78 Ind. 166; *Com. v. Philpot*, 130 Mass. 60; *Com. v. Squire*, 1 Met. (Mass.) 258; *State v. Crummey*, 17 Minn. 72; *State v. Joiner*, 19 Mo. 224; *State v. Edwards*, 90 N. Car. 710; *Hess v. State*, 5 Ohio 5; *Staeger v. Com.*, 103 Pa. St. 472; *State v. Wimberly*, 3 McCord L. (S. Car.) 190. See further, *infra*, XVIII. 2. *Greater Including Lesser Offense*.

*Contra.* — *State v. Darrah*, 1 *Houst. Cr. Cas.* (Del.) 113, holding that in *Delaware* all offenses were either misdemeanors or felonies, and that those only were felonies which were expressly so made by the statutes, all others being misdemeanors, and that an indictment for a misdemeanor was fatally defective which charged the act to have been feloniously done, as no valid judgment could be entered on it [*distinguishing Com. v. Squire*, 1 Met. (Mass.) 259, because that case turned on a statute allowing conviction for a misdemeanor on an indictment charging a felony; and *Black v. State*, 2 Md. 376, which turned upon a statute providing for the conviction for misdemeanors when the charge was for a felony in certain specified cases]; *Barber v. State*, 50 Md. 161; *State v. Wheeler*, 3 Vt. 344.

"Feloniously" Synonymous with "Criminally." — In *Minnesota* it was said that where an offense which is not a felony is charged to have been feloniously done, this will not invalidate the indictment, because, under the statute, the word "feloniously" means "criminally," and in that sense is applicable to misdemeanors as well as to felonies. *State v. Hogard*, 12 Minn. 293.

**Facts Falling Short of Felony.** — Though facts may be charged which make a part of a felony, they may be rejected as surplage and the defend-

*d. UNLAWFULLY.* — Whenever the word “unlawfully” does not enter into the definition of the offense in a statute, and the act itself appears to be unlawful, it is not necessary to allege it to have been unlawfully done.<sup>1</sup>

*e. KNOWLEDGE.* — In charging an offense wherein guilty knowledge is not a material ingredient, the averment of such knowledge need not be made,<sup>2</sup> and if such an averment is made when it is unnecessary it may be rejected as surplusage.<sup>3</sup> But when such knowledge is an ingredient of the offense it must be alleged.<sup>4</sup>

**4. Exceptions and Provisos.** — The rule usually announced is that exceptions and provisos in the enacting clause of the statute must be negatived, and such as are not in the enacting clause need not be negatived, the latter being merely matters of defense.<sup>5</sup> But

ant may be tried for the misdemeanor charged. *State v. Howes*, 26 W. Va. 110.

1. *State v. Murphy*, 43 Ark. 179; *State v. Capps*, 4 Iowa 502; *McWaters v. State*, 10 Mo. 169.

“Contrary to the Form of the Statute” has been held sufficient in a complaint, without an allegation that the act was unlawfully done, those words not being in the statute. *State v. Tibbetts*, 86 Me. 189; *Nash v. State*, 2 Greene (Iowa) 286.

“Feloniously” includes “unlawfully.” *State v. Murphy*, 21 Ind. 441; *Shinn v. State*, 68 Ind. 423; *Beavers v. State*, 58 Ind. 530.

2. *McCutcheon v. People*, 69 Ill. 603, which was an indictment for selling liquors to a minor without the written consent of his guardian or family physician, wherein it was held that it need not be alleged that the sale was made with knowledge of the minority; *Ward v. State*, 48 Ind. 289; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *State v. Hartfiel*, 24 Wis. 60; *Com. v. Emmons*, 98 Mass. 6, which was a complaint involving the same question; *Barnes v. State*, 19 Conn. 398, which was a prosecution for selling liquor to a common drunkard, and it was held that knowledge of the character of the person to whom the liquor was sold was not essential; *People v. Webster*, 17 Misc. Rep. (New York County Gen. Sess.) 410.

3. *Com. v. Farren*, 9 Allen (Mass.) 489.

4. *Com. v. Boynton*, 12 Cush. (Mass.) 499.

“Willingly” Not Equivalent to “Wittingly.” — Where the statute condemns an act “wittingly” done, it is not suffi-

cient to charge that it was “willingly” done. The one expression does not imply the other. *Harrington v. State*, 54 Miss. 493.

**Knowingly Depositing Obscene Mail.** — An indictment for depositing obscene matter in a post office, knowing it to be of such a character, charging that the defendant did knowingly deposit in the named post office an obscene letter is sufficient; the word “knowingly” qualifies the whole act charged and is not limited to the mere act of depositing in the post office. *U. S. v. Nathan*, 61 Fed. Rep. 936; *Price v. U. S.*, 165 U. S. 311; *U. S. v. Clark*, 37 Fed. Rep. 106.

5. *Alabama.* — *Clark v. State*, 19 Ala. 554.

*Arkansas.* — *Brittin v. State*, 10 Ark. 299; *Matthews v. State*, 24 Ark. 484.

*Connecticut.* — *Crandall v. State*, 10 Conn. 369; *Morse v. State*, 6 Conn. 12. *Georgia.* — *Elkins v. State*, 13 Ga. 436.

*Indiana.* — *Alexander v. State*, 48 Ind. 394; *State v. Maddox*, 74 Ind. 105; *Brutton v. State*, 4 Ind. 601.

*Iowa.* — *State v. Williams*, 70 Iowa 52; *Romp v. State*, 3 Greene (Iowa) 276; *State v. Williams*, 20 Iowa 98; *State v. Beneke*, 9 Iowa 203; *State v. Stapp*, 29 Iowa 551.

*Kansas.* — *State v. Thompson*, 2 Kan. 433.

*Kentucky.* — *Com. v. McClanahan*, 2 Metc. (Ky.) 10; *Conner v. Com.*, 13 Bush (Ky.) 714.

*Louisiana.* — *State v. Lyons*, 3 La. Ann. 154.

*Maine.* — *Hinckley v. Penobscot*, 42 Me. 92; *State v. Keen*, 34 Me. 500; *State v. Godfrey*, 24 Me. 232.

while it is undoubtedly true that exceptions which are not in the enacting clause of a statute as descriptive of the offense, need not be negated,<sup>1</sup> and those which are in the enacting clause as

*Maryland.* — *Rawlings v. State*, 2 Md. 201.

*Massachusetts.* — *Com. v. Hart*, 11 Cush. (Mass.) 130; *Com. v. Maxwell*, 2 Pick. (Mass.) 139; *Com. v. Jennings*, 121 Mass. 49.

*Missouri.* — *State v. Elam*, 21 Mo. App. 291; *State v. Sutton*, 24 Mo. 378.

*New Hampshire.* — *State v. Adams*, 6 N. H. 534.

*New York.* — *Jefferson v. People*, 101 N. Y. 19.

*North Carolina.* — *State v. Harris*, 119 N. Car. 811.

*Tennessee.* — *Matthews v. State*, 2 Verg. (Tenn.) 233.

*Texas.* — *Williams v. State*, (Tex. Crim. App. 1897) 39 S. W. Rep. 664.

*Virginia.* — *Com. v. Hill*, 5 Gratt. (Va.) 682.

*England.* — *Rex v. Bryan*, 2 Stra. 1101.

**Indictment for Damages.** — The same principle is applicable to an indictment for the recovery of damages. *Com. v. Fitchburg R. Co.*, 10 Allen (Mass.) 190. And also to declarations for the recovery of penalties under penal statutes. *Jones v. Axon*, 1 Ld. Raym. 120; *Steel v. Smith*, 1 B. & Ald. 94.

**Words Forming Exception.** — The word "except" is not necessary in order to constitute an exception which must be negated. The words "unless," "other than," "not being," "not having," etc., have the same legal effect and require the same form of pleading. *Com. v. Hart*, 11 Cush. (Mass.) 136 [citing *Gill v. Scrivens*, 7 T. R. 27; *Rex v. Palmer*, 1 Leach C. C. 102; *Com. v. Maxwell*, 2 Pick. (Mass.) 139; *State v. Butler*, 17 Vt. 145].

**Different Punishments in Different Sections of Statute.** — In *State v. Ambler*, 56 Vt. 673, the statute contained two sections, one of which prescribed a penalty for burning a dwelling house or its out-buildings, and the other prescribed a less severe penalty for burning various other buildings specifically named, "or other house or building of another, not constituting a dwelling house or its out-buildings." The indictment was for burning a building commonly called a sugar house, and did not allege that the sugar house did not constitute a dwelling house or its

out-buildings; and it was held that this case was not within the rule that provisos and exceptions in the statute creating the offense must be negated.

**Exception to the Rule.** — Where the charge preferred *ex natura rei* as conclusively imports a negation of the exception, as if such exception had been negated in express terms, the exception need not be negated though it is in the enacting clause of the statute. Thus, if a statute were to make "the malicious killing of cattle except horses" a felony, an indictment which charged the malicious killing of a cow would be sufficient, because to state that a cow is not a horse would be useless and absurd, and not required by any technicality of criminal proceedings. *State v. Price*, 12 Gill & J. (Md.) 262.

**Condition Obviating Necessity of Proof.** — Where the subject-matter of a negative averment lies peculiarly within the knowledge of the defendant, it is held that the averment will be taken as true unless it is disproved by him. *State v. Lipscomb*, 52 Mo. 32; *State v. McGlynn*, 34 N. H. 422; *Wiley v. State*, 52 Ind. 516; *Hinckley v. Penobscot*, 42 Me. 90.

But the exception must nevertheless be alleged; and an omission in this regard will not be cured by the statute of jeofails, because that statute is intended to apply only to immaterial averments, and this averment is material although the burden of disproving it is on the defendant. *State v. Meek*, 70 Mo. 357.

1. *Arkansas.* — *State v. Bailey*, 43 Ark. 150; *Brittin v. State*, 10 Ark. 301; *Matthews v. State*, 24 Ark. 485; *Bone v. State*, 18 Ark. 113; *State v. Kansas City*, etc., R. Co., 54 Ark. 546; *Wilson v. State*, 35 Ark. 417; *Wilson v. State*, 33 Ark. 557; *Perry v. State*, 37 Ark. 55; *Dean v. State*, 37 Ark. 59.

*Colorado.* — *Harding v. People*, 10 Colo. 387.

*Indiana.* — *State v. Kimmerling*, 124 Ind. 383; *Hewitt v. State*, 121 Ind. 245; *Mergentheim v. State*, 107 Ind. 567; *Bruton v. State*, 4 Ind. 601.

*Massachusetts.* — *Com. v. Fitchburg R. Co.*, 10 Allen (Mass.) 190.

*Missouri.* — *State v. Taylor*, 73 Mo.

descriptive of the offense must be negatived,<sup>1</sup> the more accurate rule deducible from the authorities is that only such exceptions and provisos need be negatived as are descriptive of the offense,<sup>2</sup> without reference to the position of the exception or proviso.<sup>3</sup>

52; *State v. O'Brien*, 74 Mo. 550; *State v. Gregory*, 27 Mo. 232; *State v. Cox*, 32 Mo. 566; *State v. Shiflett*, 20 Mo. 415; *State v. Batson*, 31 Mo. 343; *State v. Barr*, 30 Mo. App. 498.

*New Hampshire*. — *State v. Shaw*, 35 N. H. 222; *State v. Fuller*, 33 N. H. 259; *State v. McGlynn*, 34 N. H. 422; *State v. Wade*, 34 N. H. 495; *State v. Cassidy*, 52 N. H. 500.

*New York*. — *People v. Walbridge*, 6 Cow. (N. Y.) 512.

*North Carolina*. — *State v. Downs*, 116 N. Car. 1064.

*Texas*. — *Logan v. State*, 5 Tex. App. 306.

*Wisconsin*. — *Byrne v. State*, 12 Wis. 519; *Lacy v. State*, 15 Wis. 13.

*United States*. — *Evans v. U. S.*, 153 U. S. 584, 608; *Nelson v. U. S.*, 30 Fed. Rep. 112; *U. S. v. Nelson*, 29 Fed. Rep. 202.

1. *Davis v. State*, 39 Ala. 521; *Wilson v. State*, 33 Ark. 558; *Thompson v. State*, 37 Ark. 408; *Com. v. Hildreth*, (Ky. 1896) 33 S. W. Rep. 838; *State v. Savage*, 48 N. H. 484; *U. S. v. Nelson*, 29 Fed. Rep. 202; *Steel v. Smith*, 1 B. & Ald. 94. See also the cases cited in the preceding note.

2. *Alabama*. — *Blackman v. State*, 98 Ala. 77.

*Connecticut*. — *State v. Miller*, 24 Conn. 522; *State v. Powers*, 25 Conn. 48.

*Colorado*. — *Harding v. People*, 10 Colo. 394.

*Kansas*. — *State v. Decker*, 52 Kan. 193.

*Maine*. — *State v. Trefethen*, (Me. 1887) 8 Atl. Rep. 547.

*Maryland*. — *State v. Nutwell*, 1 Gill (Md.) 56.

*Michigan*. — *People v. Hamaker*, 92 Mich. 11.

*Mississippi*. — *State v. Craft*, Walk. (Miss.) 409.

*Missouri*. — *State v. Falk*, 38 Mo. App. 554.

*Nebraska*. — *Gee Wo v. State*, 36 Neb. 241.

*New Hampshire*. — *State v. Wade*, 34 N. H. 495; *State v. Abbott*, 31 N. H. 434.

*North Carolina*. — *State v. Joyner*, 81 N. Car. 534.

*Ohio*. — *Becker v. State*, 8 Ohio St.

391; *Billigheimer v. State*, 32 Ohio St. 435; *Stanglein v. State*, 17 Ohio St. 453.

*Tennessee*. — *Matthews v. State*, 2 Yerg. (Tenn.) 233; *Villines v. State*, 96 Tenn. 141.

*Virginia*. — *Hendricks v. Com.*, 75 Va. 934.

*Vermont*. — *State v. Barker*, 18 Vt. 195; *State v. Hodgdon*, 41 Vt. 139.

*Wisconsin*. — *Jensen v. State*, 60 Wis. 577.

*United States*. — *U. S. v. Nelson*, 29 Fed. Rep. 202; *U. S. v. Cook*, 17 Wall. (U. S.) 168; *U. S. v. McCormick*, 1 Cranch (C. C.) 593.

3. **Explanation of Rule.** — As a general rule, an exception contained in the enacting clause of the statute must be negatived; but in the application of this rule, and especially in the language which has been used, there is some confusion and apparent inaccuracy. It is immaterial whether the proviso or exception be contained in the enacting or subsequent sections, if it only follow a general prohibition; but if there be no general words of prohibition in the description of the offense, then it is only a limited prohibition, and the prosecutor must allege the circumstances necessary to show that the thing prohibited has been done. For example, if a statute declares that no person shall do an act, it is a general prohibition; but if it declared that no person under the age of twenty-one years, or that no colored man, should do an act, then there would be no prohibition unless it were alleged that the person accused was under twenty-one years of age or was a person of color. *State v. Miller*, 24 Conn. 527.

And while the cases seem to sustain the position that an exception must be negatived if it is contained in the enacting clause, from a careful examination of all the authorities it may be said to be the rule that it is only necessary to negative an exception in the enacting clause of the statute, which is a part of the description of the offense. *State v. Ah Chew*, 16 Nev. 53; *Territory v. Scott*, 2 Dakota 212; *Metzker v. People*, 14 Ill. 101; *Territory v. Burns*, 6 Mont. 74; *State v. McGlynn*, 34 N. H. 422; *Stanglein v. State*, 17 Ohio St. 461;

**Adoption of Exception by Words of Reference.** — It is said that an exception subsequent in a section of the statute must be brought into the enacting clause by appropriate words of reference before it becomes necessary to negative it,<sup>1</sup> but it is not necessary to negative an exception in a subsequent section which is referred to in the enacting clause unless the exception is necessary to complete the description or definition of the offense.<sup>2</sup>

**Scope of Negation.** — Where the enacting clause contains several provisos or exceptions, the indictment should negative all of them.<sup>3</sup>

*State v. O'Donnell*, 10 R. I. 472; *State v. Abbey*, 29 Vt. 66; *Nelson v. U. S.*, 30 Fed. Rep. 112.

1. *Blasdel v. State*, 5 Tex. App. 263; *U. S. v. Cook*, 17 Wall. (U. S.) 168.

2. *Com. v. Jennings*, 121 Mass. 47; *Fleming v. People*, 27 N. Y. 329; *State v. O'Donnell*, 10 R. I. 472; *State v. Abbey*, 29 Vt. 65, holding that where the clause defining the offense provides that any person committing certain acts shall be guilty of the designated crime, "except in the cases mentioned in the following section," and the following section proceeds to mention the exceptions, it is unnecessary to negative such exceptions; the court saying that the necessity of negating exceptions cannot arise from the mere fact that reference is made to the excepted cases, but that the same principle should govern as that which controls where the exception is in the enacting clause — that is, if the exception affords only matter of excuse or defense it need not be negated. This case was approved in *State v. O'Gorman*, 68 Mo. 189, holding that such an exception need not be negated.

It is broadly stated in some cases that where the exception is in another section, but is referred to in the enacting clause, it must be negated in the indictment. *Com. v. Hart*, 11 Cush. (Mass.) 137; *Rex v. Pratten*, 6 T. R. 559.

3. *Thompson v. State*, 37 Ark. 408; *State v. Fussell*, 45 Ark. 65; *State v. Haden*, 15 Mo. 447; *Com. v. Thayer*, 5 Met. (Mass.) 246.

Thus, under an act making it an offense to sell liquor without a prescription from a graduated physician or a regular practitioner of medicine, the indictment must negative the prescription of both a graduated physician and a regular practitioner of medicine. *Thompson v. State*, 37 Ark. 408.

**General Terms.** — But it is sufficient if

the negation is in general terms, embracing the negative of all authority on the part of the defendant to do the act complained of. *State v. Munger*, 15 Vt. 296; *State v. Watson*, 5 Blackf. (Ind.) 155; *State v. Buckner*, 52 Ind. 278; *State v. Wishon*, 15 Mo. 503; *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Roland*, 12 Gray (Mass.) 132; *Com. v. Kingman*, 14 Gray (Mass.) 85; *Com. v. Edds*, 14 Gray (Mass.) 406; *State v. Keen*, 34 Me. 500.

**Where Two Persons** are sought to be brought within an exception of a statute, a general negation will cover both. *Com. v. Sloan*, 4 Cush. (Mass.) 52.

**Negating by Reference to Statute.** — When a statute prohibited an act, "except as provided in section 60 of said chapter 87," an indictment was held sufficient which charged the act as "not there and then being as provided in section 60 of chapter 87 of the public statutes," etc. *State v. Walsh*, 14 R. I. 507.

**Negative of One Exception Embracing Another.** — An indictment charging a person with carrying a deadly weapon, and negating the exception to the statute that the defendant was a peace officer or policeman, also negatives the exception in favor of civil officers, because the exception in favor of civil officers is embraced by the averment that the defendant was not a peace officer or policeman. *State v. Clayton*, 43 Tex. 412.

**Several Licenses under Different Statutes.** — In *Missouri* it was held that where several licenses were required to be granted for the exercise of a trade, an indictment for carrying on such trade without license should negative a license under any of the statutes. *Neales v. State*, 10 Mo. 498; *State v. Brown*, 8 Mo. 210. But in *State v. O'Brien*, 74 Mo. 550, where the proviso in a section subsequent to the enacting clause excepted persons authorized to

**5. Variance Between Information or Indictment and Affidavit or Complaint — Information.** — Under a law requiring an information to be based upon an affidavit or complaint, the offense stated in the information must be the one set out or included in the affidavit or complaint.<sup>1</sup> The accusation need not, however, go beyond a recital of the terms of the affidavit where they are so minute that they would be sufficient in a regular indictment.<sup>2</sup> Nor does an affidavit upon which an information is predicated require the same strictness of construction as an information or indictment,<sup>3</sup> and the information need not be confined literally to the charge in the affidavit.<sup>4</sup> But the degree of strictness in this regard also depends upon the difference in practice in those states where the

do the act under the laws theretofore existing, it was held, upon the principle that the proviso was not in the enacting clause, that the exception need not be negatived.

1. *People v. Wallace*, 94 Cal. 497; *Cobb v. State*, 27 Ind. 133; *Mount v. State*, 7 Ind. 654; *Broadhurst v. State*, 21 Ind. 333; *State v. Lockstand*, 4 Ind. 572; *State v. Jarrett*, 46 Kan. 754; *People v. Jones*, 24 Mich. 215; *Johnson v. State*, 4 Tex. App. 594; *Ferguson v. State*, 4 Tex. App. 156; *Davis v. State*, 2 Tex. App. 186, wherein it is said: "If it be conceded that a county attorney can disregard the offense as stated in the affidavit, in any instance, and thereby of his own notion confer jurisdiction where it does not rightfully belong by authority of law, we can see no limit to the extent to which such power might be carried in overturning established rules of practice, and subverting the due course of law in the administration of justice." *Distinguishing State v. Elliott*, 41 Tex. 224, where the variance was not in the character of the offense so as to affect the jurisdiction of the court, but was simply in the description of the means by which the offense was committed, the complaint alleging that the assault and battery was made on the complainant "by striking him with a rock weighing about two pounds, on the left side of his hand," and the information charging that the assault was made by striking the complainant on the side of the head with a rock weighing three or four pounds.

**Waiver.** — An objection of this kind may be waived by going to trial without raising it. *People v. Jones*, 24 Mich. 215; *People v. Williams*, 93 Mich. 623. See also *supra*, VI. 2. *Preliminary Examination*.

2. *Smith v. State*, 63 Ga. 168.

3. *State v. Cornell*, 45 Mo. App. 94; *Parker v. State*, 4 Ohio St. 565. See also *infra*, X. 6. *Sufficiency of Complaints*; and *supra*, I. 3. *Complaints*.

4. *Eichenlaub v. State*, 36 Ohio St. 142; *Steinberger v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 617; *Mount v. State*, 7 Ind. 654.

Where the complaint alleges that the defendant "did unlawfully keep and exhibit \* \* \* a gaming table," an information charging that the defendant "did unlawfully exhibit," etc., omitting the word, "keep," was held to be sufficient. *Baker v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 666. See also *Strickland v. State*, 7 Tex. App. 34.

**Bad Spelling or Grammatical Construction.** — An apparent variance by reason of bad spelling or grammatical inaccuracy which does not affect the sense will not be fatal. *Stimson v. State*, 5 Tex. App. 32.

**Reference to Affidavit.** — In misdemeanors the affidavit is required to be filed with and is a part of the information, and where uncertainty exists in the latter on account of the obscure handwriting reference may be had to the affidavit. *Irvin v. State*, 7 Tex. App. 110.

In *Phants v. State*, 2 Tex. App. 398, the information was held sufficient when taken in connection with the affidavit, and it appears from the headnotes that the affidavit alleged that the defendant on a day designated "did commit the offense of disturbing religious worship, contrary," etc., but the information charged the offense with full and appropriate averments instead of alleging that the defendant did commit the offense.

information is based upon the affidavit or complaint alone, and those where it is based upon the affidavit or complaint and a preliminary examination had thereon.<sup>1</sup> If a higher grade of the

1. Thus in Texas, where the information is based upon the affidavit or complaint, it will be seen by reference to the Texas cases cited *supra*, p. 499, note 1, that greater strictness is required than in other states where a preliminary examination is had, in which case the offense may be charged according to the facts brought out on the examination, where they constitute the same transaction. See *People v. Oscar*, 105 Mich. 704; *People v. Bechtel*, 80 Mich. 623; *People v. Annis*, 13 Mich. 514; *Porath v. State*, 90 Wis. 527.

In California it was formerly said that even if the offense charged in the information was totally different from that laid in the complaint it would not affect the sufficiency of the information, as the information depended upon the commitment and not upon the complaint. *People v. Staples*, 91 Cal. 26, in which case there was a preliminary hearing. But at the same term of the court it was held, in another case where the complaint itself was the only deposition for the preliminary hearing, that the information could not contain a wholly different description of the property in question, being descriptive of the offense, from that in the complaint; though this case seems to turn upon the single fact that the complaint was the only deposition in the case. *People v. Parker*, 91 Cal. 92. At a more recent date the cases arising under the constitution providing for prosecutions by information, which seem to treat the sufficiency of the complaint before the magistrate as largely immaterial and as a non-essential factor in determining the regularity of the proceedings for a commitment, were practically abrogated as authority in California, in *People v. Christian*, 101 Cal. 471, followed in *People v. Howard*, 111 Cal. 655, in which latter case the principle was deduced that "the complaint lodged with the magistrate constitutes the groundwork of the whole superstructure to be thereafter built thereon," and that beyond the offense charged in the complaint or included therein the prosecution cannot go in charging an offense in the information.

In Kansas it is permissible, under a statute providing for such cases, to

charge an entirely different offense from that set out in the complaint, when such different offense is shown upon the preliminary examination; but the court said that while the statute did not require it, a new complaint should be made under such circumstances. *State v. Jarrett*, 46 Kan. 756.

In Washington the same crime that is set out in the commitment need not be charged in the information. *State v. Myers*, 8 Wash. 177.

**Waiver of Examination.** — Under a statute defining an offense and requiring that it be charged to have been committed knowingly and wilfully, a complaint was made before a magistrate without charging that the offense was so committed. The defendant waived examination, and in the supreme court moved to quash the information because he was not examined and had not waived an examination upon the charge set forth in the information. It was held that the offense charged in the complaint would have been only a simple assault, as therein charged, and could only have been tried by a justice of the peace, and that as no objection was made as to its form and the defendant saw fit to treat it as charging an offense not capable of trial before a justice of the peace, it could not be considered such a variance between the information and complaint as would render the offenses charged different offenses. *People v. Haley*, 48 Mich. 495.

In *Stuart v. People*, 42 Mich. 257, it was held that where an examination is waived, and the magistrate binds the party over for trial for the offense charged in the warrant, and thereafter the party is brought before the magistrate and an examination is had, the magistrate from such further examination must determine what offense has been committed, and if the accused person desires that the magistrate shall specify the offense committed, he must not waive the examination, because when the examination is waived an information may be filed charging any offense contained in the warrant which, in the opinion of the prosecuting attorney, the evidence will sustain; *distinguishing Yaner v. People*, 34 Mich.



offense is charged in the complaint, the information based thereon may charge a lower grade of the same offense.<sup>1</sup>

**Indictment.** — Where an indictment is based upon a complaint, it must conform to the charge made therein.<sup>2</sup>

**6. Sufficiency of Complaints — In General.** — A complaint, information, or affidavit must charge an offense known to the laws of

286, wherein an examination was had, and it was held that the law requiring an indictment to be definite and specific in relation to the offense charged applied to a finding of the magistrate in binding over, and that while the charge in the complaint was general, the warrant must specify some particular offense, and the magistrate must determine which offense, if any, had been committed, where the offense includes one of lesser degree, because if such a rule were not in force, an information could be filed in the circuit court charging an offense different from or greater than the one upon which the accused had been examined and held for trial. See also *State v. Boulter*, (Wyoming 1895) 39 Pac. Rep. 883; and articles COMMITMENTS, vol. 4, p. 566; PRELIMINARY EXAMINATION.

In *Kansas*, where it is permissible to charge a different offense from that set forth in the complaint, when such different offense is brought out by the preliminary examination, it was held that if there is no examination, the same being waived by the defendant, the information must charge the offense which is charged in the complaint. *State v. Jarrett*, 46 Kan. 756.

1. *People v. Sessions*, 58 Mich. 596.

But in *Texas* it was held that as an information could be preferred only for a misdemeanor a complaint for a felony will not support an information for a misdemeanor. *Kinley v. State*, 29 Tex. App. 532.

**Joinder in Separate Counts.** — In *Michigan* an examination upon a complaint charging the receiving of stolen property is not necessary before the prosecuting attorney can add such a count to an information charging larceny, if there has been an examination before a magistrate on a complaint and warrant charging larceny, because, under the statute, larceny and receiving stolen property may be joined in one information, not as separate and distinct offenses, but only to meet the evidence on the trial and prevent a failure of justice in a case where it might appear

that the accused was not the principal actor in the taking but in the receiving of the stolen property. *Brown v. People*, 39 Mich. 37.

2. *Com. v. Simons*, 6 Phila. (Pa.) 167, holding that while charges may be preferred by presentment of the grand jury or by a bill sent to the grand jury by the district attorney acting under official responsibility, an indictment found upon complaint made before a magistrate must conform to the charges in such complaint, or if other charges are made in the indictment, they must appear to be upon the presentment of the grand jury, or upon the official responsibility of the attorney, and if the indictment contains charges foreign to the return of the preliminary hearing and which are not made upon presentment or the official responsibility of the prosecuting attorney, the indictment will be bad.

But the information upon which an indictment is founded need not contain so full and specific a statement of the offense as the indictment. *Com. v. Carson*, 166 Pa. St. 179.

**Indictment for Lesser Offense.** — Where the indictment charges a simple assault it is no objection that the preliminary complaint charges assault with intent to kill. *State v. Stevens*, 36 N. H. 59.

**Circumstances of Aggravation Omitted in Indictment.** — It will not be presumed that a different offense was intended in the indictment from that charged in the preliminary complaint because numerous circumstances of aggravation set forth in the complaint are omitted in the indictment. *State v. Bean*, 36 N. H. 122.

**Bill on Authority of District Attorney.** — Upon objection that the indictment upon which the defendant was tried did not conform to the information, it was held that this was not necessary in a case where the indictment is what is called a district attorney's bill; that is, a bill sent to the grand jury upon the authority of the district attorney and by him. *Harrison v. Com.*, 123 Pa. St. 515.

the state,<sup>1</sup> and it must so charge the facts which bring the defendant within the provisions of the law that he may know with what he is charged.<sup>2</sup> The offense must be charged posi-

1. *People v. Heffron*, 53 Mich. 530; *Glenn v. People*, 17 Ill. 105.

**Knowledge or Intent.**—Where the prohibition of a statute is absolute, and knowledge and intent are not ingredients of the offense inhibited, it is not necessary to allege the knowledge or intent with which the act was done. *Com. v. Emmons*, 98 Mass. 7; *Com. v. Wentworth*, 118 Mass. 441; *State v. Tibbetts*, 86 Me. 190; *Grand Rapids v. Bateman*, 93 Mich. 135; *Grand Rapids v. Williams*, (Mich. 1897) 70 N. W. Rep. 547. But where either knowledge or intent is an ingredient of the offense, the act must be alleged to have been committed with the knowledge or intent which makes it criminal. *Com. v. Flannelly*, 15 Gray (Mass.) 195; *State v. Carpenter*, 60 Conn. 97.

**Sufficiency of Charge.**—A complaint charging that the defendant "wilfully and unlawfully" did the act complained of, sufficiently charges that it was done knowingly, under an ordinance making the act criminal when knowingly done. *Wong v. Astoria*, 13 Oregon 538.

2. *Alabama*.—*Duckworth v. Johnston*, 7 Ala. 578.

*Illinois*.—*Glenn v. People*, 17 Ill. 106; *Truitt v. People*, 88 Ill. 520.

*Indiana*.—*Hosea v. State*, 47 Ind. 180.

*Maine*.—*State v. Cottle*, 70 Me. 198.

*Massachusetts*.—*Com. v. Conant*, 6 Gray (Mass.) 482; *Com. v. Messenger*, 4 Mass. 462.

*Michigan*.—*People v. Heffron*, 53 Mich. 530; *Napman v. People*, 19 Mich. 352.

*Missouri*.—*State v. Clevenger*, 20 Mo. App. 627.

*New York*.—*People v. James*, 11 N. Y. App. Div. 609; *People v. Hannon*, (Supreme Ct.) 35 N. Y. St. Rep. 762.

*Vermont*.—*State v. Bacon*, 40 Vt. 456; *State v. Higgins*, 53 Vt. 196; *State v. Soragan*, 40 Vt. 450.

*Wisconsin*.—*Jensen v. State*, 60 Wis. 577.

**Reference to Statute Embracing Several Offenses.**—Thus an information is insufficient which charges the violation of the statute, embracing a number of offenses, without designating the particular offense sought to be charged.

*People v. Pillion*, 78 Hun (N. Y.) 74; *Fink v. Milwaukee*, 17 Wis. 26.

**Warrant as Complaint.**—In *North Carolina*, where the warrant is treated as the complaint of the prosecutor under oath, it is said that the complaint is the indictment, and must state the facts constituting the offense with such certainty that the accused may know with what he is charged, and it is said that the affidavit of the complainant does not constitute an essential part of the indictment (using indictment as synonymous with warrant or complaint) any more than does the presentment of the grand jury form a part of the bill of indictment which is predicated upon it. *State v. Bryson*, 84 N. Car. 782.

**Prior Conviction.**—Where a prior conviction is an ingredient of the offense charged, it must be alleged in the complaint. *Garvey v. Com.*, 8 Gray (Mass.) 383.

On the other hand, when the prosecution is for the original offense, it is not necessary that this fact should be stated, though a greater punishment is prescribed for a second offense. *Kilbourn v. State*, 9 Conn. 563.

**Sufficiency of Averment.**—In *State v. Kennedy*, 36 Vt. 563, it was held that a complaint which charges a former conviction, without setting out the month and day, is defective.

**Exceptions to the Rule.**—Where the offense consists not of a single act but of a series of acts as essential elements in the crime, the charge may properly be general in its character, and need not specify the details of the various distinct acts which establish guilt. For example, a charge of selling spirituous liquors without a license was said to be within this exception. *Stratton v. Com.*, 10 Met. (Mass.) 220.

**Defect Cured.**—In *State v. Freeman*, 63 Vt. 496, a complaint charged that the defendant "did profanely curse," but did not set out the language. No objection was made to the sufficiency of the complaint upon the trial, and the words which were used being proved, and the court charging what constituted profane cursing, it was held that the defect in the complaint was cured by the verdict.

tively, and not merely by way of recital or inferentially,<sup>1</sup> though a rigid compliance with forms will not be required,<sup>2</sup> and a substantial statement of the offense will be sufficient.<sup>3</sup>

**The Same Strictness Required in Indictments or Informations** in courts of record has been held to be unnecessary in informations or complaints in justices' courts and other courts of inferior and limited jurisdiction.<sup>4</sup>

**Following the Statute.** — It is usually sufficient to charge the offense in the language of the statute, without a further description where the act prohibited is itself unlawful;<sup>5</sup> and if the complaint substantially follows the act, and by its natural construction charges the offense described therein, it will be good.<sup>6</sup> On the other hand, a complaint is not sufficient, though it charges the offense in the exact language of the statute, where the words of the statute do not embrace a definition of the offense,<sup>7</sup> or where the acts are not in themselves unlawful.<sup>8</sup>

**Technical Words — Vi et Armis.** — Adopting the distinction in the English practice, under the statute 37 Henry VIII., c. 8, it is not necessary to insert the words *vi et armis* in a complaint, and it is sufficient if they may be implied from other words therein. *Brackett v. State*, 2 Tyler (Vt.) 166; *State v. Hanley*, 47 Vt. 293.

1. *State v. Higgins*, 53 Vt. 196.

2. *Com. v. Messenger*, 4 Mass. 462.

3. *Ford v. State*, 4 Chand. (Wis.) 148; *Gallagher v. State*, 26 Wis. 423.

**Certainty to a Common Intent** is all that is required. *Gallagher v. State*, 26 Wis. 423.

4. *Williams v. State*, 88 Ala. 80; *Rawson v. State*, 19 Conn. 296; *State v. Holmes*, 28 Conn. 230; *Goddard v. State*, 12 Conn. 448; *Whiting v. State*, 14 Conn. 487; *Barth v. State*, 18 Conn. 432; *State v. McLaughlin*, 35 Kan. 650; *Kingman v. Berry*, 40 Kan. 625; *Com. v. Keenan*, 139 Mass. 193; *Keeler v. Milledge*, 24 N. J. L. 145; *People v. Pillion*, 78 Hun (N. Y.) 74.

**Form Not Provided by Statute.** — In *State v. Higgins*, 53 Vt. 196, it was said that a complaint before a justice of the peace for an offense that is denounced by a statute which does not provide a form, will be tested as to the sufficiency of its averments by the rules of the common law.

The offense charged must be brought under the definition thereof in the statute creating it. *Merriam v. Langdon*, 10 Conn. 471.

5. *People v. Maguire*, 26 Cal. 635; *State v. Craddock*, 44 Kan. 489; *State v. Blakesley*, 39 Kan. 153; *Com. v.*

*Connelly*, 163 Mass. 539; *State v. Lauver*, 26 Neb. 757; *State v. Perkins*, 42 N. H. 464; *State v. Hallback*, 40 S. Car. 298; *State v. Higgins*, 53 Vt. 199; *Bonneville v. State*, 53 Wis. 680.

6. *Com. v. Sprague*, 128 Mass. 75; *Com. v. Ballou*, 124 Mass. 28; *Com. v. Rowe*, 141 Mass. 79; *Com. v. Lagorio*, 141 Mass. 81; *Ex p. Helbing*, 66 Cal. 215.

7. *Miles v. State*, 94 Ala. 106; *State v. Peirce*, 43 N. H. 275; *State v. Higgins*, 53 Vt. 198; *State v. Matthews*, 42 Vt. 542.

8. *State v. Higgins*, 53 Vt. 198.

**Allegation of Unlawfulness.** — In *State v. Tibbetts*, 86 Me. 189, it is held that the conclusion "contrary to the form of the statute" is sufficient to indicate that the act is unlawful, without averring it to have been unlawfully done.

**Generic Terms.** — Where the words of the statute may, by their generality, embrace cases which fall within the literal sense but not within the spirit or meaning of the statute, the complaint must allege all the facts necessary to bring the offense within the meaning of the statute. *Com. v. Filburn*, 119 Mass. 297; *Com. v. Bean*, 14 Gray (Mass.) 52, wherein the statute provided that no owner should permit or suffer horses, cows, or grazing animals to "stop to feed on any street." The complaint averred that the defendant "did permit and suffer the same to stop and feed in certain public streets," etc. It was held that the act prohibited was the stopping to feed by grazing, and that the offense charged in the complaint might have been the stopping to

**Exceptions and Provisos.** — A complaint, like an indictment or information, need not negative the exceptions in the enacting clause of a statute, which form no part of the description of the offense,<sup>1</sup> but exceptions in the enacting clause which constitute part of the description of the offense must be negated.<sup>2</sup> Exceptions or provisos are sufficiently negated in general terms.<sup>3</sup>

**XI. DESCRIPTION OF PERSON** <sup>4</sup> — **1. Defendant** — *a.* **IN GENERAL.** — An indictment or information must name the defendant whom it is intended to charge with the offense therein alleged, and an omission in this regard will make the indictment bad.<sup>5</sup> But

feed by eating grain out of a trough or bucket standing in the street, and that such an act would not be within the meaning of the statute.

1. *State v. Gurney*, 37 Me. 149; *Com. v. Shannihan*, 145 Mass. 99; *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. Edwards*, 12 Cush. (Mass.) 189; *State v. Norton*, 45 Vt. 259. See *supra*, X. 4. *Exceptions and Provisos*.

2. *Com. v. Crossley*, 162 Mass. 515; *Com. v. Byrnes*, 126 Mass. 248; *Jacobus v. Meskill*, 56 N. J. L. 256; *State v. Barker*, 18 Vt. 196; *State v. Norton*, 45 Vt. 259; *Jensen v. State*, 60 Wis. 577.

**Unlawfully.** — An allegation that the act was unlawfully done is not sufficient. *Com. v. Crossley*, 162 Mass. 515; *Com. v. Byrnes*, 126 Mass. 248.

3. *Com. v. Keefe*, 7 Gray (Mass.) 335; *Com. v. Lafontaine*, 3 Gray (Mass.) 479; *Com. v. Conant*, 6 Gray (Mass.) 482; *State v. Tall*, 56 Wis. 577.

**Objections to Complaints.** — See *infra*, XXI. 6. *Objection to Complaints*.

4. For the description of persons in prosecutions for particular offenses, see the particular titles. Thus, for the designation of person as owner of stolen goods, see article LARCENY; ownership of building in burglary, see article BURGLARY, vol. 3, p. 736; and so on throughout this work.

5. *Campbell v. State*, 10 Ind. 420; *Enwright v. State*, 58 Ind. 567; *State v. Stern*, 4 Mo. App. 385; *Minchen v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 712; *Com. v. Snider*, 2 Leigh (Va.) 744.

**Name in Title.** — But the name in the title may be made to refer to the charging part of the indictment by a grammatical construction which makes the meaning plain. Thus, "The State of Minnesota *v.* Peter Monson, accused by the grand jury \* \* \* by this indictment of the crime of \* \* \*

committed as follows:' (then follows the body of the indictment in proper form.) The defendant could not possibly have been prejudiced by the fact that his name in the title is used as the subject of the verb 'accused' in the 'commencement,' which is, strictly speaking, no part of the indictment. The meaning is perfectly plain." *State v. Monson*, 41 Minn. 140.

**English for Foreign Name.** — The defendant pleaded in abatement to an indictment in which he was called "Sabato Alexander," that he was baptized by the name of "Sabato D'Allessandro," and upon a trial of the issue joined on this plea it was held that it was sufficient to show that Alexander was the English translation of D'Allessandro. *Alexander v. Com.*, 105 Pa. St. 8.

**Repetition of Name — Reference.** — When the name is once mentioned it need not be repeated, but may be referred to by appropriate words, as by "said" or "aforesaid." *State v. Brown*, 3 Heisk. (Tenn.) 1; *State v. Coppenburg*, 2 Strobb. L. (S. Car.) 273. And in case of error or inaccuracy in the reference, the sense will control. *Means v. State*, (Ga. 1896) 25 S. E. Rep. 682.

If in an indictment against several persons the defendants are named, and in continuing the charge the names are omitted, a plural pronoun will sufficiently indicate them. Thus in "they the said, then and there having in their possession," etc., although the words "the said" evidently refer to the defendants already named, they may be rejected and the word "they" would certainly refer to such defendants. *State v. Brown*, 3 Heisk. (Tenn.) 1.

If the allegation as to the defendant's name occurs in a part of the indictment in which it is immaterial, it may be rejected as surplusage. *Mayo*

while the defendant should be indicted by his true name when known, still, the identification of the person being at this day the pre-eminent object of accuracy of description, he may usually be indicted by any name which is sufficient for that purpose, and under the practice permitting amendments in this regard,<sup>1</sup> as well as statutory provisions in many states, the objection on account of a misnomer is variously obviated,<sup>2</sup> though the question of identity is one for the jury.<sup>3</sup>

*b.* BY COMMON NAME. — The defendant may be indicted by any name by which he is as well known as by his proper name.<sup>4</sup>

**2. Persons Other than the Defendant.** — In many offenses the names of third persons necessarily enter for the identification as well as material description of the offense, and under the rule in criminal pleading requiring such certainty as will notify the defendant of the nature of the charge against him, the names of

*v. State*, 7 Tex. App. 346; but if the name is differently stated in proper places, the indictment will be defective. *Kinney v. State*, 21 Tex. App. 348. But see *State v. White*, 32 Iowa 18, wherein the defendant was accused as *Elisha White*, and in the charging part he was called *Elmer White*, and it was held that the defendant should have corrected the error upon arraignment, and, further, that under the statute providing that no trial, judgment, or other proceedings upon an indictment shall be affected by any matter "which does not tend to the prejudice of the substantial rights of the defendants upon the merits," a motion in arrest cannot be sustained.

**Complaint — Repetition by Reference.** — Where the defendant is described in the first count of a complaint, the description need not be repeated in a subsequent count, but may be had by reference to the first count. *Com. v. Clapp*, 16 Gray (Mass.) 237; *Com. v. Hagarman*, 10 Allen (Mass.) 401, holding that a reference in a second count to the defendant as "the said John" sufficiently refers to the defendant described in the first count, though the complainant first named is also John.

**Descriptio Personæ — Public Officer.** — A public officer who commits an offense against the general laws may be indicted therefor individually, and the addition of his official capacity will be merely *descriptio personæ* which may be rejected as surplusage. Thus, where a mail carrier commits such an offense, in an indictment against him the description of him as such carrier

will not make the indictment one against him in his official capacity. *U. S. v. Burroughs*, 3 McLean (U. S.) 405.

**Offense in Official Capacity.** — In an indictment against persons for maintaining a nuisance, designated respectively as *burgess* and *councilmen* of a certain borough, the defendants are charged in their official capacity and not as individuals. *Com. v. Bredin*, 165 Pa. St. 224.

**Particular Class of Persons.** — Under a statute providing against an offense by persons of a certain description only, the indictment must aver the facts necessary to show that the defendant is a person of that description. Thus, when a statute imposes a punishment upon ministers for performing the marriage ceremony between persons under age without the consent of their parents, etc., the indictment should aver that the defendant was a minister. *U. S. v. McCormick*, 1 Cranch (C. C.) 593.

1. See article AMENDMENTS, vol. 1, p. 458.

2. For misnomer, its effect, the method of objecting thereto, and the sufficiency in general of describing persons by name, see article NAMES.

3. *Davis v. State*, (Tex. App. 1889) 11 S. W. Rep. 647.

4. *Wilson v. State*, 69 Ga. 224; *State v. Dresser*, 54 Me. 569; *State v. Brecht*, 41 Minn. 51; *State v. Pierre*, 39 La. Ann. 915; *Com. v. Jacobs*, 152 Mass. 276; *Com. v. Seeley*, 167 Mass. 163; *State v. Martin*, 10 Mo. 392.

**Alias.** — See article NAMES.

such third persons should be alleged,<sup>1</sup> and the defendant cannot be convicted if the names are so erroneously stated as to fail to identify the offense,<sup>2</sup> though certainty to a common intent is generally sufficient.<sup>3</sup> And if such person is equally well known

1. For the offenses requiring the names of persons other than the defendant to be set out in the charge, reference should be had to the titles in this work which treat of the particular offense. See also the following cases upon the general proposition stated in the text:

*Connecticut*. — *State v. Wilson*, 30 Conn. 500.

*Delaware*. — *State v. Walker*, 3 Harr. (Del.) 548.

*Florida*. — *Jordan v. State*, 22 Fla. 528.

*Illinois*. — *Willis v. People*, 2 Ill. 399.

*Indiana*. — *State v. Noland*, 29 Ind. 212; *McLaughlin v. State*, 45 Ind. 338; *Zook v. State*, 47 Ind. 463; *Alexander v. State*, 48 Ind. 394; *State v. Irvin*, 5 Blackf. (Ind.) 343; *Butler v. State*, 5 Blackf. (Ind.) 280.

*Iowa*. — *State v. McConkey*, 20 Iowa 574.

*Maryland*. — *Capritz v. State*, 1 Md. 574; *Spielman v. State*, 27 Md. 524; *State v. Nutwell*, 1 Gill (Md.) 56.

*Massachusetts*. — *Com. v. Stoddard*, 9 Allen (Mass.) 280; *Com. v. Sherman*, 13 Allen (Mass.) 248.

*Mississippi*. — *McBeth v. State*, 50 Miss. 84.

*North Carolina*. — *State v. Angel*, 7 Ired. L. (N. Car.) 27.

*Ohio*. — *Buck v. State*, 1 Ohio St. 61.

*Texas*. — *Owen v. State*, 7 Tex. App. 329.

*Vermont*. — *State v. Hover*, 58 Vt. 497.

**In a Complaint.** — *State v. Higgins*, 53 Vt. 196; *Com. v. Shearman*, 11 Cush. (Mass.) 547.

**Sufficiency of Reference After Name Once Stated.** — When the name has been once fully and accurately stated in the indictment, there can be no objection to referring to the person afterwards as "the said —," giving the Christian name only. *State v. Pike*, 65 Me. 111; *State v. Lang*, 63 Me. 215; *Com. v. Melling*, 14 Gray (Mass.) 388.

**Offense Against Particular Class of Persons.** — If the offense is made more highly punishable when committed against persons of a particular class, the indictment is good notwithstanding

it does not designate to which class the injured person belongs, though in such a case a milder punishment will be awarded. *State v. Fielding*, 32 Me. 585.

2. *Lewis v. State*, 90 Ga. 95; *Com. v. Buckley*, 145 Mass. 181; *Humbard v. State*, 21 Tex. App. 200; *Owens v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 558.

**Persons Injured — Variance Immaterial.** — Under the statutes in some states an erroneous allegation of the person injured is not material where the act is otherwise sufficiently identified.

*Arkansas*. — *State v. Seeley*, 30 Ark. 164.

*Iowa*. — *State v. Hall*, (Iowa 1896) 66 N. W. Rep. 725; *State v. Thompson*, 19 Iowa 299; *State v. Emmons*, 72 Iowa 265; *State v. Flynn*, 42 Iowa 164.

*Kentucky*. — *Olive v. Com.*, 5 Bush. (Ky.) 376.

*New York*. — *People v. Johnson*, 104 N. Y. 213; *Kennedy v. People*, 39 N. Y. 245; *People v. Richards*, 44 Hun (N. Y.) 286; *People v. Dunn*, 53 Hun (N. Y.) 387.

**Variance when Names Unnecessary — Surplusage.** — When an indictment for an offense wherein the names of third persons are unnecessary attempts to set out such names, a variance is immaterial, as the names may be rejected as surplusage. *U. S. v. Howard*, 3 Sumn. (U. S.) 12.

3. *Point v. State*, 37 Ala. 148; *People v. Leong Sing*, 77 Cal. 117; *Herron v. State*, 93 Ga. 554; *Chapman v. State*, 18 Ga. 736; *Barnes v. People*, 18 Ill. 52; *State v. Timmens*, 4 Minn. 325; *State v. Patterson*, 2 Ired. L. (N. Car.) 346; *State v. Farr*, 12 Rich. L. (S. Car.) 24; *State v. France*, 1 Overt. (Tenn.) 434; *Wilks v. State*, 27 Tex. App. 381; *Cotton v. State*, 4 Tex. 260.

**An Infant Child** may be described in an indictment for murder, as "an infant child, name to the grand jury unknown." *Tempe v. State*, 40 Ala. 353. Or if the child has not been named, in an indictment for ill treatment of such a child it may be described as a child not named. *Reg. v. Waters*, 2 C. & K. 864, 61 E. C. L. 864, 13 Jur. 130.

*An Illegitimate Infant* may be suffi-

by several names, either of such names is sufficient.<sup>1</sup>

**3. Name Unknown — Of Defendant.** — The rule requiring the defendant to be named is also subject to the qualification that if the name is unknown that fact may be so stated.<sup>2</sup>

ciently described as "a certain illegitimate male child then lately born of the body of A B." Reg. v. Hogg, 2 M. & Rob. 380.

**The Addition of "Jr."** to the name of the third person is merely descriptive of the person, and may be rejected in order to avoid a variance from the proof. State v. Best, 108 N. Car. 747; Ross v. State, 116 Ind. 495. But to the contrary see State v. Vitum, 9 N. H. 519. See also article NAMES.

**The Use of a Wrong Pronoun** referring to the person whose property was stolen is not a valid objection after verdict where there is no surprise occasioned thereby, as where the pronoun is feminine instead of masculine, or *vice versa*. State v. Willis, 16 Mo. App. 553.

**Question of Identity — Province of Jury.** — In State v. Thompson, 10 Mont. 549, it was held that the name of the prosecutrix being so differently pronounced by various witnesses that the court could not ascertain from the witnesses whether the name was the same as that set out in the indictment, the question was properly submitted to the jury.

**Change of Name by Marriage before Indictment Found.** — In Rex v. Turner, 1 Leach C. C. 536, it was held that an indictment for robbery of a married woman described by her maiden name is good notwithstanding she marry before the indictment is found.

But in Com. v. Brown, 2 Gray (Mass.) 358, it was held that an indictment for the unlawful sale of spirituous liquors charging the sale to have been made to a woman by her maiden name, who had changed her name by marriage after the sale and before the indictment was found, could not be supported by proof of the sale to her under her maiden name.

1. *Arkansas.* — State v. Seely, 30 Ark. 164; Mason v. State, 55 Ark. 529.

*California.* — People v. Leong Quong, 60 Cal. 107; People v. Woods, 65 Cal. 121.

*Florida.* — Reddick v. State, 25 Fla. 112.

*Georgia.* — Jones v. State, 65 Ga. 147.

*Illinois.* — Vandermark v. People, 47 Ill. 122.

*Indiana.* — Ehler v. State, 93 Ind. 76.  
*Kentucky.* — Robinson v. Com., 88 Ky. 386.

*Maine.* — State v. Bundy, 64 Me. 507; State v. Peterson, 70 Me. 216.

*Michigan.* — People v. Van Alstine, 57 Mich. 69.

*Mississippi.* — McBeth v. State, 50 Miss. 84.

*New York.* — People v. Lake, 110 N. Y. 61; Cowley v. People, 83 N. Y. 464.

*North Carolina.* — State v. Johnson, 67 N. Car. 55; State v. Davis, 109 N. Car. 780.

*South Carolina.* — State v. Anderson, 3 Rich. L. (S. Car.) 174.

*Texas.* — Bell v. State, 25 Tex. 574; Lott v. State, 24 Tex. App. 723; Hunter v. State, 8 Tex. App. 75; DeOlles v. State, 20 Tex. App. 145; Young v. State, 30 Tex. App. 308; Bell v. State, 25 Tex. 575; Rye v. State, 8 Tex. App. 163.

*Virginia.* — Taylor v. Com., 20 Gratt. (Va.) 825.

2. *Skinner v. State*, 30 Ala. 524; *O'Brien v. State*, 91 Ala. 25; *Jones v. State*, 11 Ind. 357; *State v. Geiger*, 5 Iowa 484; *Wilcox v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 958; *U. S. v. Upham*, 43 Fed. Rep. 68; *Rex v. —*, R. & R. C. C. 489.

**Complaints.** — *Scheer v. Keown*, 29 Wis. 588, holding that the use of the word "alias" without stating that the name of the defendant is unknown is insufficient; *Levy v. State*, 6 Ind. 281; *Gardner v. State*, 4 Ind. 632; *Ard v. State*, 114 Ind. 542; *Beaumont v. Dallas*, 34 Tex. Crim. Rep. 68.

**Christian Name Unknown.** — It may be alleged that the Christian name of the defendant is unknown. *Jones v. State*, 11 Ind. 357; *O'Brien v. State*, 91 Ala. 25; *Skinner v. State*, 30 Ala. 524; *Wilcox v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 958, holding that the statute in *Texas*, requiring that if the name of a person accused is unknown the indictment may allege that fact if a reasonably accurate description of the defendant is given, does not apply where the Christian name is given, and under such circumstances no such description is necessary; *overruling State v. Vandever*, 21 Tex. 335.

**Of Third Persons.** — And the rule requiring the names of persons other than the accused to be set forth is subject to the same qualification.<sup>1</sup> Indeed, when it is necessary to allege the names of third persons, an omission in this regard must be supplied by an averment that the names are unknown.<sup>2</sup>

**Name in Fact Known.** — But such a statement is only permissible where the names are in fact unknown, and if that allegation be shown to be untrue, the defendant will be entitled to an acquittal.<sup>3</sup>

**Where One Christian Name Is Given,** a statement that the Christian name is otherwise unknown may be rejected as surplusage, as only one Christian name is necessary. *Taylor v. State*, 100 Ala. 68.

1. When such names are unknown it may be so alleged.

*Alabama.* — *Cheek v. State*, 38 Ala. 230.

*Arkansas.* — *State v. Seely*, 30 Ark. 163; *Cameron v. State*, 13 Ark. 717; *Gabe v. State*, 6 Ark. 519.

*Delaware.* — *State v. Walker*, 3 Harr. (Del.) 548.

*Indiana.* — *State v. Jackson*, 4 Blackf. (Ind.) 49; *Wall v. State*, 51 Ind. 453.

*Iowa.* — *State v. Ean*, 90 Iowa 534; *State v. McIntire*, 59 Iowa 264.

*Maryland.* — *Capritz v. State*, 1 Md. 574.

*Massachusetts.* — *Com. v. Sherman*, 13 Allen (Mass.) 249; *Com. v. Thornton*, 14 Gray (Mass.) 42.

*Mississippi.* — *Grogan v. State*, 63 Miss. 151.

*Texas.* — *Wells v. State*, 4 Tex. App. 23; *De Olles v. State*, 20 Tex. App. 146.

*United States.* — *U. S. v. Scott*, 74 Fed. Rep. 213; *Durland v. U. S.*, 161 U. S. 307.

**In Complaints.** — *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Com. v. Sherman*, 13 Allen (Mass.) 249; *State v. Higgins*, 53 Vt. 196.

**Illegitimate Child — Before Baptism.** — In an indictment for the murder of an illegitimate infant twelve days old, the name was alleged to be unknown. It seemed that the child had not been baptized, but the mother (the defendant) had said that she should like to have the child named "Mary Anne," and on two occasions she called the child by that name, and once on another occasion "little Mary." It was held that the allegation that the child's name was unknown was sufficient to support a conviction. *Rex v. Smith*, 6 C. & P. 151, 25 E. C. L. 327.

**After Baptism.** — But the calling an infant by its name of baptism for two days after baptism is sufficient evidence to warrant the jury in finding that the infant is properly designated by that name. *Reg. v. Evans*, 8 C. & P. 765, 34 E. C. L. 625, wherein *Rex v. Waters*, 7 C. & P. 250, 32 E. C. L. 503, which held that when an illegitimate child had been baptized it cannot be described by a surname until it has acquired a name by reputation, was distinguished by *Erskine, J.*, because in the case last cited there was no evidence that the child was ever called by the name in question.

2. *Connecticut.* — *State v. Wilson*, 30 Conn. 500.

*Illinois.* — *Willis v. People*, 2 Ill. 399.

*Indiana.* — *State v. Irvin*, 5 Blackf. (Ind.) 343; *Zook v. State*, 47 Ind. 463; *Alexander v. State*, 48 Ind. 394; *McLaughlin v. State*, 45 Ind. 338.

*Iowa.* — *State v. McConkey*, 20 Iowa 574.

*Massachusetts.* — *Com. v. Stoddard*, 9 Allen (Mass.) 280; *Com. v. Sherman*, 13 Allen (Mass.) 248.

*North Carolina.* — *State v. Angel*, 7 Ired. L. (N. Car.) 27.

*Ohio.* — *Buck v. State*, 1 Ohio St. 61.

*South Carolina.* — *State v. O'Donald*, 1 McCord L. (S. Car.) 532.

**The Omission of the Statement in the Proper Place,** if it is made in another part of the indictment, is not such a defect or imperfection as tends to prejudice the substantial rights of the defendant. *State v. Grant*, 86 Iowa 216.

3. *Guthrie v. State*, 16 Neb. 670; *Blodget v. State*, 3 Ind. 403; *Cheek v. State*, 38 Ala. 227; *Winter v. State*, 90 Ala. 637; *Presley v. State*, 24 Tex. App. 494; *Kimbrough v. State*, 28 Tex. App. 367; *State v. Geiger*, 5 Iowa 484; *Oxier v. U. S.*, (Indian Ter. 1896) 38 S. W. Rep. 331; *Rex v. Walker*, 3 Campb. 264.

In *Indiana* it was held that an allegation that the names of "persons" were unknown would not support proof



**4. Description of Corporation.**<sup>1</sup> — When the nature of the offense charged makes it necessary to set out the name of a corporation, it is generally sufficient to describe the corporation by its corporate name,<sup>2</sup> without reference to the individuals or officers who compose it,<sup>3</sup> and usually without a specific allegation of

that the name of one person was unknown. *Moore v. State*, 65 Ind. 213.

**Burden of Proof.** — The burden of showing the fact that the name alleged to be unknown was in fact known, or could have been ascertained by the exercise of due diligence, is upon the defendant. *Guthrie v. State*, 16 Neb. 670 [citing *Com. v. Gallagher*, 126 Mass. 54; *Com. v. Hill*, 11 Cush. (Mass.) 137; *Com. v. Thompson*, 2 Cush. (Mass.) 551; *Rex v. Bush, R. & R. C. C.* 372]; *Coffin v. U. S.*, 156 U. S. 432, holding that in the absence of testimony impeaching the verity of the allegation the presumption is that the allegation is true.

*Contra.* — *Stone v. State*, 30 Ind. 115, wherein the defendant was described as "one Stone, whose given name is to the jurors unknown," and the court held that there could be no conviction in the absence of proof that the name was in fact unknown; but this case is said to go beyond the rule requiring truthfulness in the allegation that the name is unknown; *Guthrie v. State*, 16 Neb. 670.

**Meaning of the Term.** — An allegation in an information that an assault and battery was committed upon a certain boy "whose name is unknown to the affiant," means that the name of the boy was unknown to the pleader and nothing more. *Brooster v. State*, 15 Ind. 190.

**Unknown Name Made Known to Court.** — Where the Christian or given name is stated to be unknown, yet it appears that the full Christian name of the defendant is by some means made known to the court and it is agreed by the defendant to be his full Christian name, this action on the part of the defendant does not create any necessity on the part of the court to prosecute an inquiry whether his Christian name at the time of the presentation of the indictment by the grand jury was unknown. *Wilcox v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 958.

**In Complaints** if it appears that the complainant knew the person whose name is alleged to be unknown, it is held that the defendant should be dis-

charged, though if the fact does not appear in the evidence the question does not arise. *Com. v. Thornton*, 14 Gray (Mass.) 42; but the fact that the complainant afterwards obtains knowledge of the name of such person will not affect the validity of the complaint. *Com. v. Hendrie*, 2 Gray (Mass.) 504.

1. As to designating corporation in burglary, see article BURGLARY, vol. 3, p. 759; in embezzlement, see article EMBEZZLEMENT, vol. 7, p. 410; and so on in the several titles of offenses.

2. *Com. v. Jacobs*, 152 Mass. 276; *State v. Knox*, 17 Neb. 683; *Braithwaite v. State*, 28 Neb. 832; *State v. Shaw*, 92 N. Car. 768; *Noakes v. People*, 25 N. Y. 387.

**Question Immaterial.** — In an indictment for trespass on land of the trustees of the Methodist Protestant Church, it was held that as said trustees owned and were in possession of the land under that name, and had been owners thereof for a long time before the commission of the offense, whether or not they were a corporation was a question which would not afford the defendant any defense, and was one which could not be raised except by the state. *White v. State*, 69 Ind. 279.

**De Facto Corporation.** — The guilt of the defendant not depending upon the legal organization of the corporation, it is sufficient to prove a *de facto* corporation. *Burke v. State*, 34 Ohio St. 79; *State v. Tucker*, 84 Mo. 25; even where the corporate existence is alleged. *People v. Frank*, 28 Cal. 508; *People v. Leonard*, 106 Cal. 302; *Smith v. State*, 28 Ind. 321; *U. S. v. Amedy*, 11 Wheat. (U. S.) 392.

**A Town** may be designated as "the town of —" (naming it), instead of "the inhabitants of the town." *Com. v. Dedham*, 16 Mass. 141.

**Change of Name Pending Indictment.** — Where an indictment is preferred against a town, the changing of the name of the town by the legislature, pending the indictment, will have no effect thereon. *Com. v. Phillipsburg*, 10 Mass. 78.

3. *Rex v. Patrick*, 1 Leach C. C. 253; *Aldridge v. State*, 88 Ala. 114.

incorporation or corporate existence.<sup>1</sup> But in some jurisdictions it is necessary to allege corporate existence,<sup>2</sup> and, of course, when the corporate existence is an essential ingredient of the offense it must be alleged.<sup>3</sup> While the correct name of the corporation must be set out,<sup>4</sup> a slight variance or mistake which does not affect the identity of the corporation referred to will not be material.<sup>5</sup>

#### 5. Variance Between Complaint and Information or Indictment. —

The names of persons set out in an indictment or information must be the same as those set out in the complaint, affidavit, or information upon which the indictment or information is based, both with respect to the defendant<sup>6</sup> and to other persons necessary to be described;<sup>7</sup> although a variance not affecting the identity of the parties will be immaterial.<sup>8</sup>

1. *Arkansas*. — *Ball v. State*, 48 Ark. 94.

*California*. — *People v. McDonnell*, 80 Cal. 287; *People v. Ah Sam*, 41 Cal. 645; *People v. Henry*, 77 Cal. 445.

*Iowa*. — *State v. Pierce*, 8 Iowa 232.

*Nebraska*. — *Braithwaite v. State*, 28 Neb. 832.

*Nevada*. — *State v. McKiernan*, 17 Nev. 229; *State v. Cleavland*, 6 Nev. 185.

*New Jersey*. — *Fisher v. State*, 40 N. J. L. 169.

*New York*. — *Noakes v. People*, 25 N. Y. 387.

*North Carolina*. — *State v. Grant*, 104 N. Car. 910; *State v. Shaw*, 92 N. Car. 770; *State v. Ward*, 2 Hawks (N. Car.) 443.

2. *Emmonds v. State*, 87 Ala. 12; *Wallace v. People*, 63 Ill. 452; *Staaen v. People*, 82 Ill. 432; *Thurmond v. State*, 30 Tex. App. 539; *Daud v. State*, 34 Tex. Crim. Rep. 460; *Nasets v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 698.

**Sufficiency of Description.** — The existence of a corporation is sufficiently alleged in an information against the corporation by the designation "The Vermont Central Railroad Company, a corporation existing under and by virtue of the laws of this state, duly organized and doing business." *State v. Vermont Cent. R. Co.*, 28 Vt. 586. See generally article CORPORATIONS, vol. 5, p. 70.

**Admission by Plea.** — By a plea of not guilty, the corporation charged admits its corporate existence by the name by which it is charged. *State v. Western North Carolina R. Co.*, 95 N. Car. 607.

3. *Murry v. Com.*, 5 Leigh (Va.) 720.

4. *Alden v. State*, 18 Fla. 187; *Sykes v. People*, 132 Ill. 32; *McGary v. People*, 45 N. Y. 157; *State v. Waters*, 3 Brev. (S. Car.) 507.

**Common Though Incorrect Name.** — It has been held that the description of a corporation by the name by which it is commonly known is as good as the proper corporate name. *Com. v. Jacobs*, 152 Mass. 276. But this ruling is in conflict with *McGary v. People*, 45 N. Y. 153, and *Sykes v. People*, 132 Ill. 32. These last cases, however, present a question as to the omission of an integral part of the name of the corporation, and are distinguished from one presenting the omission of the place of doing business as a part of the corporate name, which would be commonly understood. *Putnam v. U. S.*, 162 U. S. 691; *Rogers v. State*, 90 Ga. 463. See also cases cited in the following note.

5. *Jackson v. State*, 72 Ga. 29; *Jackson v. State*, 76 Ga. 567; *State v. Goode*, 68 Iowa 595; *Price v. State*, 41 Tex. 216.

6. *Riddle v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 21; *McDevro v. State*, 23 Tex. App. 429; *Juniper v. State*, 27 Tex. App. 478.

7. *People v. Christian*, 101 Cal. 471; *Com. v. Morningstar*, 2 Pa. Dist. Rep. 41.

**Persons Unknown.** — An indictment cannot charge a defendant with conspiring with "unknown" persons where the commitment on affidavit alleges the conspiring with certain persons named. *Com. v. Hunter*, 13 Pa. Co. Ct. Rep. 573.

8. *Harrison v. State*, 6 Tex. App.

XII. DESCRIPTION OF PROPERTY.<sup>1</sup>

## XIII. LAYING TIME — 1. General Rules — Necessity and Precision. —

Every traversable fact must be alleged with time,<sup>2</sup> but when the time of the commission of the offense is not of the essence of the offense it need not be precisely laid, and it is sufficient if it be laid at any time before the finding of the indictment and within the period of limitation which may be prescribed for that particular offense.<sup>3</sup> It has been held sufficient to allege that the

256; *Hardy v. State*, (Tex. App. 1890) 13 S. W. Rep. 1008; *Girous v. State*, 29 Ind. 93; *Hockenberger v. State*, 49 Neb. 706.

1. See the articles in this work treating the particular topic under investigation. For example, for description of property embezzled, see article EMBEZZLEMENT, vol. 7, p. 410; for description of property in burglary, see article BURGLARY, vol. 3, p. 736, etc.

2. *State v. Thurstin*, 35 Me. 205; *State v. LaBore*, 26 Vt. 765; *State v. Bacon*, 7 Vt. 222.

The general rule requiring certainty of averment of time and place "does not apply to those descriptive or definite portions of an indictment whose office it is to so qualify or limit the object acted upon as to show it to be the proper subject of complaint, unless time or place is an element necessary to constitute it a proper subject, and the existence of this element would be susceptible of question if not averred. Upon this principle much of the apparent conflict of authorities upon this subject is reconcilable." *State v. Cook*, 38 Vt. 438.

3. *Alabama*. — *Thompson v. State*, 25 Ala. 45; *Shelton v. State*, 1 Stew. & P. (Ala.) 209; *State v. Beckwith*, 1 Stew. (Ala.) 318.

*Arkansas*. — *State v. Hoover*, 31 Ark. 677; *Gill v. State*, 38 Ark. 527.

*California*. — *People v. Bidleman*, 104 Cal. 608; *People v. Rice*, 73 Cal. 220; *People v. Miller*, 12 Cal. 291.

*Delaware*. — *State v. Smith*, 5 Harr. (Del.) 490.

*Florida*. — *Chandler v. State*, 25 Fla. 728.

*Georgia*. — *McBryde v. State*, 34 Ga. 202; *Clarke v. State*, 90 Ga. 448; *Bryant v. State*, 97 Ga. 103; *Dacy v. State*, 17 Ga. 441; *Cook v. State*, 11 Ga. 53; *Wingard v. State*, 13 Ga. 396.

*Indiana*. — *Hubbard v. State*, 7 Ind. 160; *State v. Rust*, 8 Blackf. (Ind.) 195; *Courtney v. State*, 5 Ind. App. 356; *State v. Patterson*, 116 Ind. 45.

*Iowa*. — *State v. Bell*, 49 Iowa 440; *State v. Kirkpatrick*, 63 Iowa 554; *State v. Johnson*, 69 Iowa 623; *State v. Knouse*, 33 Iowa 365; *State v. Malling*, 11 Iowa 239.

*Louisiana*. — *State v. Walters*, 16 La. Ann. 400.

*Maryland*. — *Capritz v. State*, 1 Md. 574.

*Massachusetts*. — *Com. v. Dacey*, 107 Mass. 206; *Com. v. Harrington*, 3 Pick. (Mass.) 26; *Com. v. Jacobs*, 9 Allen (Mass.) 275.

*Minnesota*. — *State v. Johnson*, 23 Minn. 569, holding that when, in the progress of the trial, the evidence tends to show a similar offense on another day, the state will be allowed to elect for which of the two offenses it will proceed, and may proceed for that which appears to have been committed on a day other than that laid in the indictment.

*Mississippi*. — *McCarty v. State*, 37 Miss. 411; *Miazza v. State*, 36 Miss. 613; *Oliver v. State*, 5 How. (Miss.) 14.

*Nebraska*. — *Palin v. State*, 38 Neb. 862; *Hans v. State*, (Neb. 1897) 69 N. W. Rep. 838.

*New Hampshire*. — *State v. Hunkins*, 43 N. H. 557; *State v. Ingalls*, 59 N. H. 89.

*New York*. — *People v. Jackson*, 111 N. Y. 362; *People v. Emmerson*, 53 Hun (N. Y.) 437, 7 N. Y. Crim. Rep. 97; *People v. Krank*, 46 Hun (N. Y.) 634; *People v. Stocking*, 50 Barb. (N. Y.) 573.

*North Carolina*. — *State v. Shepherd*, 8 Ired. L. (N. Car.) 197; *State v. Haney*, 67 N. Car. 468.

*Pennsylvania*. — *Com. v. Bennett*, 1 Pittsb. (Pa.) 265.

*Rhode Island*. — *Kenney v. State*, 5 R. I. 385.

*South Carolina*. — *State v. Howard*, 32 S. Car. 91.

*Texas*. — *Lucas v. State*, 27 Tex. App. 322; *Collins v. State*, 5 Tex. App. 37; *State v. Johnson*, 32 Tex. 96; *Crass v. State*, 30 Tex. App. 480; *Herchen-*

offense was committed before the finding of the indictment or

bach *v.* State, 34 Tex. Crim. Rep. 122.

*Vermont.*—State *v.* G. S., 1 Tyler (Vt.) 300.

*Virginia.*—Arrington *v.* Com., 87 Va. 96.

In Gill *v.* State, 38 Ark. 527, it was held that it need not be alleged that an offense was committed on a day within the period of limitations. This ruling was made upon the following state of the pleadings: "On the eighth day of September, 1880, Rufus Gill was indicted in the Conway Circuit Court for Sabbath breaking, by selling liquor on Sunday, on the twenty-ninth day of August, 1880. A bench warrant was ordered but not issued until January 25th, 1882, and served the next day. On the seventh of March, 1882, the indictment was quashed, on motion of the state, and the case referred to the grand jury, then in session; and on March 13th, 1882, the grand jury returned into court another indictment against him for Sabbath breaking, charging that 'the said Rufus Gill, on the twenty-ninth day of August, 1880, in the county and state aforesaid, unlawfully did sell one pint of ardent spirits on Sunday, against the peace and dignity of the state of Arkansas.'" From this it appears that the prosecution was not barred, because the time during which the first indictment was pending stopped the running of the statute to that extent. The second indictment, however, showed on its face, without any explanation, that the action was barred by the statute of limitations, and the broad ruling of the court that an indictment need not allege that the offense was committed on a day within the period of limitations is based upon Scoggins *v.* State, 32 Ark. 205, a case not deciding that an indictment is good which affirmatively shows that the prosecution is barred.

**Effect upon Defense of Alibi.**—Inasmuch as the jury must find beyond a reasonable doubt that the defendant actually did the act, the charge that the precise time laid need not be proven cannot be construed into a direction to disregard proof of an alibi. People *v.* Wright, 11 Utah 41; State *v.* Bell, 49 Iowa 440.

**Omission of Year.**—An indictment does not sufficiently lay the time when

the offense was committed by alleging that the act was done on a certain day of a certain month "now past," because this does not in terms nor by reference state any year, and is therefore not sufficiently certain. Com. *v.* Griffin, 3 Cush. (Mass.) 524.

*A Complaint* which alleges the time without stating the year is bad. State *v.* Kennedy, 36 Vt. 563; People *v.* Gregory, 30 Mich. 371; Com. *v.* Hut-ton, 5 Gray (Mass.) 89.

*Where No Statute of Limitations Is Involved.*—It is not necessary to allege the precise day, or even the year, if the time does not enter into the nature of the offense and is laid before the finding of the indictment. State *v.* Branham, 13 S. Car. 392; State *v.* Stumbo, 26 Mo. 306.

**Omission of Month and Day.**—When the time does not enter into the offense it need not be alleged, and it is sufficient to allege the year if that is before the finding of the indictment. State *v.* Gibbs, 6 Baxt. (Tenn.) 238; Jones *v.* Com., 1 Bush (Ky.) 34; State *v.* Thompson, 26 W. Va. 149.

An indictment charged the offense to have been committed on the — day of —, 1870. The indictment was found in 1873. It was held that this sufficiently showed that the offense was committed before the indictment was found. State *v.* Wade, 7 Baxt. (Tenn.) 26, *distinguishing* King *v.* State, 3 Heisk. (Tenn.) 148, where the indictment was found in 1870 and the offense was alleged therein to have been committed on the — day of —, 1870. See also State *v.* Parker, 5 Lea (Tenn.) 570.

So a charge of the day as on the — day of a certain month and year, where any day of the month would be prior to the finding of the indictment and within the period of limitations, is sufficient. U. S. *v.* Conrad, 59 Fed. Rep. 458.

But in *Texas*, where the information charged the offense to have been committed on the — day of December, 1872, it was held not sufficient, even though the affidavit laid the exact day, because the allegation in the information must be taken most strongly against the pleader and referred to the first day of December, which would in the particular case bar the offense. State *v.* Eubanks, 41 Tex. 291. See

filing of the information,<sup>1</sup> and in some states the statutes have been construed to obviate altogether the necessity of laying the time when it is not of the essence of the offense, leaving it to be proved at the trial,<sup>2</sup> but it is usually necessary, both at common law and under the statutes, to state some particular day.<sup>3</sup>

also *State v. Roach*, 2 Hayw. (N. Car.) 352.

**Time Laid as Between Two Dates.**—It has been held sufficient to lay the time as between two dates. *U. S. v. Smith*, 2 Mason (U. S.) 143; *Rex v. Simpson*, 10 Mod. 248, citing *Rex v. Chandler*, Ld. Raym. 581. But in *Rex v. Roberts*, 4 Mod. 101, there is a dictum expressing a contrary view.

**Complaint.**—In *State v. Beaton*, 79 Me. 314, it was held that the laying of the time between two dates, as "on sundry and divers days and times between" two certain dates, is insufficient. *Contra*, *People v. Polhamus*, 8 N. Y. App. Div. 133.

1. *Scoggins v. State*, 32 Ark. 215, referring to the former practice in *Arkansas*. See also *State v. Davis*, 6 Baxt. (Tenn.) 606; *Jones v. Com.*, 1 Bush (Ky.) 40.

It is sufficient that the language used in an indictment imports that the offense was committed before the indictment was found, without stating such fact in terms. *Gratz v. Com.*, 96 Ky. 162. See also *State v. Wade*, 7 Baxt. (Tenn.) 27.

But the rule permitting any time to be laid is generally stated with the qualification that the time should be within the statute of limitations. *Hatwood v. State*, 18 Ind. 492; *State v. Rust*, 8 Blackf. (Ind.) 195. See also the last preceding note and *infra*, XIII. 3. *Negating Statute of Limitations*.

2. *Smith v. State*, 58 Miss. 871; *Fleming v. State*, 136 Ind. 149; *State v. McDonald*, 106 Ind. 233; *Armstrong v. State*, 145 Ind. 609; *Ketline v. State*, (N. J. 1897) 36 Atl. Rep. 1033. See also *State v. Hussey*, 7 Iowa 409; *State v. Groome*, 10 Iowa 308.

In *Molett v. State*, 33 Ala. 411, it was held that before the code the objection that an indictment did not show the day of the commission of the offense would have been fatal, but that since the code no specification of time is necessary, unless it is a material ingredient of the offense. So also *McGuire v. State*, 37 Ala. 161.

**After Verdict.**—In *Tennessee* the omission to lay the time was held

cured by verdict. *Perkins v. State*, 8 Baxt. (Tenn.) 559, citing *King v. State*, 3 Heisk. (Tenn.) 151, as showing the necessity of laying time for the purpose of giving "the party an opportunity by motion to quash, or by demurrer, to free himself from the vexatious litigation and the state from needless costs, if the offense appeared," etc. But the judge who delivered the opinion in the case last cited does not seem to concur with this construction of his language, as he dissents from a similar holding in a later case. *State v. Parker*, 5 Lea (Tenn.) 570.

**Statute of Jeofails.**—In *Missouri* an omission to lay the time in an indictment is cured by the statute of jeofails after verdict. *State v. Hughes*, 82 Mo. 87; *State v. Findley*, 77 Mo. 338. See also *State v. Peters*, 107 N. Car. 876.

3. *State v. Ingalls*, 59 N. H. 89; *People v. Stocking*, 50 Barb. (N. Y.) 573; *State v. Brown*, 24 S. Car. 224; *State v. Dodge*, 81 Me. 395; *State v. Beaton*, 79 Me. 314; *State v. Davis*, 6 Baxt. (Tenn.) 606; *Bolton v. State*, 5 Coldw. (Tenn.) 653.

**In Complaints.**—*State v. O'Keefe*, 41 Vt. 694; *State v. Beaton*, 79 Me. 314.

If the complaint fails to state any time it is no ground for discharging the accused on habeas corpus after conviction. *Ex p. Ah Sing*, 87 Cal. 423.

**Time Collected from Whole Statement.**

—An indictment is good if the time can be collected from the whole statement, though not specifically averred. *Gill v. People*, 3 Hun (N. Y.) 187. And so with a complaint. *State v. Saxton*, 2 Kan. App. 13; *Com. v. Blake*, 12 Allen (Mass.) 188; *Gill v. People*, 3 Hun (N. Y.) 187, 60 N. Y. 643.

**Different Dates in Separate Counts.**—

It was objected on motion in arrest of judgment, that an indictment in separate counts alleged the offense to have been committed on two different days, thereby rendering it repugnant and uncertain in charging the offense. The court said that the repugnancy suggested did not exist between the several parts of any one count, but arose only upon comparison of one

**When Time Is an Ingredient of the Offense.** — When time is of the essence of the offense, or is an essential part of the description thereof, it should be accurately laid,<sup>1</sup> or at least with such precision as may be necessary to describe the offense.<sup>2</sup> Thus, where an act is prohibited on certain particular days, it must be charged

count with another, and that in contemplation of law each count of the indictment charged a distinct and separate offense, and any question as to its sufficiency must be determined by its own averments alone. The variance between the several counts, therefore, is no ground of objection, so long as it does not present a case of different offenses which cannot be joined in the same indictment, and, therefore, an indictment so charging the time was held to be good. *Griffin v. State*, 18 Ohio St. 443. See also *Shuman v. State*, 34 Tex. Crim. Rep. 69.

1. *Dacy v. State*, 17 Ga. 439; *State v. Reakey*, 1 Mo. App. 6; *Lester v. State*, 9 Mo. 666; *State v. Caverly*, 51 N. H. 446; *State v. Robinson*, 29 N. H. 274.

*In Complaints.* — *Effinger v. State*, 47 Ind. 235; *Com. v. Gelbert*, 170 Pa. St. 426.

**Materiality with Reference to Laws in Effect.** — An indictment which shows that it was found before the passage of the act under which it charges the offense will be held bad on motion in arrest, but where the indictment concludes simply "against the form of the Act of the General Assembly in such case made and provided," etc., but no particular act is referred to, and another act exists under which the punishment inflicted is consistent, the court will conclude that it was under the latter act. *State v. Branham*, 13 S. Car. 393. See also *State v. Dorr*, 82 Me. 212.

Where time is not of the essence of the offense, it is sufficient if it is laid after the statute prescribing the punishment of the offense. *State v. Evans*, 69 N. Car. 41, *distinguishing State v. Wise*, 66 N. Car. 120. See also *Cool v. Com.*, (Va. 1896) 26 S. E. Rep. 412.

Where an indictment charges an offense on a day certain, if the court had no jurisdiction at that time, and the defendant pleads guilty, no valid judgment can be rendered against him, as he only pleads guilty to the

charge at the time laid. *State v. Rollet*, 6 Iowa 534.

So where an indictment for perjury alleges that the oath was administered by an officer at a time when such officer had no authority to administer an oath, the time will be material and the indictment will be bad. *State v. Phippen*, 62 Iowa 54.

**Complaint.** — Where the date of the offense is specified in the complaint that date must be shown if the punishment for the offense has been changed, and it will not be sufficient in such a case to show the commission of the offense on a date after the change of the punishment thereof. *Com. v. Maloney*, 112 Mass. 283.

**Effect of Continuando.** — The averment in an indictment that the offense was committed at a time before the law under which the charge was made took effect, and continued from that time forward, during which period there was a law punishing the offense, does not invalidate an indictment nor defeat an investigation during the time the law was in fact in force. *Territory v. Ashby*, 2 Mont. 95; *State v. Way*, 5 Neb. 283. *Contra*, *Collins v. State*, 58 Ind. 5.

But an indictment fixing the date of the offense at a time thirteen years before the state in which it is brought became a state, and forty years before the statute creating the offense was passed, was held to be defective, although the offense was set out with a *continuando*. *State v. O'Donnell*, 81 Me. 271.

2. *Miller v. State*, 33 Miss. 357.

**On or About a certain day** is not sufficient when time is of the essence of the offense. *Ruge v. State*, 62 Ind. 388.

**Offense Committed Between Two Dates.** — Under a statute denouncing certain acts between the twenty-first day of September and the first day of April, etc., it is sufficient to charge that they were committed on March 9, without stating that they were committed between September 21 and April 1. *Rex v. Brown, M. & M.* 163, 22 E. C. L. 277.

to have been done on such day or days,<sup>1</sup> though the precise day need not necessarily be laid in all cases, as, for instance, under the laws against the doing of certain acts on Sunday, while the gist of the offense is that the act was committed on a Sunday, it is not material on what particular Sunday the time is laid.<sup>2</sup>

**2. Future or Impossible Date.** — The effect of laying a future or impossible date depends upon the strictness required in the various jurisdictions with regard to the laying of the time before the finding of an indictment or the filing of an information.<sup>3</sup>

1. *State v. Dodge*, 81 Me. 395; *State v. Turnbull*, 78 Me. 392.

2. *Robinson v. State*, 38 Ark. 549; *Jackson v. State*, 88 Ga. 787; *Frasier v. State*, 5 Mo. 536.

**Day of Month.** — The statement of the day of the month, in an indictment for an offense committed on Sunday, is not more material than in other cases if the offense is stated to have been committed on Sunday. *People v. Ball*, 42 Barb. (N. Y.) 324; *State v. Eskridge*, 1 Swan (Tenn.) 413. And though the indictment adds a date which by reference to the calendar does not fall on a Sunday, the indictment is nevertheless good. *State v. Eskridge*, 1 Swan (Tenn.) 413. *Contra*, *Werner v. State*, 51 Ga. 426, holding that an indictment which charged that the defendant did the act on the fourth day of April, 1873, "being the Sabbath day," when in fact the fourth day of April was Friday, was bad.

3. Thus in some states it is fatal to the charge that it alleges the commission of an offense at a date after the charge is made. *York v. State*, 3 Tex. App. 16; *Robles v. State*, 5 Tex. App. 347; *Arcia v. State*, 28 Tex. App. 198; *Lee v. State*, 22 Tex. App. 547; *Hall v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 996; *McJunkins v. State*, (Tex. Crim. App. 1897), 38 S. W. Rep. 994; *State v. Smith*, 88 Iowa 178; *State v. McKee*, Add. (Pa.) 33; *State v. Pratt*, 14 N. H. 456; *State v. Sexton*, 3 Hawks (N. Car.) 184; *Dickson v. State*, 20 Fla. 800.

**Time Laid Contrary to Law of Nature.** — In *Serpentine v. State*, 1 How. (Miss.) 260, the crime charged against the defendant was alleged to have been committed on the thirtieth day of September, "one thousand and thirty-three," and it was held that the allegation contradicted a known law of nature regarding the duration of human life and was clearly defective.

**Same Day as That of Charge.** — An indictment must show that the offense was committed prior to the finding of the indictment, and where the indictment was found on the day on which the offense was alleged to have been committed, it was held that the fact that the offense was charged in the past tense sufficiently showed that it was committed before the indictment was found. *State v. Pratt*, 14 N. H. 457; *Vowells v. Com.*, 84 Ky. 52; *People v. Squires*, 99 Cal. 327; *State v. Emmett*, 23 Wis. 632. *Contra*, *Joel v. State*, 28 Tex. 644; *Kennedy v. State*, 22 Tex. App. 693; *Andrews v. State*, (Tex. App. 1890) 14 S. W. Rep. 1014; *Gill v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 578.

**Future Date in Complaint.** — In *Com. v. Doyle*, 110 Mass. 103, it was held that a complaint which alleges an offense to have been committed on a future day alleges no offense, and is properly quashed.

In *Georgia*, it is held that an indictment is good although an impossible date be stated. *McMath v. State*, 55 Ga. 308; *Jones v. State*, 55 Ga. 625.

In *Indiana*, where the date is laid as after the finding of the indictment it is not fatal when the allegations show that the offense was actually committed before the finding of the indictment. *State v. Patterson*, 116 Ind. 45.

In *Tennessee*, it was held that where the offense was alleged to have been committed "heretofore, to wit," etc., the word "heretofore" was sufficient to show that the offense was committed before the finding of the indictment, although the date following was an impossible one, and that this rule was consistent with *King v. State*, 3 Heisk. (Tenn.) 148, holding that, under the statute, it must be alleged that the offense was committed before the finding of the indictment. *Stevenson v. State*, 5 Baxt. (Tenn.) 683.

**3. Negating Statute of Limitations.** — Where circumstances have intervened to stop the running of the statute of limitations, it is said to be the better practice to allege the true time of the commission of the offense, and to set forth the facts which avoid the bar of the statute,<sup>1</sup> and while, in some cases, it has been held that the statute need not be negated, but is only matter of defense,<sup>2</sup> there are other authorities which hold to the contrary.<sup>3</sup>

**4. Time Matter of Record.** — When any time stated in an indictment is to be proved by matter of record it must be truly and precisely laid, and a variance will be fatal.<sup>4</sup>

**5. "On or About."** — In some jurisdictions it is sufficient to charge the time as "on or about" a day certain,<sup>5</sup> though in others it has been deemed to be insufficient.<sup>6</sup>

In *Kentucky* the past tense in charging the offense was held sufficient to show the priority of the offense in point of time. *Williams v. Com.*, (Ky. 1892) 18 S. W. Rep. 1024.

**After Verdict** the fact that the date is laid at a time after the finding of the indictment is cured. *State v. Burnett*, 81 Mo. 121; *State v. Crawford*, 99 Mo. 74.

**After Plea of Guilty**, the objection that an offense is laid in an indictment to have been committed on a future day cannot be taken. *Reg. v. Fenwick*, 2 C. & K. 915, 61 E. C. L. 915.

1. *State v. Meyers*, 68 Mo. 266. But it has also been held that the offense may be alleged to have been committed within the time fixed by statute, and the facts which suspend the running of the statute may be left to the proof on the trial. *State v. English*, 2 Mo. 182.

2. *People v. Durrin* (Warren County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 328; *People v. Van Santvoord*, 9 Cow. (N. Y.) 655.

3. *State v. Bilbo*, 19 La. Ann. 76; *State v. Pierce*, 19 La. Ann. 90; *People v. Miller*, 12 Cal. 291, wherein the court refers to *People v. Van Santvoord*, 9 Cow. (N. Y.) 655, cited in the preceding note as against the settled doctrine in California as well as in the courts of England and in the United States generally.

**Where the Statute of Limitations Is Negated in One Count** by a full statement of the facts which take the case out of the operation thereof, another count would be good, notwithstanding a nol. pros. had been entered as to the former. *Rosenberger v. Com.*, 118 Pa. St. 83.

4. *Rhodes v. Com.*, 78 Va. 696, holding that in an indictment for perjury

the day on which the perjury was committed must be truly laid, which point is also affirmed in *U. S. v. McNeal*, 1 Gall. (U. S.) 387; *U. S. v. Bowman*, 2 Wash. (U. S.) 328.

5. *State v. Tuller*, 34 Conn. 293, upon the authority of *Rawson v. State*, 19 Conn. 292, where the same principle is laid down in reference to a grand juror's complaint. *State v. Cokely*, 4 Iowa 477; *State v. Thompson*, 10 Mont. 549; *People v. Jackson*, 111 N. Y. 362; *State v. Williams*, 13 Wash. 335.

**When Not of the Essence of the Offense**, the time may be laid as "on or about" a certain date. *Johnson v. State*, 1 Tex. App. 118; *State v. Elliot*, 34 Tex. 148, holding that the allegation of time is immaterial, and that "on or about" a certain day was a sufficient charge thereof, approved in *State v. Hill*, 35 Tex. 348, but disapproved in *Drummond v. State*, 4 Tex. App. 150, in so far as it held that the averment of time was a matter of form and not generally material.

**"On or About" as Surplusage.** — When it is unnecessary to state the time of the commission of the offense, unless the time is an ingredient of the offense, except in so far as to show that it was committed before the indictment was found, in laying the time as "on or about" a certain date, the words quoted should be regarded as surplusage. *State v. Hoover*, 31 Ark. 677; *Hampton v. State*, 8 Ind. 336; *Hardebeck v. State*, 10 Ind. 459; *State v. McCarthy*, 44 La. Ann. 323.

**In a Complaint** where time is not of the essence of the offense it may be charged in the complaint as "on or about." *Brown v. State*, 16 Neb. 659; *Rawson v. State*, 19 Conn. 294.

6. *U. S. v. Crittenden*, Hempst. (U.



**6. The Christian Era.**—When the year in which an offense is committed is stated, it is not necessary to the validity of the indictment or information that the era, as "in the year of our Lord," should be added thereto, because the Christian era will be understood from the mere statement of the year;<sup>1</sup> although it is said that the usual and approved practice has been to insert such words.<sup>2</sup>

**7. Night-time.**—The time when the offense was committed also becomes material in those cases where the criminality of the act depends upon its consummation in the night-time, though the precise hour is not generally important.<sup>3</sup>

**8. Continuando—General Rule.**—When the alleged offense may have continuance, the time may be laid with a *continuando*, that is, it may be laid to have been on a single day certain and also on divers other days without charging more than one offense,<sup>4</sup>

S.) 61; *Mau-zau-mau-ne-kah v. U. S.*, 1 Pin. (Wis.) 124; *Territory v. Armijo*, 7 N. Mex. 571.

*In a Complaint.*—See *State v. O'Keefe*, 41 Vt. 694, holding that some day certain must be stated, though the exact day laid need not be proved.

1. *Hall v. State*, 3 Ga. 18; *Engleman v. State*, 2 Ind. 91; *State v. Bartlett*, 47 Me. 388; *Smith v. State*, 58 Miss. 871; *State v. Lane*, 4 Ired. L. (N. Car.) 434; *State v. Gilbert*, 13 Vt. 647. *Contra*, *Whitesides v. People*, 1 Ill. 21.

*In a Complaint.*—*Com. v. Doran*, 14 Gray (Mass.) 38; *Com. v. Sullivan*, 14 Gray (Mass.) 97; *State v. Clark*, 44 Vt. 636.

**The Reason of the Old Rule.**—The former necessity of designating the era rested upon the fact that two periods were in vogue in computing time, namely, the reign of the king and the Christian era, and unless the one or the other were designated the time would be uncertain; but in this country no such reason exists, and, therefore, the rule does not obtain. *Com. v. Doran*, 14 Gray (Mass.) 38. In *State v. Lane*, 4 Ired. L. (N. Car.) 434, the decision is based upon a statute, and the court laments what it terms a needless departure from ancient form without recognizing that the reason for the ancient rule did not exist in this country. In *Com. v. McLoon*, 5 Gray (Mass.) 91, it was held that an allegation that the offense was committed "on the fifteenth of July, 1855," was defective because it did not prefix the letters "A. D." before the figures indicating the year; and while this case is men-

tioned in *Com. v. Doran*, 14 Gray (Mass.) 38, above cited, the correctness thereof is not questioned further than might be implied from the decision itself in the last-mentioned case, which is directly opposed to the decision in the former.

2. *Com. v. Doran*, 14 Gray (Mass.) 38.

3. See article BURGLARY, vol. 3, p. 736.

**Sale of Cotton Seed at Night.**—Under a statute prohibiting the sale of seed cotton "between the hours of sundown and sunrise of any day," an indictment which charges the act to have been done "in the night-time" is sufficient as designating the time contemplated by the legislature in the use of the words "between the hours of sundown and sunrise." *State v. Padgett*, 18 S. Car. 321.

4. *Arkansas.*—*State v. Lemay*, 13 Ark. 405.

*California.*—*People v. Otto*, 70 Cal. 523.

*Connecticut.*—*State v. Bosworth*, 54 Conn. 2.

*Iowa.*—Our House No. 2 *v. State*, 4 Greene (Iowa) 172.

*Maine.*—*State v. Cofren*, 48 Me. 364; *State v. Auburn*, 86 Me. 276.

*Massachusetts.*—*Com. v. Woods*, 9 Gray (Mass.) 131; *Com. v. Mitchell*, 115 Mass. 141; *Wells v. Com.*, 12 Gray (Mass.) 327; *Com. v. Snow*, 14 Gray (Mass.) 20; *Com. v. Langley*, 14 Gray (Mass.) 21; *Com. v. Chisholm*, 103 Mass. 213; *Com. v. Dunn*, 111 Mass. 426; *Com. v. Wood*, 4 Gray (Mass.) 11; *Com. v. McKenney*, 14 Gray (Mass.) 1; *Com. v. Bradley*, 2 Cush. (Mass.) 553.

but those other days must be alleged with the same legal exactness which is required in alleging a single day,<sup>1</sup> unless the allegation of the other days can be wholly disregarded and rejected as surplusage.<sup>2</sup> But the charge may be good though not laid with a *continuando*, as when any one act may be sufficient to determine the criminal liability.<sup>3</sup>

**In Complaints.** — The same general rules with regard to laying time with a *continuando* are applied to complaints before magistrates.<sup>4</sup>

1. *Wells v. Com.*, 12 Gray (Mass.) 327, where the court said: "Such exactness is obtained by alleging that the offense was committed on a day certain and on divers other days between two days certain."

2. *Wells v. Com.*, 12 Gray (Mass.) 327.

**Surplusage.** — Where an indictment charges an offense to have been committed on a certain day and "on divers other days and times, before and after that day," the latter words may be rejected as surplusage. *Cook v. State*, 11 Ga. 53.

An indictment charging that on a certain day (April 30, 1844) and "on divers other days and times between the 1st day of January last and the 1st Monday of May," etc., is not good for *continuando*, but the words quoted may be rejected as surplusage, as the indictment still charges one offense on a certain day. *Com. v. Bryden*, 9 Met. (Mass.) 137; *Cook v. State*, 11 Ga. 53.

**Reference to Time Subsequent to Indictment.** — Where the *continuando* referred to time subsequent to the finding of the indictment it was rejected as surplusage. *People v. Gilkinson*, 4 Park. Cr. Rep. (Dutchess Oyer & T. Ct.) 26.

**Where Only One Act Can Be Proven** it has been held that the *continuando* will render the charge bad for duplicity. *State v. Pischel*, 16 Neb. 490; *People v. Hamilton*, 101 Mich. 87; *Barnhouse v. State*, 31 Ohio St. 39; *State v. Temple*, 38 Vt. 37. But on the other hand it is held that the *continuando* may be rejected as surplusage. *State v. Kobe*, 26 Minn. 149; *State v. Briggs*, 68 Iowa 416; *People v. Adams*, 17 Wend. (N. Y.) 475.

**Inconsistent Reference.** — Where the time is laid for a continuing offense with a *continuando*, the addition of the words "and on said third day of September," referring to the last day in the *continuando*, add nothing to the previous charge, and the offense is properly charged. *Com. v. Sheehan*, 143 Mass. 469.

3. *State v. Ah Sam*, 14 Oregon 347; *State v. Ransell*, 41 Conn. 441.

**Thus the Charge of Adultery** may be sufficient, though not laid with a *continuando*, *State v. Glaze*, 9 Ala. 283; and living together in adultery may be consummated at one time when the intention is within the statute. *Hall v. State*, 53 Ala. 463.

In *Texas* it was held that adultery could be charged on one day, though one act was not sufficient under the statute, where the day laid was before the filing of the information. *Swancoat v. State*, 4 Tex. App. 118.

4. **Where an Offense Is Continuing** in its nature it may be charged with a *continuando*, and when such form is used only one offense is charged. *Com. v. Sheehan*, 143 Mass. 469; *State v. Bosworth*, 54 Conn. 2.

**Repetition of Place.** — The insertion of the allegation of place between the first day named and the time limited in the *continuando*, though not commendable in point of style, does not change the sense, or require any repetition of the words "then and there." *Com. v. Keyon*, 1 Allen (Mass.) 6.

**Reference to Date of Complaint.** — In *Com. v. Frates*, 16 Gray (Mass.) 236, the time was held to be sufficiently alleged, being charged on a certain day, and thereafter from that day to the day of receiving the complaint, the complaint bearing no date except the certificate of the justice of the peace, after the signature to the complaint.

**Offense Not Continuing.** — Where a complaint for a continuing offense charged only such a violation as could have been committed on one day, it was held to be bad for uncertainty. *Com. v. Adams*, 1 Gray (Mass.) 481.

**Future Date.** — A *continuando* must not refer to a date in the future, but if it appears from the date of the signature and oath to the complaint, and an inspection of the copy of the warrant, etc., that the future date is a clerical error, a new trial will be ordered for the

**9. Words of Reference** — “Then and There.” — When time is once mentioned in any part of the information or indictment, it may be subsequently laid as the time of the commission of the offense by words of reference, as “then and there,” with the same effect as if it were actually repeated,<sup>1</sup> and likewise where the time is laid in one count, it may be laid in subsequent counts by such words of reference;<sup>2</sup> but such a reference is not sufficient where more than one time is laid in the part of the pleading referred to by the words, because it would not appear to which time such words applied.<sup>3</sup>

**10. Expression of Date in Figures.** — Although at common law it was necessary that the date should be written out in full, it has generally been held in this country that the date may be properly expressed in figures.<sup>4</sup> A few cases, however, are found

purpose of allowing an amendment of the record. *Com. v. LeClair*, 147 Mass. 539.

1. *State v. Schultz*, 57 Ind. 19; *State v. Paine*, 1 Ind. 163; *State v. Kennedy*, 8 Rob. (La.) 591; *Com. v. McKenney*, 14 Gray (Mass.) 2; *Com. v. Butterick*, 100 Mass. 12; *Com. v. Robertson*, 162 Mass. 90; *State v. Cotton*, 24 N. H. 143; *State v. Haney*, 67 N. Car. 468; *Jacobs v. Com.*, 5 S. & R. (Pa.) 315; *Blair v. State*, 32 Tex. 474; *State v. Slack*, 30 Tex. 356; *State v. Ferry*, 61 Vt. 624.

“Then and There” — **Necessity of Repetition.** — When the day of the commission of the offense is charged it is unnecessary to repeat it by the words “then and there” in order sufficiently to charge the time. *Thomas v. State*, 71 Ga. 47; *State v. Doyle*, 15 R. I. 527; *State v. Capers*, 61 La. Ann. 268; *State v. Willis*, 78 Me. 70; *Turpin v. State*, 80 Ind. 149. And this holds good in regard to complaints. *Gallagher v. State*, 26 Wis. 423; *State v. Bishop*, 7 Conn. 184.

**Preceding Conclusion.** — If the words “then and there” precede every material allegation it is sufficient, though they may not precede the conclusion drawn from the facts stated. *State v. Johnson*, Walk. (Miss.) 392; *State v. Wilson*, 11 La. Ann. 163.

2. *State v. Hertzog*, 41 La. Ann. 775; *Fisk v. State*, 9 Neb. 64; *Evans v. State*, 24 Ohio St. 209.

*In a Complaint.* — *State v. Allphin*, 2 Kan. App. 28.

**When One Fact Is Laid with Time** a subsequent reference by the words “then and there” is sufficient. *State v. Hurley*, 71 Me. 354.

3. *State v. Hayes*, 24 Mo. 360; *Jane v. State*, 3 Mo. 61; *Com. v. Moore*, 11 Cush. (Mass.) 602; *State v. Day*, 74 Me. 220.

4. *State v. Raiford*, 7 Port. (Ala.) 101; *Hampton v. State*, 8 Ind. 336; *Hizer v. State*, 12 Ind. 330; *State v. Seamons*, 1 Greene (Iowa) 418; *State v. Egan*, 10 La. Ann. 698; *State v. Haddock*, 2 Hawks (N. Car.) 461; *State v. Dickens*, 1 Hayw. (N. Car.) 406; *State v. Hodges*, 3 Vt. 481; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Cady v. Com.*, 10 Gratt. (Va.) 776. And the following cases of complaints: *Rawson v. State*, 19 Conn. 296; *Com. v. Smith*, 153 Mass. 97; *State v. Reed*, 35 Me. 489.

Some of the foregoing cases are based upon statutes providing that an intelligible statement is all that is required. *State v. Haddock*, 2 Hawks (N. Car.) 461; *State v. Dickens*, 1 Hayw. (N. Car.) 406. Or that an imperfect or wrong statement of time, when not an ingredient of the offense, need not be stated. *State v. Egan*, 10 La. Ann. 698.

**Omission of the Word “Year.”** — In stating the time of the commission of the offense the omission of the word “year” after the day of the month and before the number of the year can have no effect on the indictment, under a statute providing that all that is necessary is that the offense must be set forth in ordinary and concise language. *State v. Munch*, 22 Minn. 70. Though at common law the rule was different. *State v. Lane*, 4 Ired. L. (N. Car.) 434.

**Abbreviated Statement.** — “First March,” instead of “the first day of March,” is sufficient. *Simmons v. Com.*, 1 Rawle (Pa.) 142.

adhering to the old rule,<sup>1</sup> and some of the cases which hold that it is sufficient to designate the dates in figures recommend the former practice as the safer one to be followed.<sup>2</sup>

**11. Variance Between Information and Complaint.** — The allegation of time in an information should conform to that laid in the affidavit or complaint upon which it is based.<sup>3</sup> But where the complaint is for the purpose of a preliminary hearing and the information is based upon the complaint and examination, it is held proper to lay the time in the information as it appears from the examination, without regard to that stated in the complaint.<sup>4</sup>

**XIV. LAYING VENUE — 1. General Sufficiency.** — The venue of the offense is necessary in order that it may appear that the court has jurisdiction,<sup>5</sup> and also to identify the offense and pro-

**Bad Spelling in Date.** — "One thousand eight hundred and fifty-two" is not so unintelligible as to render an indictment bad. "Fifty-two" will be construed to mean "fifty-two." *State v. Hedge*, 6 Ind. 330.

So, where the word "twelfth," indicating the day of the month, was written "twelfth," the indictment is good, under the act which makes an indictment sufficient which contains "the charge expressed in a plain, intelligible, and explicit manner." *State v. Shepherd*, 8 Ired. L. (N. Car.) 197.

So, where the month is misspelled, as where January is spelled "Janury," or February is spelled "Tebuary," the indictment is sufficient. *Hutto v. State*, 7 Tex. App. 45; *Witten v. State*, 4 Tex. App. 70.

**But Where the Statute of Limitations** is concerned, an information charging the date of the offense must charge such a date as to make it appear that that the offense is not barred thereby, and an information which charged the offense to have been committed on August 18, A. D. "one thousand eight and seventy-five" was held to charge no date. *Blake v. State*, 3 Tex. App. 150.

1. *Berrian v. State*, 23 N. J. L. 9; *Finch v. State*, 6 Blackf. (Ind.) 533; *State v. Voshall*, 4 Ind. 589. But these decisions in *Indiana* were superseded by later cases in the same state cited in the preceding note.

2. *State v. Seamons*, 1 Greene (Iowa) 418; *State v. Raiford*, 7 Port. (Ala.) 101; *State v. Reed*, 35 Me. 489.

3. **Effect of Variance.** — In *Indiana* a variance between the time laid in the information and that laid in the complaint is not a ground for arrest of

judgment. *State v. Record*, 16 Ind. 111; *Trout v. State*, 107 Ind. 578; *Rubush v. State*, 112 Ind. 107. Though it is good matter for quashing the information on motion. *Dyer v. State*, 85 Ind. 525.

In *Texas* the variance is fatal. *Swink v. State*, 7 Tex. App. 73; *Hoerr v. State*, 4 Tex. App. 75; *Hawthorne v. State*, 6 Tex. App. 563; *Williamson v. State*, 5 Tex. App. 485; *Little v. State*, (Tex. App. 1892) 19 S. W. Rep. 332; *Huff v. State*, 23 Tex. App. 291; *Baumgartner v. State*, 23 Tex. App. 335; *Collins v. State*, 5 Tex. App. 37. In *Shelton v. State*, 27 Tex. App. 443, a view contrary to that in the foregoing cases seems to have prevailed, but with no reason assigned.

4. *People v. Annis*, 13 Mich. 511; *People v. Whitney*, 105 Mich. 622; *People v. Flock*, 100 Mich. 512; *People v. Russell*, (Mich. 1896) 67 N. W. Rep. 1099; *People v. Cox*, (Mich. 1895) 65 N. W. Rep. 283.

5. *Cook v. State*, 20 Fla. 802; *People v. Higgins*, 15 Ill. 110; *State v. Egan*, 10 La. Ann. 698; *State v. Conley*, 39 Me. 78; *State v. Jackson*, 39 Me. 291; *Knight v. State*, 54 Ohio St. 365; *Searcy v. State*, 4 Tex. 451; *State v. Johnson*, 32 Tex. 96; *Collins v. State*, 6 Tex. App. 648; *State v. La Bore*, 26 Vt. 765; *State v. Bacon*, 7 Vt. 222; *State v. Hobbs*, 37 W. Va. 812; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78.

**Notwithstanding the Statutory Form Omits the Venue**, where another section requires a statement of all the essential facts this will control and require a statement of the venue. *State v. Chamberlain*, 6 Nev. 257.

In an *Iowa* case, upon objection that the indictment did not charge the

tect the accused from a subsequent prosecution therefor;<sup>1</sup> but it is usually sufficient if the county or subdivision embraced in the

offense to have been committed in the state, the court used this language: "A comparison of the indictment in question with section 4651 of the Revision shows it to be exactly like the form there prescribed. This should be enough to establish its sufficiency without further inquiry." But the name of the state and county appeared in the caption of this indictment, and the offense was alleged to have been committed "in the county aforesaid." *State v. Winstrand*, 37 Iowa 111.

**Omission in Information Founded on Complaint.** — The fact that the venue is set out in a complaint upon which an information is founded will not aid the omission of the venue in the information itself. *Smith v. State*, 25 Tex. App. 454; *Orr v. State*, 25 Tex. App. 453. But in these cases it was held that as the complaint was sufficient another information could be based upon it, and the prosecution would not be dismissed, but the cause would be remanded in order that a new information might be presented, should the county attorney see proper to do so.

**Variance between Information and Complaint.** — It is also held that even though the name is correctly laid in the information, it must be so laid in the complaint upon which the information is based or the information will not be good. *Smith v. State*, 3 Tex. App. 549; *Rice v. State*, 15 Ind. App. 427; *State v. Beebe*, 83 Ind. 171.

Where the affidavit sets out in the commencement thereof the state and county, and in charging the offense refers to the state and county in the commencement, the venue is sufficiently laid. *Strickland v. State*, 7 Tex. App. 37, *distinguishing* *Smith v. State*, 3 Tex. App. 549, in that while the name of the county was set out in the commencement of the affidavit in the latter case, it did not state the offense to have been committed in that county by reference to the commencement or otherwise.

**Sufficiency of Venue.** — An indictment against the clerk of a court for failing to turn over to his successor in office moneys received by him as such clerk was held to state sufficiently the venue of the offense when it recited that the defendant was at certain dates and times the clerk of a particular court in a particular county, though in charg-

ing the offense it was not alleged to have been committed in that particular county. *State v. Assman*, 46 S. Car. 554. The same principle was applied in *People v. Rogerson*, 4 Utah 231; *Stahl v. State*, 11 Ohio Cir. Ct. Rep. 23.

But in *Knight v. State*, 54 Ohio St. 365, an indictment against county commissioners, after alleging that the defendants were at a certain date the commissioners of a certain county, and that as such commissioners they had declared their intention of erecting a new court house in and for that county, proceeded as follows: "Thereupon, on said 3d day of May, A. D. 1893, said Jacob Stahl, Samuel Knight, and James Gibson, as such county commissioners of said county, as aforesaid, did unlawfully, wilfully, knowingly, and corruptly make and enter into a certain contract," etc.; and it was held that if it was conceded that the commissioners could not legally make such a contract outside of the county in which they were commissioners, yet it would not follow as a legal conclusion that the transaction did not occur outside of the county, and a demurrer to the indictment was sustained.

So also in *New York*, an indictment for grand larceny against a public trustee was held to be bad for not laying the venue, although it was charged by way of inducement that on a day named, at the city of Rochester, in the county of Monroe, the defendant was acting as trustee, etc. *People v. Horton*, 62 Hun (N. Y.) 610. See also *infra*, XIV. 2. *Venue Laid by Words of Reference*.

1. *Seifried v. Com.*, 101 Pa. St. 203; *Knight v. State*, 54 Ohio St. 365; *State v. Hanson*, 39 Me. 340, which was an indictment under a statute prohibiting the shooting at a mark along or across a public highway, and it was held that the particular highway should be designated.

**Allegation of Jurisdiction in Terms.** — It is not necessary to state in express terms that an offense was committed within the jurisdiction of the court, but it is sufficient if the offense is charged to have been committed in the proper county, the jurisdiction of the court being general; and a charge that the offense was committed in the county is equivalent to an express averment that

general jurisdiction of the court is set out, when the place is not a material part of the description of the offense,<sup>1</sup> because in

it was committed within the jurisdiction of the court. *Drummond v. Republic*, 2 Tex. 157. In fact, it has been held that to allege merely that the offense was committed within the jurisdiction of the court is a mere conclusion of law, and does not sufficiently lay the venue. *Early v. Com.*, 93 Va. 765.

1. *State v. Smith*, 5 Harr. (Del.) 490; *Cook v. State*, 20 Fla. 802; *Wingard v. State*, 13 Ga. 396; *Zumhoff v. State*, 4 Greene (Iowa) 526; *State v. Roberts*, 26 Me. 263; *State v. Cotton*, 24 N. H. 143; *State v. Glasgow*, Conf. Rep. (N. Car.) 38; *Heikes v. Com.*, 26 Pa. St. 513; *Drummond v. Republic*, 2 Tex. 157; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78.

**Certainty Compared with That in Deed.** — An indictment which alleged the place to be "a gore north of townships numbered two and three, in range six, in the county of Franklin," was held to be sufficient, the court saying: "If these respondents should receive a deed of conveyance to them of real estate, with this description, \* \* \* they would undoubtedly look for their land within Franklin county, and expect to find it in that county, and next north of said townships. They would not look for it in any other county or country. The same language in an indictment sufficiently alleges a place in Franklin county." *State v. Libby*, 78 Me. 546.

**Common-law Rule Distinguished.** — In *Com. v. Springfield*, 7 Mass. 11, Parsons, C. J., in distinguishing the former *English* practice, said: "The objection by the common law of England might prevail, as in the case of *Rex v. Burridge*, 3 P. Wms. 496, because the judges cannot presume that the whole of a township or parish lies in the same county. In England the limits of the several counties and parishes are not ascertained by public acts of parliament, the records of which are remaining; but they are determined by ancient usage, of which the judges cannot judicially take notice. \* \* \* Our county limits, and also the boundaries of our several towns, are prescribed by public statutes, of which we are bound judicially to take notice. When, from these limits or boundaries, it appears that every part of any town

is in the same county, of that fact we can judicially take notice."

In *Louisiana* an indictment did not show that the offense was committed within the jurisdiction of a certain District Court for a certain parish, but charged that the offense was committed at that parish, and the indictment having been found at a session of the District Court therein by a grand jury impaneled to inquire for the body of that parish alone, it was held that it sufficiently appeared that the offense was committed within the jurisdiction of the court of that district. *State v. Gomer*, 6 La. Ann. 311.

**Designation of District.** — In *Utah* an indictment charged that the offense was committed "in the said district, territory aforesaid, and within the jurisdiction of this court; to wit, in the county of Weber and territory of Utah;" and it was held that the words "in the county of Weber" were not descriptive of the offense, but were pleaded as venue; that the naming of the district was sufficient venue, that it was not necessary to prove that the offense was committed in any particular county of the district, and that the addition of the allegation of the county was surplusage. *U. S. v. Kershaw*, 5 Utah 619; *U. S. v. Wilson*, 1 Baldw. (U. S.) 78.

**Different Venue in Separate Counts.** — Where one count charges the offense to have been committed in one county and another count charges it to have been committed in a different county, the counts are repugnant, and the indictment will either be quashed on motion or the prosecutor will be compelled to elect upon which he will proceed. *State v. Johnson*, 5 Jones L. (N. Car.) 221.

**Sufficient Certainty for Preparation of Defense.** — Sufficient certainty has also been required in laying the venue to enable the defendant to prepare to meet the charge against him, and less certainty than would serve this purpose has been held to be insufficient. Thus, under an Act of Congress, September 19, 1890, prohibiting the depositing and placing of ballast, stone, and other articles mentioned, in any place or situation on the bank of a navigable river where the same shall be liable to be washed into said river by ordinary or

such a case it sufficiently appears that the offense was committed within the jurisdiction of the court; nor is it necessary to set out the town<sup>1</sup> or state.<sup>2</sup> In some jurisdictions it is provided by

high tides, or by storms or floods, or otherwise, when navigation may be impeded thereby, a count which charged that the defendant, in the district of West Virginia, "did wilfully and unlawfully deposit and place, and cause, suffer, and procure to be deposited and placed, certain ballast, stone, \* \* \* and other waste of divers kinds, in such a place and situation on the bank of the Little Kanawha river, which said Little Kanawha river was then and there a navigable river, \* \* \* where the same was and is liable to be washed into the said Little Kanawha river by ordinary and high tide and by storms," etc., was held to be bad. The place where the offense was committed is of the utmost importance in this offense, and under the allegation in this indictment the prosecution would be permitted to show the act done at any place within five counties from the source to the mouth of the river, and thus the defendant would be liable to surprise, whereas he was entitled to be fully advised as to the place in order that he might have an opportunity to show by witnesses who had examined the place that it was not a situation where the articles enumerated were liable to be washed into the river and navigation thereby impeded. *U. S. v. Burns*, 54 Fed. Rep. 361.

1. *Zumhoff v. State*, 4 Greene (Iowa) 529; *State v. Roberts*, 26 Me. 263; *O'Connell v. State*, 6 Minn. 279; *State v. Moore*, 24 S. Car. 155.

**Designation of Wrong Town.** — An indictment charging an assault to have been committed in one town is supported by proof that it was committed in another town in the same county, within the jurisdiction of the court. *Com. v. Heffron*, 102 Mass. 150; *Com. v. Lavery*, 101 Mass. 207; *Com. v. Creed*, 8 Gray (Mass.) 387; *Com. v. Tolliver*, 8 Gray (Mass.) 386; *People v. Waller*, 70 Mich. 238; *State v. Godfrey*, 12 Me. 361.

**Judicial Notice of County When Town Designated.** — In *Schilling v. Territory*, 2 Wash. Ter. 285, it was held that a crime having been charged to have been committed in the city of Seattle, which is a city duly incorporated under the laws of Washington Territory, the

court would take judicial notice that said city was situated in the county of King, and the indictment thus headed was sufficient in this regard. See also *People v. Breese*, 7 Cow. (N. Y.) 429; *State v. Palmer*, 4 Mo. 453.

**Change of Boundary.** — But if the boundaries of the county have been changed, and the law changing the boundaries does not show whether the town is left within the old county or is included within that part of the county which is taken off, the court will not judicially know that the town is or is not in the county. *Hite v. State*, 9 Yerg. (Tenn.) 357.

**Towns on Border Line.** — Where an indictment charged that the defendant unlawfully transported liquors "from Burnham in the county of Waldo to Clinton in the county of Kennebec," the town of Clinton being a border town, in different counties, and the charge being that the transportation was "to" and not "into" or "within" it, it was held that the venue was not sufficiently laid, as the transportation might have been to the line and not across it into the proper jurisdiction. *State v. Bushey*, 84 Me. 460; *State v. Landry*, 85 Me. 95.

So an indictment which alleged the offense to have been committed "near the town of Arizona City in said county of Yuma and territory of Arizona," was held not sufficiently to lay the venue, because the offense might have been committed on that side of the Colorado river opposite Arizona City and in the state of California. This case is certainly against the overwhelming weight of authority on the question of certainty required in laying the venue. *Territory v. Do*, 1 Arizona 508.

2. *Covy v. State*, 4 Port. (Ala.) 186; *People v. Lafuente*, 6 Cal. 202; *Malone v. State*, 14 Ind. 219; *State v. Wentworth*, 37 N. H. 196; *State v. Cook*, 38 Vt. 437.

**State in Caption Sufficient.** — Where the indictment sets out that it is preferred by the grand jurors of the state of Mississippi, etc., and that the offense was committed in "said county of Tishomingo," it sufficiently and certainly charges the commission of the offense in the state. *Smith v. State*, 58 Miss. 871. And it is said that it was

statute that venue need not be alleged in the body of the indictment, and that it is sufficient if it be shown on the trial to be within the jurisdiction of the court, the venue of the caption being taken as that of the charge.<sup>1</sup>

**2. Venue Laid by Words of Reference.** — Where the place of the commission of the offense is sufficiently set out in the formal or any preceding part of the charge, it is enough to lay it in the body thereof by appropriate words of reference;<sup>2</sup> as, for example, by the words "then and there,"<sup>3</sup> or "at the county (or place) afore-

not necessary, under the strict common-law rule where everything which the pleader should have stated and which is not expressly alleged, or by necessary implication included in what is alleged, must be presumed against him, to state the realm in which the offense was committed. *Foster v. State*, 19 Ohio St. 417.

1. *Noles v. State*, 24 Ala. 672; *Toole v. State*, 89 Ala. 131; *Wedge v. State*, 12 Md. 235; *People v. Schultz*, 85 Mich. 114; *State v. Dawson*, 90 Mo. 149; *State v. Simon*, 50 Mo. 371; *State v. DeLay*, 30 Mo. App. 357; *State v. Beauchleigh*, 92 Mo. 490; *State v. Arnold*, (Mo. 1886) 2 S. W. Rep. 269; *Wickham v. State*, 7 Coldw. (Tenn.) 525; *Williams v. State*, 3 Heisk. (Tenn.) 37.

**Presentment.** — Under section 5125 of the *Tennessee Code*, it is not necessary to allege in the indictment where the offense was committed, it being sufficient to show in the proof that the offense was committed within the jurisdiction of the county in which the indictment was preferred, and although a presentment is not embraced in the terms of the statute, there is no reason why the same rule should not be applied as in the case of indictments. *State v. Shull*, 3 Head (Tenn.) 44.

**Omission of Venue in Body Waived by failure to raise the objection by motion to quash.** See *Nichols v. People*, 40 Ill. 395.

2. *State v. Hunn*, 34 Ark. 323; *Thetstone v. State*, 32 Ark. 179; *Haase v. State*, 8 Ind. App. 488; *Hawkins v. State*, 136 Ind. 632; *State v. Alsop*, 4 Ind. 141; *State v. Slocum*, 8 Blackf. (Ind.) 315; *State v. Reid*, 20 Iowa 417; *Zumhoff v. State*, 4 Greene (Iowa) 527; *State v. Conley*, 39 Me. 78; *Com. v. Edwards*, 4 Gray (Mass.) 6; *State v. Taylor*, 7 S. Dak. 533.

**Reference in One Count to Another.** — Under a statute providing that no indictment shall be defective for want of

an allegation of time or place of any material fact, when the time and place have once been stated in the indictment, it is sufficient to lay the venue in one count by a reference to that already laid in another count. *Fisk v. State*, 9 Neb. 64. See also *Noe v. People*, 39 Ill. 96.

3. *Thomas v. State*, 71 Ga. 47; *Davidson v. State*, 135 Ind. 254; *State v. Schultz*, 57 Ind. 19; *Com. v. Butterick*, 100 Mass. 12; *State v. Bell*, 3 Ired. L. (N. Car.) 506; *State v. Cotton*, 24 N. H. 143; *State v. Shull*, 3 Head (Tenn.) 44; *Johnson v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 929; *Blair v. State*, 32 Tex. 475; *State v. S. A. L.*, 77 Wis. 467.

But where the county appeared only in the margin, and the charge was that the defendant "did with force and arms," etc., "make an assault in and upon one William Woods," etc., "and then and there did with force and arms beat," etc., it was held that the word "there" refers to the place where the assault was made, and as no place is alleged where the assault was made the word "there" can relate to no place. *Kennedy v. Com.*, 3 Bibb (Ky.) 490.

In *Ohio* it was held that a statute which provides that "no indictment shall be deemed invalid \* \* \* for want of an allegation of the time or place of any material fact, when the time and place have been once stated in the indictment," etc., does not relieve the pleader from the necessity of laying the venue altogether, but only where it has once been stated, in which case it may be laid by the words of reference "then and there." *Knight v. State*, 54 Ohio St. 365.

**Necessity of Repeating "Then and There."** — Words of reference in a count apply to every paragraph of the count. *State v. Harris*, 106 N. Car. 682.

In an indictment for a felonious assault which alleged the fact of the



said,"<sup>1</sup> or "in said county of ———." <sup>2</sup> These words, however, are used to refer to a place already particularly designated, and their use is of no advantage if the place has not been certainly indicated in some previous part of the pleading.<sup>3</sup>

defendant being armed "then and there," it was not necessary to repeat these words before the charge that he "did actually strike," etc. *Com. v. Bugbee*, 4 Gray (Mass.) 207, citing *State v. Price*, 11 N. J. L. 210, in which case Ewing, C. J., referring to these words, said: "There might have been, with the words 'then and there,' a greater deference to tautology, but not thereby a more explicit or intelligible averment."

**Preceding the Conclusion.**—If the words "then and there" precede every material allegation, they need not precede the conclusion drawn from the facts stated. *State v. Johnson*, Walk. (Miss.) 392; *State v. Wilson*, 11 La. Ann. 163.

**Former Practice.**—In *Rex v. Kilderby*, 1 Saund. 308, note 1, the editor says: "It is usual in practice to insert the name of the county in the caption, as 'the county of Suffolk,' instead of 'the county aforesaid,' and perhaps it is better to adhere to this form." But I have not been able to find any authority where this is held to be necessary. On the contrary, all the cases upon the subject agree that the word *aforesaid* is sufficient, because it refers to the county in the margin. So in the indictment itself it is held sufficient to allege the place where the offense was committed to be in the county 'aforesaid,' unless indeed another county has been mentioned before, and then, because it is uncertain to which county the word 'aforesaid' refers, it is necessary to insert the name of the county. In either case, to mention the place only, without the addition of the words 'in the county aforesaid' or 'the county of S.' is held insufficient, notwithstanding the place has been before alleged to be 'in the county.' But in civil cases it is otherwise; for it is held sufficient to name the place only in the declaration, because the place is always construed to refer to the county in the margin, although another county has been mentioned before. *Rex v. Burridge*, 3 P. Wms. 497, 2 H. H. P. C. 165, 166, 2 Hawk. P. C., c. 25, § 128; *Lenthal's Case*, Cro. Eliz. 137; *Child's Case*, Cro. Eliz. 606; *Hammond v.*

*Reg.*, Cro. Eliz. 751; *Morgan's Case*, Cro. Eliz. 101; *Elnor's Case*, Cro. Eliz. 184; *Parker v. Sadd*, 1 Sid. 345; *Ross v. Morris*, Cro. Eliz. 436; *Hall v. Walland*, Cro. Jac. 618; *Sutton v. Fenn*, 3 Wils. 340, 2 W. Bl. 847."

1. *California*. — *People v. Baker*, 100 Cal. 189.

*District of Columbia*. — U. S. v. *Schneider*, 21 D. C. 381.

*Illinois*. — *Noe v. People*, 39 Ill. 96.

*Indiana*. — *Rivers v. State*, 144 Ind. 16; *State v. Alsop*, 4 Ind. 141.

*Iowa*. — *State v. Salts*, 77 Iowa 193.

*Kentucky*. — *Armstrong v. Com.*, (Ky. 1895) 29 S. W. Rep. 342.

*Louisiana*. — *State v. Crittenden*, 38 La. Ann. 448.

*Maryland*. — *Philadelphia*, etc., R. Co. v. *State*, 20 Md. 161; *Acton v. State*, 80 Md. 547.

*Missouri*. — *McDonald v. State*, 8 Mo. 283; *State v. Ames*, 10 Mo. 744; *State v. Goode*, 24 Mo. 361.

*Pennsylvania*. — *Com. v. Williams*, 149 Pa. St. 54.

*South Dakota*. — *State v. Taylor*, 7 S. Dak. 533.

*Tennessee*. — *Sanderlin v. State*, 2 Humph. (Tenn.) 315; *Barnes v. State*, 5 Yerg. (Tenn.) 186.

*Texas*. — *Satterwhite v. State*, 6 Tex. App. 612.

2. *Malone v. State*, 14 Ind. 219; *Long v. State*, 56 Ind. 133; *Evarts v. State*, 48 Ind. 422; *State v. Beebe*, 83 Ind. 171; *State v. Wagner*, 61 Me. 178; *State v. Conley*, 39 Me. 78.

3. *Rex v. Mathews*, 5 T. R. 162.

**Two Places Previously Mentioned.**—Where two counties have been mentioned in a preceding part of the pleading, words of reference are not sufficient for the purpose of laying the venue. *Connor v. State*, 29 Fla. 455; *State v. McCracken*, 20 Mo. 411; *Jane v. State*, 3 Mo. 61.

Thus an indictment which, after the words "State of Texas, county of Fayette," and the usual commencement, charged that "James Cain, late of Travis county aforesaid," etc., "did then and there," etc., was held to be bad for repugnancy and uncertainty in stating the venue. *Cain v. State*, 18 Tex. 391. To the same effect; see

**3. Jurisdiction in Two Counties.**—At common law, when an offense was commenced in one county and consummated in another, the venue could be laid in neither, and it seems that the offender went unpunished.<sup>1</sup> And when, by statute, the jurisdiction for a certain offense is in either of two counties, the venue should be laid according to the fact.<sup>2</sup>

Com. v. Wheeler, 162 Mass. 429; Bell v. Com., 8 Gratt. (Va.) 600; Elnor's Case, Cro. Eliz. 184, cited in 1 Saund. 308, note 1.

But in *Maine* it was held that when one of the places was designated only as a place of residence, or *descriptio personæ*, the reference would be sufficient. *State v. Jackson*, 39 Me. 291.

**Where the Sense Is Plain** by making the words of reference relate to one of the places mentioned, they will be so understood. *Rex v. Wright*, 1 Ad. & El. 434, 28 E. C. L. 117, *distinguishing* *Ogle's Case*, 2 Hal. P. C. 180, in that the sense in the latter case was ambiguous, as the assault therein involved could have been committed as well at one place mentioned as at the other.

In *Alabama* a case arose in which the county was set forth in the caption of the indictment as "Butler county," following which was a recital that "the grand jurors," etc., "for the body of the county of *Buter*," etc., and in the body of the indictment the words used to indicate the county in which the offense was committed were "in the county aforesaid." The court held that these words referred to the statement of the county in the caption, as there was no such county as "Buter" in the state, and that such statement of the venue was sufficient. *Reeves v. State*, 20 Ala. 35.

**"Count Aforesaid."**—Upon objection that the indictment did not charge the offense to have been committed within the county, it appeared that the indictment was headed "Cumberland county," and charged that the defendant committed the offense in the "count aforesaid." It was held that as there was no "count aforesaid" to which such an expression could refer it was palpable that the expression referred to the county aforesaid, and that the defendant could not have been misled. *State v. Evans*, 69 N. Car. 42.

**Place as Part of Official Description.**—It has been held that the statement of the county as a part of the description of the office held by the defendant is

not a sufficient statement of place to give effect to a subsequent laying of venue by the use of the word "there." *State v. Brown*, 12 Minn. 490.

1. *Watt v. People*, 126 Ill. 9; *Searcy v. State*, 4 Tex. 451.

**2. Application of the Rule — Distinction in Particular Cases.**—Under a statute which provided that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county," the information or indictment for burglary in the county to which the property is taken should charge the offense to have been committed in the county in which it was actually committed. *People v. Scott*, 74 Cal. 95, *citing and approving* *Haskins v. People*, 16 N. Y. 344, where *Denio*, C. J., distinguishing cases charging simple larceny, said: "The difference between the two cases is this: burglaries may be tried out of their proper counties in certain special cases, that is, where the goods burglariously taken are carried into another county by the offenders; but this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must, therefore, be set out which brings the case within the statute; but in the case of an indictment for a simple larceny, found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and hence there is no occasion for a statement in the pleading of what occurred in the other county."

**Insufficiency Under Particular Statute.**

—In *Florida* an information for obtaining property under false pretenses, which by reason of its uncertainty does not make it appear that the property was obtained in the county where the pretenses were made, nor elsewhere in the state, does not show that a court of the county where the pretenses are

**4. Border Counties.** — Statutes sometimes make provisions for the punishment of offenses committed on or within a certain distance of the boundary line between two counties, conferring jurisdiction upon either county, and it has been held that the venue in such a case need not be laid in the county where the indictment is found,<sup>1</sup> and, on the other hand, that it may be so charged, notwithstanding it may have been committed in the other county, but within the prescribed distance from the boundary line.<sup>2</sup>

alleged to have been made has jurisdiction of the offense; and this even under a statute (McClell. Dig., § 4, p. 446), which provides that in all cases where an indictable offense shall be perpetrated in Florida, and the same shall commence in one county and terminate in another, the person offending shall be liable to indictment in either county. *Connor v. State*, 29 Fla. 455.

1. It is sufficient if the indictment allege the truth of the fact, where the offense was committed in the other county, but within five hundred yards of the boundary. *People v. Davis*, 56 N. Y. 99. See also *People v. Davis*, 45 Barb. (N. Y.) 495.

2. *Com. v. Gillon*, 2 Allen (Mass.) 502; *State v. Pugsley*, 75 Iowa 742, citing *State v. Robinson*, 14 Minn. 447, where the indictment found in Carver county and charging the offense to have been committed "in the county of Scott, in the state of Minnesota, within one hundred rods of the dividing line between the said county of Scott and county of Carver," was held to be sufficient.

**Uncertainty of Boundary.** — Under a statute which provided that "when any offense may be committed on the boundary of two counties," etc., "the indictment may be found, and trial and conviction thereon had, in either of such counties," and further provided that "if it is uncertain where the boundary is, the indictment may be found," etc., "in either county," it was held, in a case where the boundary line between two counties had been surveyed and marked, and the state failed to prove in which county the offense was committed, that a new trial would not be granted to the state, as no question with regard to the uncertainty of the boundary was presented under the provision of the statute. *State v. Rhoda*, 23 Ark. 157.

**Offense Committed on Steamboat.** — In *California*, under a statute which pro-

vided that "when an offense is committed within this state, on board of a vessel navigating a river, bay, or slough, or lying therein, in the prosecution of her voyage, the jurisdiction shall be in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate," an assault was alleged to have been committed in the county of San Francisco, and on the trial it was shown that the assault was committed while the steamer was lying at her berth in Sacramento or on her passage to San Francisco. The court held that the extra-territorial jurisdiction conferred by the above statute was special in its character, and in derogation of the common-law rule upon this subject, and that whenever it was invoked the facts and circumstances should be set out fully in the indictment, because if such allegations could be dispensed with the defendant might be indicted, and tried, and convicted in every county through which the vessel might pass in making her voyage, and the judgment was reversed on account of the insufficiency of this indictment. *People v. Dougherty*, 7 Cal. 398. But in *Minnesota*, under a statute almost identical with that above quoted, it was held that an indictment could properly lay the venue of the offense in the county wherein it was found, for an offense committed on any part of the voyage of the vessel, if the vessel pass through that county on her voyage. *State v. Timmens*, 4 Minn. 325.

**In the United States Court,** under a statute which provides that "every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with in-

**5. Newly Organized Counties.** — When an offense was committed in that part of a county which has since been created into, or embraced in, a new county, the venue may be laid in the new county.<sup>1</sup>

**6. Counties Annexed for Judicial Purposes.** — Where one county is annexed to another for judicial purposes, the venue must be truly laid.<sup>2</sup>

tent to perpetrate any felony, commits an assault on another, shall be punished," etc., it was held that an indictment must state the facts which show that the offense was committed outside of the jurisdiction of any state of the Union; that an allegation that the offense was committed "in the harbor of Guantanamo, in the island of Cuba," is not sufficient, because there may be an island called Cuba within the jurisdiction of some of the United States. *U. S. v. Anderson*, 17 Blatchf. (U. S.) 239, citing *U. S. v. Jackalow*, 1 Black. (U. S.) 484.

**Offense on Railroad Train.** — In *Illinois*, under a statute providing that "where any offense is committed in or upon any railroad car passing over any railroad in this state, or on any water craft navigating any of the waters within this state, and it cannot readily be determined in what county the offense was committed, the offense may be charged to have been committed and the offender tried in any of the counties through or along or into which such railroad car or water craft may pass or come, or can reasonably be determined to have been, on or near the day when the offense was committed," it was held proper to charge the offense which was committed on a railroad train to have been committed in the county where the indictment was found, though it was uncertain whether it was done in that county or another through which the train passed. *Watt v. People*, 126 Ill. 15.

1. *McElroy v. State*, 13 Ark. 709; *State v. Donaldson*, 3 Heisk. (Tenn.) 52.

**Naming the Town as of the New County,** the offense having been committed before the organization of the new county, is sufficient. *State v. Jackson*, 39 Me. 291.

**In Georgia** laying the venue in that part of the old county (by name) which is now the new county (by name) was held sufficient. But it does not appear that it would not have been sufficient

if the allegation had been that the offense was committed in the new county (by name). *Jordan v. State*, 22 Ga. 555.

In *New Jersey* it was held that the offense should not be alleged to have been committed in the new county where it was committed before the formation of the new county, because at the time mentioned there was no such place, as the place named as the new county, *State v. Jones*, 8 N. J. L. 307; although the offense is indictable in the new county, *State v. Jones*, 9 N. J. L. 364.

2. Thus an indictment for murder charged the offense to have been committed in the county of Webb. The evidence showed that the offense was committed in another county, but one which was attached to Webb county for judicial purposes, and it was held that although the case was properly triable in Webb county, the offense should have been alleged as committed in the county in which it was actually committed, because the attaching of one county to another for judicial purposes is not intended to and does not destroy the character of the former as a separate and independent subdivision of the state. *Chivarrio v. State*, 15 Tex. App. 334; *Miles v. State*, 23 Tex. App. 413.

**New County Annexed to Original.** — In *North Carolina*, under an act whereby a part of the county of Burke and a part of the county of Rutherford were made into a new county by the name of McDowell county, and under a supplemental act whereby jurisdiction of criminal offenses committed in that part of the new county which was taken from Burke county was given to the Superior Court of Burke county, it was held that an indictment for an offense committed in the new county must truly lay the venue, and that it could not be supported by evidence that the offense was committed in such new county if the allegation in the indictment was that it had been com-

**7. In Complaints.** — The rules applied to indictments and informations with regard to laying the venue are substantially applied to complaints. The venue of the offense must be charged so that it will appear to have been committed within the jurisdiction of the court,<sup>1</sup> and it is sufficiently laid if this is shown.<sup>2</sup> Where the offense is local in its nature the allegation of the city or town where it was committed must be supported by proof,<sup>3</sup> and the allegations of venue must be more particular where the jurisdiction is confined to certain territorial limits.<sup>4</sup>

**XV. DESCRIPTION OF PLACE AS A MATERIAL INGREDIENT.** — If the criminal character of an act depends upon the locality in which it is committed the allegation of place becomes material,

mitted in Burke county. In other words, notwithstanding the trial is to be had in one county, the venue must be laid as of the county in which the offense was actually committed. *State v. Fish*, 4 Ired. L. (N. Car.) 220.

**Different Venues in Separate Counts.** — But where a new county is established out of a part of an old one, and it is provided that offenses committed in that part of the old county which constitutes the new shall be tried in the old county, an indictment is not objectionable which charges the offense in both counties in separate counts. *State v. Johnson*, 5 Jones L. (N. Car.) 221.

**Construction of a Particular Statute.** — In *Holmes v. State*, 20 Ark. 168, it was held that an act declaring that "all those citizens living on the east fork of the Illinois bayou, in the county of Van Buren, are declared to be citizens of the county of Pope, with the rights and privileges thereof," did not purport to change the line between the counties of Van Buren and Pope; therefore the venue of an offense committed in either one of these counties must be laid truly, and not as if the statute had the effect of transferring the territory of one county to the other.

1. *State v. Hinkle*, 27 Kan. 308; *Com. v. Barnard*, 6 Gray (Mass.) 488; *Thayer v. Com.*, 12 Met. (Mass.) 9; *People v. Gregory*, 30 Mich. 371; *Com. v. Phelps*, 170 Pa. St. 430.

**Residence of Defendant.** — Where the offense charged is within the jurisdiction of the court, the want of allegation of the defendant's residence is immaterial. *Com. v. Taylor*, 113 Mass. 1.

**2. Omission of County.** — If the name of the town is stated it will be sufficient. *State v. Powers*, 25 Conn. 48;

*People v. Telford*, 56 Mich. 542; *Com. v. Carroll*, 145 Mass. 403.

**Border Counties.** — In *Massachusetts* a complaint before a police court for an offense committed within one hundred rods of the dividing line between two counties may be alleged to have been committed within the county in which the offense is prosecuted. *Com. v. Gillon*, 2 Allen (Mass.) 502.

**"Then and There" Need Not Be Repeated** after the venue has once been laid. *Gallagher v. State*, 26 Wis. 423. To the same effect see also *Com. v. Cummings*, 6 Gray (Mass.) 487; *State v. Lake*, 16 R. I. 511.

**Venue Laid by Words of Reference.** — Where the place has once been definitely stated it may be laid as the venue of the offense by the proper words of reference. *State v. Baker*, 50 Me. 45; *State v. Bell*, 26 Minn. 388, wherein the laying of the venue "at the city of Minneapolis, in said county," was held to refer to the county stated in the caption of the complaint, and was sufficient.

3. *Com. v. Bacon*, 108 Mass. 26.

4. Thus where the jurisdiction of a municipal court does not extend over the whole city, it is necessary to lay the venue more particularly than would otherwise be the case, but even in this case the established formula "within the judicial district of said court," following the allegations of the city, county, and state, is sufficient. *Com. v. Clancy*, 154 Mass. 128; *Com. v. Hoar*, 121 Mass. 375. See also *Burnett v. State*, 72 Miss. 994, wherein it was held that the jurisdiction of a mayor, *ex officio* justice of the peace, being restricted to the corporate limits of the town, a venue in an affidavit before him laid as of the district in which the town is situated is imperfect, but

and does not then merely determine the venue, but furnishes an essential feature in the description of the offense and must be accurately laid,<sup>1</sup> and matter of local description must be proved.<sup>2</sup> But the sufficiency of the description of such place depends upon the relation of the place to the particular offense with which it is connected.<sup>3</sup>

**XVI. SURPLUSAGE AND REPUGNANCY** — **Surplusage.** — Consistently with the maxim *utile per inutile non vitiatur*, an allegation which may be wholly stricken out and still leave the count a perfect one may be rejected as surplusage if it is not descriptive of the offense.<sup>4</sup> But as a general rule no allegation, even though it be

that such an objection must be made before the jury is impaneled.

1. *State v. Turnbull*, 78 Me. 392; *State v. Cotton*, 24 N. H. 143; *State v. Shaw*, 35 N. H. 221; *State v. McClure*, 13 Tex. 23.

Thus an indictment for an affray must charge that the fighting occurred in a public place, and this charge must not be left to inference or to proof. A charge that the affray took place in a certain town is not sufficient. *State v. Heflin*, 8 Humph. (Tenn.) 84. See article AFFRAY, vol. I, p. 382.

**A Variance** between allegation and proof when place is of material description is fatal. *State v. Cotton*, 24 N. H. 143; *Com. v. Heffron*, 102 Mass. 150; *Com. v. Wellington*, 7 Allen (Mass.) 302; *People v. Slater*, 5 Hill (N. Y.) 401; *State v. Crogan*, 8 Iowa 523.

2. *Wertz v. State*, 42 Ind. 161; *Ball v. State*, 26 Ind. 155; *State v. Crogan*, 8 Iowa 523.

3. **Gaming on Premises.** — Thus an indictment for gaming on one's premises is sufficient when it charges the commission of the offense in his "house." *Covy v. State*, 4 Port. (Ala.) 186.

**Gaming in Room of Inn.** — Under a statute prohibiting gaming in a public place, and further providing that an inn, tavern, or hotel is such a public place, though a private room therein is not such a place unless such room is commonly used for gaming, an indictment is good which charges the place as a tavern and inn and in a room in and attached thereto. *Comer v. State*, 26 Tex. App. 509.

**Omnibus as Public Place.** — In an indictment for indecent exposure alleged to have been committed in an omnibus, it was held that an omnibus was sufficiently a public place to support the indictment. *Reg. v. Holmes*, 20 Eng. L. & Eq. 597.

**A Public Street** is a public highway and may be so charged. *State v. Mathis*, 21 Ind. 277; *State v. Waggoner*, 52 Ind. 481; *State v. Moriarty*, 74 Ind. 104, *overruling Williams v. State*, 64 Ind. 553.

**Public Place.** — But where a statute makes an act criminal when committed in certain designated places "or any other public place," any other place than those specifically designated cannot be described simply as "a public place," but the facts must be stated which give the place that character. *Scribner v. State*, 12 Tex. App. 173; *Askey v. State*, 15 Tex. App. 558; *State v. Fuller*, 31 Tex. 559; *Elsberry v. State*, 41 Tex. 158.

4. *Alabama.* — *Henderson v. State*, 105 Ala. 82.

*Arkansas.* — *Orr v. State*, 18 Ark. 540.

*Connecticut.* — *State v. Corrigan*, 24 Conn. 286; *State v. Dowd*, 19 Conn. 392.

*Indiana.* — *Myers v. State*, 92 Ind. 390; *Trout v. State*, 111 Ind. 499; *State v. Callahan*, 124 Ind. 364; *Feigel v. State*, 85 Ind. 580; *O'Connor v. State*, 97 Ind. 104; *Myers v. State*, 101 Ind. 379; *State v. McDonald*, 106 Ind. 233; *State v. White*, 129 Ind. 153; *State v. Judy*, 60 Ind. 138; *Drake v. State*, 145 Ind. 210.

*Iowa.* — *State v. Ormiston*, 66 Iowa 143; *State v. Ansaleme*, 15 Iowa 44; *State v. Goode*, 68 Iowa 593; *State v. Finan*, 10 Iowa 19; *Eldora v. Burlington*, 62 Iowa 32; *State v. Ean*, 90 Iowa 534.

*Kentucky.* — *Travis v. Com.*, 96 Ky. 77.

*Maine.* — *State v. Mayberry*, 48 Me. 218; *State v. Madison*, 63 Me. 546; *State v. Robbins*, 66 Me. 324; *State v. Noble*, 15 Me. 476.

*Maryland.* — *Rawlings v. State*, 2 Md. 201; *U. S. v. Vickery*, 1 Har. & J. (Md.) 428.

one which there was no necessity to make, can be rejected as surplusage if it is descriptive of the identity of what it is legally essential to charge.<sup>1</sup>

*Massachusetts*. — *Com. v. Bolkom*, 3 Pick. (Mass.) 281.

*Mississippi*. — *State v. Broughton*, 71 Miss. 90; *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 398.

*Missouri*. — *State v. Wall*, 39 Mo. 532; *State v. Hamilton*, 7 Mo. 300; *State v. Edmundson*, 64 Mo. 398.

*Nebraska*. — *State v. Kendall*, 38 Neb. 817; *Blodgett v. State*, (Neb. 1897) 69 N. W. Rep. 751.

*Nevada*. — *State v. Pierce*, 8 Nev. 296; *State v. Harkin*, 7 Nev. 384.

*New Hampshire*. — *State v. Bailey*, 31 N. H. 521; *State v. Webster*, 39 N. H. 96.

*New Jersey*. — *State v. Kern*, 51 N. J. L. 259.

*New York*. — *Lohman v. People*, 1 N. Y. 379; *La Beau v. People*, 33 How. Pr. (N. Y. Supreme Ct.) 66; *Biggs v. People*, 8 Barb. (N. Y.) 547.

*North Carolina*. — *State v. Cozens*, 6 Ired. L. (N. Car.) 82.

*Oregon*. — *Burchard v. State*, 2 Oregon 79.

*Pennsylvania*. — *Respublica v. Shryber*, 1 Dall. (Pa.) 68; *Com. v. Leisenring*, 11 Phila. (Pa.) 392.

*South Carolina*. — *State v. Coppenburg*, 2 Strobb. L. (S. Car.) 273.

*Tennessee*. — *State v. Brown*, 8 Humph. (Tenn.) 89; *State v. Bellville*, 7 Baxt. (Tenn.) 549.

*Texas*. — *State v. Moreland*, 27 Tex. 726; *Peterson v. State*, 25 Tex. App. 70; *Mayo v. State*, 7 Tex. App. 346; *Gordon v. State*, 2 Tex. App. 158; *McCConnell v. State*, 22 Tex. App. 354.

*Vermont*. — *State v. Munger*, 15 Vt. 296.

*United States*. — *U. S. v. Howard*, 3 Sumn. (U. S.) 12; *U. S. v. Larkin*, 3 Cranch (C. C.) 617; *U. S. v. Johns*, 1 Wash. (U. S.) 363.

*England*. — *Rex v. Morris*, 1 Leach C. C. 109.

**"Whatever Properly Belongs to the Caption is unnecessary in the body of the indictment. Whatever is immaterial to the indictment, even if inconsistent with the caption is surplusage which may be wholly disregarded or rejected. Then so much as purports to belong to the caption of this indictment, whether it be the time when found by the grand jury, the character of the judge who**

**presided, the name of the court, the place where or authority by which it was holden, the names and number of the grand jury, cannot be considered as part of the indictment. Another part of the record properly shows these matters, and they were all unnecessary in the body of the indictment and may be rejected."** *Rose v. State*, Minor (Ala.) 29.

**Meaning of Whole Instrument Considered.** — The rule as to surplusage does not authorize the court to go over an indictment and garble it, picking out a word and sentence here and there, regardless of the general tenor and scope of the pleading, so as entirely to change its meaning. *Littell v. State*, 133 Ind. 577; *Myers v. State*, 101 Ind. 379.

**Right of State to Strike Out.** — The state should be allowed to strike out words in an information which are merely surplusage and which do not tend to negative any of the essential averments. *State v. Kendall*, 38 Neb. 817.

**In Complaints** the same general rule applies, and allegations which may be omitted without affecting the charge, and which are not required to be proven, may be rejected as surplusage. *State v. Corrigan*, 24 Conn. 286; *Com. v. Penniman*, 8 Met. (Mass.) 522; *Johnson v. State*, 13 Ind. App. 299.

**Scandalous Matter.** — A complaint should not be dismissed because it contains scandalous matter, but the court should strike out such matter. *Butte v. Peasley*, 18 Mont. 303.

1. *California*. — *People v. Myers*, 20 Cal. 76.

*Indiana*. — *Wertz v. State*, 42 Ind. 161; *Morgan v. State*, 61 Ind. 447.

*Iowa*. — *State v. Newland*, 7 Iowa 242; *State v. Hesner*, 55 Iowa 494.

*Kentucky*. — *Clark v. Com.*, 16 B. Mon. (Ky.) 213.

*Maine*. — *State v. Noble*, 15 Me. 476.

*Massachusetts*. — *Com. v. Atwood*, 11 Mass. 93; *Com. v. King*, 9 Cush. (Mass.) 284.

*Mississippi*. — *Dick v. State*, 30 Miss. 633.

*Nebraska*. — *State v. Kendall*, 38 Neb. 817.

*Tennessee*. — *Hite v. State*, 9 Yerg. (Tenn.) 369.

**Repugnancy.** — As hereinbefore stated, the offense must be clearly set out, with such certainty that the defendant may know with what he is charged,<sup>1</sup> and allegations which are so repugnant as to violate this rule will render a count bad.<sup>2</sup> But repugnancy in matters which are immaterial may be rejected as surplusage, and will not have such an effect.<sup>3</sup>

**XVII. DUPLICITY** — 1. **The General Rule Forbidding Duplicity.** — A defendant cannot be charged in one and the same count with two or more independent offenses, as such, subject to different penalties.<sup>4</sup> This is the rule against duplicity in criminal plead-

*Texas.* — *Mayo v. State*, 7 Tex. App. 346; *Rose v. State*, 1 Tex. App. 400; *Soria v. State*, 2 Tex. App. 297.

*United States.* — *U. S. v. Howard*, 3 Sumn. (U. S.) 12; *U. S. v. Brown*, 3 McLean (U. S.) 233; *U. S. v. Porter*, 3 Day (Conn.) 286.

*England.* — *Rex v. Owen*, 1 Moo. C. C. 118; *Rex v. Craven*, R. & R. C. C. 14.

1. See *supra*, X. 1. *b. Degree of Certainty.*

2. *People v. Myers*, 20 Cal. 76; *Jane v. State*, 3 Mo. 61; *State v. Hand*, 6 Ark. 165; *State v. Haven*, 59 Vt. 399.

3. *Taylor v. State*, 100 Ala. 68; *Reese v. State*, 90 Ala. 624; *State v. Freeman*, 8 Iowa 433; *State v. Finan*, 10 Iowa 19; *Com. v. Crowther*, 117 Mass. 116; *State v. Henson*, 81 Mo. 386.

**Surplusage by Statute.** — It is sometimes expressly provided by statute that surplusage or repugnant allegations shall not be sufficient reason for quashing an indictment if the offense is charged with such a degree of certainty that the court may pronounce judgment, as such words may be stricken out. *Wall v. State*, 23 Ind. 150; *State v. Callahan*, 124 Ind. 364; *State v. White*, 129 Ind. 153; *State v. Patterson*, 116 Ind. 45; *State v. McDonald*, 106 Ind. 233; *State v. Kendall*, 38 Neb. 87; *State v. Chamberlain*, 89 Mo. 129. But if the charge is so uncertain that the defendant cannot know what he is to answer, the indictment will be bad, *Keller v. State*, 51 Ind. 111; for if the allegations are repugnant to such a degree the offense cannot be said to be set out plainly under the statute, *People v. Wise*, (Albany County Ct. Sess.) 3 N. Y. Crim. Rep. 303.

**Repugnancy in Antecedent and Subsequent Averments.** — If an allegation in a count is sensible and consistent in

the place where it occurs, and is not repugnant to antecedent matter, it cannot be rejected as surplusage, although it may be repugnant to a subsequent allegation, and an objection to such a count for repugnancy cannot be removed by striking out the allegation which is inconsistent with the previous one unless a legal description of the offense remains after striking out the subsequent allegation. *Rex v. Stevens*, 5 East 244; *Dias v. State*, 7 Blackf. (Ind.) 20; *Griffin v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 552. See also *State v. Mayberry*, 48 Me. 218.

**Counts Repugnant to Each Other.** — The doctrine of repugnancy is generally applied to inconsistencies within a count and not to repugnancy of one count to another. *State v. Mallon*, 75 Mo. 356; *Boren v. State*, 23 Tex. App. 35, declaring that *Com. v. Fitchburg R. Co.*, 120 Mass. 372, does not support the statement that while the doctrine of repugnancy is applied to inconsistencies within one count, and not to the joinder of repugnant counts, yet if the counts are for one offense the verdict should be taken only on such as are not mutually repugnant, because it was not upon the ground of repugnancy in the different counts that the verdict of the jury was held wrong in that case, but because by the form of the verdict the defendant was convicted of three offenses when he could be legally convicted of but one.

4. *Alabama.* — *Thomas v. State*, 111 Ala. 51; *Ben v. State*, 22 Ala. 11; *Turnipseed v. State*, 6 Ala. 665.

*California.* — *People v. Quive*, 56 Cal. 396.

*Georgia.* — *Long v. State*, 12 Ga. 293.

*Indiana.* — *Joslyn v. State*, 128 Ind. 160; *McCollough v. State*, 132 Ind. 427; *Lohman v. State*, 81 Ind. 15; *Knopf v. State*, 84 Ind. 316; *State v. Weil*, 89 Ind. 286; *Siebert v. State*, 95



ing, which is enforced for the benefit of the defendant, and is intended to prevent confusion and prolixity, and to secure singleness in the issue to be tried upon each count.<sup>1</sup> But if one offense alone is charged, it is not sufficient to render an indictment or

Ind. 471; *Kreamer v. State*, 106 Ind. 192; *Stewart v. State*, 111 Ind. 554; *Henry v. State*, 113 Ind. 304; *Kiley v. State*, 120 Ind. 65; *Hayworth v. State*, 14 Ind. 590; *State v. Shields*, 8 Blackf. (Ind.) 151.

*Kansas*. — *State v. Goodwin*, 33 Kan. 541.

*Louisiana*. — *State v. Ford*, 30 La. Ann. 311; *State v. Johns*, 32 La. Ann. 812.

*Maine*. — *State v. Palmer*, 35 Me. 9; *State v. Smith*, 61 Me. 386; *State v. Burgess*, 40 Me. 592.

*Massachusetts*. — *Com. v. Symonds*, 2 Mass. 163.

*New Hampshire*. — *State v. Gorham*, 55 N. H. 163.

*New York*. — *People v. Wright*, 9 Wend. (N. Y.) 193; *Reed v. People*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 481.

*Texas*. — *Weathersby v. State*, 1 Tex. App. 645; *State v. Dorsett*, 21 Tex. 656.

*Virginia*. — *Sprouse v. Com.*, 81 Va. 376.

**Different Penalties.** — An indictment which charges in one count two separate offenses, each of which subjects the defendant to a different punishment, is bad. Thus, an indictment which charges the offense of "disfiguring" an ox, and in the same count charges the offense of "injuring" an ox, where there is one statute making it an offense to wilfully or maliciously kill, maim, or disfigure, etc., any beast, and another making it an offense to wilfully and maliciously destroy the personal property of another, etc., each providing a different penalty, is bad. *McGahagin v. State*, 17 Fla. 666. See also *U. S. v. Sharp*, Pet. (C. C.) 131, wherein it was held that an indictment was bad which charged in the same count an offense made capital in one section of an act, with another offense made a misdemeanor by another section of the act; *State v. Harrison*, 62 Mo. App. 112, holding that an indictment charging the accused with aiding the escape of a prisoner charged with both a misdemeanor and a felony is bad for duplicity, under a statute making the offense a felony, when the crime for which the escaped party is

accused is a felony, and a misdemeanor when the offense of which the escaped party is accused is a misdemeanor. But, in *Oleson v. State*, 20 Wis. 60, an indictment which charged in one count that the defendant aided two persons to escape, the one being charged with a higher grade of crime than the other, and the penalty for aiding the escape of persons charged with these different grades being different, was held to be good, the court saying: "If the aiding them both to escape was but one act, then but one offense was committed, and on conviction the defendant would be liable only to the greater punishment."

**Allegations for Increased Punishment.** — When the pleader is authorized by statute to allege certain facts for the purpose of subjecting the accused to an increased punishment, the charge of such facts will not operate to make a count objectionable for duplicity. Thus, for such purpose, an indictment for arson may further allege that when the house was burned it contained a child who was injured by the fire. *Beaumont v. State*, 1 Tex. App. 536.

**Former Conviction.** — So if an indictment charges a former conviction for the purpose of subjecting the accused to an increased penalty, it is not thereby bad for duplicity. *State v. Moore*, 121 Mo. 514.

**Complaint.** — In *Deveny v. State*, 47 Ind. 208, it was held that an affidavit before a justice of the peace might charge two offenses, because there was no such thing as different counts in an affidavit. But this view is not now adhered to. *Herron v. State*, (Ind. App. 1897) 46 N. E. Rep. 540.

In *New York* it was held that a complaint might contain the charge of several misdemeanors where the judgment is for but one conviction. *People v. Polhamus*, 8 N. Y. App. Div. 133.

**Different Violations of Municipal Ordinance.** — It may be provided in an ordinance that any number of violations may be included in one prosecution. *Eldora v. Burlingame*, 62 Iowa 32.

1. *Sprouse v. Com.*, 81 Va. 374; *Scruggs v. State*, 7 Baxt. (Tenn.) 39.

information double that another offense is stated in setting out the manner in which it was committed, or the different means employed.<sup>1</sup> So the criminal act may operate upon more than one person or thing, and as long as it is one act, consummated at the same time, the indictment or information charging the facts will be good,<sup>2</sup> but the acts must appear to be one and the same.<sup>3</sup>

1. *Indiana*. — *Herron v. State*, (Ind. App. 1897) 46 N. E. Rep. 541; *Stewart v. State*, 111 Ind. 554.

*Louisiana*. — *State v. Collins*, 33 La. Ann. 152.

*Maine*. — *State v. Lang*, 63 Me. 215.

*Massachusetts*. — *Com. v. Brown*, 14 Gray (Mass.) 428; *Com. v. Holmes*, 165 Mass. 457.

*New York*. — *People v. Casey*, 72 N. Y. 393.

*Ohio*. — *Jackson v. State*, 39 Ohio St. 39.

*Texas*. — *Allphin v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 223; *Thomas v. State*, (Tex. Crim. App. 1894) 26 S. W. Rep. 724.

*Virginia*. — *Sprouse v. Com.*, 81 Va. 376.

*Washington*. — *State v. Townsend*, 7 Wash. 462; *State v. Regan*, 8 Wash. 506.

*United States*. — *U. S. v. Watkins*, 3 Cranch (C. C.) 545.

See also article CONSPIRACY, vol. 4, p. 706.

In *Reg. v. Giddins, C. & M.* 634, 41 E. C. L. 344, an indictment in one count charged four prisoners with assaulting George Pritchard and Henry Pritchard, and with stealing from George Pritchard two shillings and from Henry Pritchard one shilling and a hat, on the 14th day of May, 1842. It appeared that the persons assaulted were walking together when they were assaulted and robbed. A motion was made to put the counsel for the prosecution to his election upon the ground that the count charged two distinct felonies, but the court held that as the assaulting and robbing of both individuals occurred at the same time, it was one entire prosecution.

**Matters of Aggravation.** — In the description of an offense matters of aggravation will not have the effect of making a count double. *State v. Fontenette*, 38 La. Ann. 61; *Green v. State*, 23 Miss. 509; *Com. v. Clarke*, 162 Mass. 495; *State v. Hardy*, 47 N. H. 538; *Scott v. Com.*, 6 S. & R. (Pa.) 224; *McKinney v. State*, 25 Wis. 382.

2. *Alabama*. — *Ben v. State*, 22 Ala. 9.

*Maine*. — *State v. Nelson*, 29 Me. 329.

*Maryland*. — *State v. Warren*, 77 Md. 121.

*Massachusetts*. — *Com. v. O'Brien*, 107 Mass. 208; *Com. v. Sullivan*, 104 Mass. 552.

*Missouri*. — *State v. Morphin*, 37 Mo. 373.

*New Hampshire*. — *State v. Merrill*, 44 N. H. 624.

*New York*. — *People v. Adams*, 17 Wend. (N. Y.) 475.

*Ohio*. — *State v. Hennessey*, 23 Ohio St. 339.

*Tennessee*. — *Fowler v. State*, 3 Heisk. (Tenn.) 154; *Womack v. State*, 7 Coldw. (Tenn.) 510.

*Texas*. — *Rucker v. State*, 7 Tex. App. 549; *Thompson v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 629.

*Vermont*. — *State v. Newton*, 42 Vt. 538.

*Virginia*. — *Alexander v. Com.*, 90 Va. 809.

*United States*. — *U. S. v. Scott*, 74 Fed. Rep. 215.

*England*. — *Rex v. Benfield*, 2 Burr. 980.

3. *Gordon v. State*, 46 Ohio St. 626, where it was held that an indictment is not objectionable for duplicity which charges that on a certain day the accused sold intoxicating liquors to "divers persons" whose names to the jurors were unknown, because, for aught that appeared on the record, the offense charged may be deemed a single transaction, and a conviction will be had upon proof of sale to one person. See also *People v. Adams*, 17 Wend. (N. Y.) 475.

**Different Acts Developed by Testimony**

— **Election.** — If the testimony develops the fact that the killing of two persons was not by one act, the defendant has the right to compel the state to elect upon which charge it will proceed. *Forrest v. State*, 13 Lea (Tenn.) 104. To the same effect see *Long v. State*, 56 Ind. 182; *Lebkovitz v. State*, 113 Ind. 26; *State v. Crimmins*, 31 Kan. 376; *State v. Schmidt*, 34 Kan. 400; *Stockwell v. State*, 27 Ohio St. 563.

2. **Where One of Two Offenses Is Inadequately Charged.** — Even if the indictment attempts to charge two offenses in the same count it is not double, unless each offense is set out in adequate terms,<sup>1</sup> as the statements which are not sufficient as a charge of an offense may be regarded as surplusage.

3. **Surplusage.** — Any matters which are merely surplusage, and may be rejected as such without affecting the charge, will not operate to make an indictment or information bad for duplicity.<sup>2</sup>

4. **Multifariousness.** — No matters, however multifarious, will constitute duplicity in an indictment or information, provided that all such matters taken together constitute but one connected charge.<sup>3</sup>

5. **Distinct Offenses as Stages of One Crime.** — Where several distinct acts are connected with the same general offense, though they are subject to the same penalties and might be distinct crimes if committed by different persons, or at different times, when they are committed by the same person, at the same time, they may be considered as representing stages of the same offense, and may be joined in the same count of an indictment or information as constituting a single violation of the law.<sup>4</sup>

6. **Greater Including Lesser Offense.** — When the offense charged includes or embraces another or smaller constituent offense, the charge of such other offense will not render an indictment or information double.<sup>5</sup>

1. *Jackson v. Com.*, (Ky. 1891) 17 S. W. Rep. 215; *Com. v. Powell*, 8 Bush (Ky.) 7; *State v. Desroche*, 47 La. Ann. 651; *State v. Haskell*, 76 Me. 399; *State v. Palmer*, 35 Me. 9; *Larned v. Com.*, 12 Met. (Mass.) 245; *State v. Henn*, 39 Minn. 464; *Dawson v. People*, 25 N. Y. 399; *State v. Walworth*, 58 Vt. 503.

*In a Complaint.* — *State v. Haskell*, 76 Me. 399; *Herron v. State*, (Ind. App. 1897) 46 N. E. Rep. 540.

2. *State v. Horn*, 19 Ark. 578; *State v. Hutzell*, 53 Ind. 160; *Eagan v. State*, 53 Ind. 162; *Com. v. Ballou*, 124 Mass. 28; *State v. Comings*, 54 Minn. 359; *State v. Flanders*, 118 Mo. 227; *Com. v. Frey*, 50 Pa. St. 245; *State v. Brown*, 8 Humph. (Tenn.) 89. See also *supra*, XVI. *Surplusage and Repugnancy.*

3. *Barnes v. State*, 20 Conn. 232; *Jackson v. Com.*, (Ky. 1891) 17 S. W. Rep. 215; *Com. v. Brown*, 14 Gray (Mass.) 429; *State v. Palmer*, 4 Mo. 453; *State v. Gorham*, 55 N. H. 163; *Francisco v. State*, 24 N. J. L. 30; *People v. Harris*, (Supreme Ct.) 7 N. Y. Supp. 773; *State v. Jopling*, 10 Humph. (Tenn.) 418; *State v. Edmond-*

*son*, 43 Tex. 165; *State v. Haven*, 59 Vt. 399.

4. *California.* — *People v. Shotwell*, 27 Cal. 400; *People v. De La Guerra*, 31 Cal. 460.

*Kansas.* — *State v. Meade*, 56 Kan. 690.

*Louisiana.* — *State v. Hendricks*, 38 La. Ann. 682; *State v. Miller*, 45 La. Ann. 1170.

*Maine.* — *State v. Robbins*, 66 Me. 324; *State v. Willis*, 78 Me. 70.

*New Jersey.* — *Farrell v. State*, 54 N. J. L. 416.

*New York.* — *People v. Altman*, 147 N. Y. 473; *People v. Dumar*, 106 N. Y. 510.

*Virginia.* — *Wright v. Com.*, 82 Va. 189; *Sprouse v. Com.*, 81 Va. 376.

*United States.* — *U. S. v. Fero*, 18 Fed. Rep. 901; *U. S. v. Scott*, 74 Fed. Rep. 215.

5. *Alabama.* — *Robinson v. State*, 84 Ala. 434.

*Georgia.* — *Long v. State*, 12 Ga. 293. *Illinois.* — *Love v. People*, 160 Ill. 501.

*Kansas.* — *State v. Brandon*, 7 Kan. 106; *State v. Hodges*, 45 Kan. 389; *State v. Emmons*, 45 Kan. 397; *State v. Lillie*, 21 Kan. 728.

### 7. Conjunctive and Disjunctive Averments — Conjunctive Averments. —

When a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offense.<sup>1</sup> And

*Louisiana.* — State *v.* Fontenette, 38 La. Ann. 61.

*Massachusetts.* — Com. *v.* Tuck, 20 Pick. (Mass.) 361; Jennings *v.* Com., 105 Mass. 587.

*Michigan.* — People *v.* Haley, 48 Mich. 495.

*Mississippi.* — Roberts *v.* State, 55 Miss. 423; Smith *v.* State, 57 Miss. 823.

*Montana.* — Territory *v.* Milroy, 8 Mont. 364.

*Nebraska.* — Lawhead *v.* State, 46 Neb. 607; Aiken *v.* State, 41 Neb. 263.

*New Hampshire.* — State *v.* Gorham, 55 N. H. 163.

*New Jersey.* — Francisco *v.* State, 24 N. J. L. 30.

*Ohio.* — Breese *v.* State, 12 Ohio St. 148; Blair *v.* State, 5 Ohio Cir. Ct. Rep. 496.

*Pennsylvania.* — Hollister *v.* Com., 60 Pa. St. 106; Becker *v.* Com., (Pa. 1887) 9 Atl. Rep. 510; Stoops *v.* Com., 7 S. & R. (Pa.) 499.

*Tennessee.* — Morton *v.* State, 1 Lea (Tenn.) 499; Davis *v.* State, 3 Coldw. (Tenn.) 77.

*Texas.* — Dunham *v.* State, 9 Tex. App. 331.

With reference to including a smaller offense in charging a greater the titles of the various offenses should be consulted, as one offense may be embraced in another in one state, while in others it may not be so considered. Thus some of the cases above cited refer to the charge of burglary and larceny in one count, but there are exceptions to this ruling. See article BURGLARY, vol. 3, p. 787.

**Every Larceny Includes a Trespass** to the person or property of the owner, but a larceny of the property of one person does not include a trespass to the person or property of another person. Morton *v.* State, 1 Lea (Tenn.) 499.

**Intent to Commit — Allegation of Consummation.** — As to an allegation of larceny in an indictment for breaking, etc., with intent to steal, see article BURGLARY, vol. 3, p. 736.

**Ingredients of Smaller Offense Not Embraced in Larger Offense.** — In Territory *v.* Dooley, 4 Mont. 298, it was held that while an indictment may charge

two offenses in the same count, in so far as the greater offense charged includes the lesser, it should not charge a lesser offense by including ingredients thereof which form no part of the larger offense. Thus, in charging an assault with intent to commit murder, a battery is no part of the offense, and if recited in connection with the consummation of the assault it forms no part of the charge, and a conviction could be had only for an assault with intent to commit murder or for a simple assault, and not for an assault and battery. See also Com. *v.* Thompson, 116 Mass. 348; Francisco *v.* State, 24 N. J. L. 32.

But it has also been held that an information charging a statutory offense of committing an assault with a dangerous weapon with intent to do bodily injury did not include an assault and battery, and if the assault and battery is charged in such a case in addition to the assault with intent to do bodily injury, the information is fatally defective. State *v.* Marcks, 3 N. Dak. 532.

1. *Alabama.* — Mooney *v.* State, 8 Ala. 331; McElhaney *v.* State, 24 Ala. 73; Johnson *v.* State, 32 Ala. 584; State *v.* Raiford, 7 Port. (Ala.) 101.

*Arkansas.* — Slicker *v.* State, 13 Ark. 397.

*California.* — People *v.* Leyshon, 108 Cal. 440; People *v.* Gusti, 113 Cal. 177.

*Connecticut.* — Barnes *v.* State, 20 Conn. 235; State *v.* De Ladson, 66 Conn. 7.

*Florida.* — Bradley *v.* State, 20 Fla. 740.

*Georgia.* — Wingard *v.* State, 13 Ga. 397.

*Illinois.* — Blemer *v.* People, 76 Ill. 265; Seacord *v.* People, 121 Ill. 629.

*Indiana.* — Dormer *v.* State, 2 Ind. 308; McAlpin *v.* State, 3 Ind. 567; State *v.* Staker, 3 Ind. 570; State *v.* Alsop, 4 Ind. 141; Crawford *v.* State, 33 Ind. 304; Davis *v.* State, 100 Ind. 154; Fahnestock *v.* State, 102 Ind. 156; Mergentheim *v.* State, 107 Ind. 567; State *v.* Stout, 112 Ind. 245; Marshall *v.* State, 123 Ind. 128; Hobbs *v.* State, 133 Ind. 404; State *v.* Sarlls, 135

where the statute provides in the alternative several means by

Ind. 195; *Hauk v. State*, (Ind. 1897) 46 N. E. Rep. 127.

*Iowa*. — *State v. Abrahams*, 6 Iowa 117; *State v. Barrett*, 8 Iowa 536; *State v. Cooster*, 10 Iowa 453; *State v. Myers*, 10 Iowa 448; *State v. Harris*, 11 Iowa 414; *State v. Hockenberry*, 11 Iowa 269; *State v. Becker*, 20 Iowa 438; *State v. Dean*, 44 Iowa 648; *State v. Spurbek*, 44 Iowa 667; *State v. Winebrenner*, 67 Iowa 230; *State v. Phipps*, (Iowa 1895) 64 N. W. Rep. 411; *State v. Lewis*, (Iowa 1895) 65 N. W. Rep. 295.

*Kansas*. — *State v. Schweiter*, 27 Kan. 499.

*Kentucky*. — *Hinkle v. Com.*, 4 Dana (Ky.) 518.

*Louisiana*. — *State v. Banton*, 4 La. Ann. 32; *State v. Markham*, 15 La. Ann. 498; *State v. Romus*, 48 La. Ann. 581; *State v. Cook*, 20 La. Ann. 145; *State v. Adam*, 31 La. Ann. 717; *State v. Richards*, 33 La. Ann. 1294.

*Maine*. — *State v. Robbins*, 66 Me. 324; *State v. Nelson*, 29 Me. 329.

*Massachusetts*. — *Stevens v. Com.*, 6 Met. (Mass.) 241; *Com. v. Hall*, 4 Allen (Mass.) 305; *Com. v. Nichols*, 10 Allen (Mass.) 199; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *Com. v. Foss*, 14 Gray (Mass.) 50; *Com. v. Eaton*, 15 Pick. (Mass.) 273.

*Michigan*. — *People v. Clarke*, 105 Mich. 169.

*Missouri*. — *State v. Kesslering*, 12 Mo. 565; *Polsten v. State*, 14 Mo. 463; *State v. Fletcher*, 18 Mo. 425; *State v. Myers*, 20 Mo. 410; *State v. Freeze*, 30 Mo. App. 347; *State v. Batson*, 31 Mo. 343; *State v. Ragsdale*, 59 Mo. App. 590; *State v. Pate*, 67 Mo. 490; *State v. Nations*, 75 Mo. 54; *State v. Breward*, 76 Mo. 322; *State v. Pittman*, 76 Mo. 56.

*Montana*. — *State v. Marion*, 14 Mont. 458; *State v. McGinnis*, 14 Mont. 462.

*New Hampshire*. — *State v. Hastings*, 53 N. H. 456.

*New York*. — *Read v. People*, 86 N. Y. 381; *Bork v. People*, 91 N. Y. 5; *People v. Burns*, 53 Hun (N. Y.) 274, 7 N. Y. Crim. Rep. 92; *People v. Smith*, (New York County Gen. Sess.) 6 N. Y. Crim. Rep. 470; *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 272; *La Beau v. People*, 33 How. Pr. (N. Y. Supreme Ct.) 66; *People v. Harris*, (Supreme Ct.) 28 N. Y. St. Rep. 300.

*Ohio*. — *Kerr v. State*, 36 Ohio St. 614; *State v. Bauer*, (Com. Pl.) Ohio N. P. 103.

*Oregon*. — *State v. Carr*, 6 Oregon 133; *State v. Bergman*, 6 Oregon 341; *State v. Dale*, 8 Oregon 229.

*South Carolina*. — *State v. Smalls*, 11 S. Car. 285.

*Tennessee*. — *State v. Ailey*, 3 Heisk. (Tenn.) 9; *Cornell v. State*, 7 Baxt. (Tenn.) 520.

*Texas*. — *Tompkins v. State*, 4 Tex. App. 161; *Copping v. State*, 7 Tex. App. 61; *Comer v. State*, 26 Tex. App. 509; *Phillips v. State*, 29 Tex. 232; *Lancaster v. State*, 43 Tex. 520.

*Vermont*. — *State v. Woodward*, 25 Vt. 618; *State v. Morton*, 27 Vt. 312.

*Virginia*. — *Morganstern v. Com.*, (Va. 1896) 26 S. E. Rep. 402.

*Wisconsin*. — *Byrne v. State*, 12 Wis. 520; *State v. Bielby*, 21 Wis. 204; *Clifford v. State*, 29 Wis. 327.

*United States*. — *U. S. v. Thomas*, 69 Fed. Rep. 588; *U. S. v. Janes*, 74 Fed. Rep. 545; *Crain v. U. S.*, 162 U. S. 625.

**In Complaints.** — *State v. Haskell*, 76 Me. 399; *Com. v. Curran*, 119 Mass. 208; *Com. v. Dolan*, 121 Mass. 374; *Com. v. Lufkin*, 7 Allen (Mass.) 579; *State v. Nerbovig*, 33 Minn. 481; *State v. Gray*, 29 Minn. 142; *State v. McGinnis*, 30 Minn. 53; *State v. Matthews*, 42 Vt. 542; *State v. Norton*, 45 Vt. 259; *State v. Bielby*, 21 Wis. 204.

**Each Act a Separate Offense.** — But in some instances the acts which have been thus set out in the statute have been held to be each a separate and distinct offense. Thus a statute prohibiting certain persons from "carrying for sale, or offering for sale, or offering to obtain, or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors," was held to denounce separate and distinct offenses which could not be joined in one count. *State v. Smith*, 61 Me. 386. And a statute against the sale of spirituous, vinous, or intoxicating liquors was held to create separate offenses which could not be joined in one count of an information. *Smith v. State*, 32 Neb. 106; *State v. Pischel*, 16 Neb. 490.

In *Wendell v. State*, 46 Neb. 824, under a statute providing that "if any person shall wilfully and maliciously

which the offense may be committed,<sup>1</sup> or where the intent or purpose is set out in several aspects disjunctively, they may all be charged in setting out one and the same offense.<sup>2</sup> But the rule has been limited in its application to cases where the offenses created in the statute are not repugnant, either in themselves or in the punishment therefor.<sup>3</sup>

**Disjunctive Averments.** — While it is permissible to charge an offense in the manner stated in the preceding paragraphs, it is equally true that the charge of such acts may not be made in the alternative, because such a charge would not be sufficiently certain, and where the statute uses the disjunctive "or," the indictment

burn or cause to be burned any dwelling house," etc., it was held that two offenses, each distinct from the other, were charged in an indictment charging the defendant in one count with burning and with causing another person to do the burning.

In *Vermont* the rule stated in the text was fully recognized, but it was held that, under the statute in question, the act of signing a false certificate with intent that it should be used and issued was one offense, and causing the certificate to be issued and used was another offense, and that the two could not be joined in one count. *State v. Haven*, 59 Vt. 399.

**Any One of the Cumulative Acts** is sufficient to subject the accused to the penalty prescribed. *McElhaney v. State*, 24 Ala. 73; *People v. Smith*, (New York County Gen. Sess.) 6 N. Y. Crim. Rep. 470; *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 272; *Hobbs v. State*, 133 Ind. 404; *State v. Harris*, 11 Iowa 414; *State v. Myers*, 10 Iowa 448; *Crain v. U. S.*, 162 U. S. 625.

**Copulative in Statute Construed as Disjunctive.** — In *Iowa* a case arose in which the acts set up in the statute were connected with the conjunctive instead of the disjunctive. It was held that, applying the strictness of interpretation usually given to such cases, the defendant would have to be brought within the words of each conjunctive clause before he could be convicted, but that in the particular case in hand (which was a charge of having counterfeit money in possession with intent to pass the same, and with counterfeiting the coin) it was against the obvious intent of the law to apply such a construction, and in order to carry out the spirit of the statute the court would interpret the conjunction so as to make it disjunctive, as this was

clearly the intention of the act. *State v. Myers*, 10 Iowa 448.

1. *Johnson v. State*, 32 Ala. 584; *Turnipseed v. State*, 6 Ala. 665; *Long v. State*, 12 Ga. 293; *Thomas v. State*, 59 Ga. 784; *Heath v. State*, 91 Ga. 126; *Com. v. Symonds*, 2 Mass. 163; *State v. Manchester, etc.*, R. Co., 52 N. H. 547; *People v. Davis*, 56 N. Y. 95; *State v. Callicutt*, 1 Lea (Tenn.) 715; *State v. Irvine*, 3 Heisk. (Tenn.) 155; *State v. Ailey*, 3 Heisk. (Tenn.) 9; *Wilcox v. State*, 3 Heisk. (Tenn.) 110.

**In a Complaint.** — Where several means of committing the same offense are joined by the disjunctive in the statute, they may be charged in the conjunctive. *State v. Clark*, 44 Vt. 636; *Com. v. Moody*, 143 Mass. 178.

2. *People v. Ah Woo*, 28 Cal. 212; *State v. Falk*, 66 Conn. 250; *King v. State*, 17 Fla. 186; *State v. Banton*, 4 La. Ann. 32; *State v. Nickleson*, 45 La. Ann. 1172; *Robeson v. State*, 3 Heisk. (Tenn.) 267; *State v. Townsend*, 7 Wash. 462.

3. *State v. Woodward*, 25 Vt. 618; *State v. Flint*, 62 Mo. 397, which was an indictment charging under a statute that the defendant both converted to his own use by way of investment in property and merchandise, and made away with and secreted, certain public money alleged to have been embezzled, and it was held that the defendant could not have done both those things with the same money, and that therefore the two acts could not be charged in the same count; but the rule was recognized that where a statute enumerates offenses which are not repugnant they may be joined, or if repugnant expressions do not enter into the substance of the offense, and the indictment will be good without them, they may be rejected as surplusage. See also *State v. Fitzsimmons*, 30 Mo. 241.

must use the copulative "and,"<sup>1</sup> unless the disjunctive is used in the statute in the sense of "to wit," or as indicating that the terms preceding and following it are synonymous.<sup>2</sup>

**8. Objections for Duplicity, How Made and Waived.** — Objection on account of duplicity must be made *in limine*.<sup>3</sup> It cannot generally, according to the weight of authority, be made in arrest of judgment,<sup>4</sup> nor can it be taken advantage of, on a motion for a new trial,<sup>5</sup> by writ of error,<sup>6</sup> or for the first time on appeal.<sup>7</sup> The objection must generally be raised by demurrer, or motion to quash,<sup>8</sup>

1. *Arkansas*. — *Thompson v. State*, 37 Ark. 410.

*Connecticut*. — *Smith v. State*, 19 Conn. 500.

*Missouri*. — *State v. Flint*, 62 Mo. 397; *State v. Fitzsimmons*, 30 Mo. 241; *State v. McCollum*, 44 Mo. 344.

*New Hampshire*. — *State v. Gary*, 36 N. H. 361.

*North Carolina*. — *State v. Harper*, 64 N. Car. 130.

*South Carolina*. — *State v. O'Bannon*, 1 Bailey L. (S. Car.) 144.

*Tennessee*. — *State v. Green*, 3 Heisk. (Tenn.) 133.

*Texas*. — *Hart v. State*, 2 Tex. App. 40; *Tompkins v. State*, 4 Tex. App. 161; *Copping v. State*, 7 Tex. App. 61.

*New Hampshire*. — *State v. Hastings*, 53 N. H. 452.

*Wisconsin*. — *Clifford v. State*, 29 Wis. 327.

**Contra.** — *Burdine v. State*, 25 Ala. 60; *Horton v. State*, 53 Ala. 488, wherein this method of pleading is held to be proper under a statute in *Alabama*. *Cunningham v. State*, 5 W. Va. 508. See also *State v. Van Doran*, 109 N. Car. 866.

In *Iowa* there seems to have been a statute permitting the means to be set out in the alternative. *State v. Watrous*, 13 Iowa 94.

**Complaints.** — The rule stated in the text applies to complaints. *Steel v. Williams*, 18 Ind. 161; *Com. v. Grey*, 2 Gray (Mass.) 502.

2. *State v. Hester*, 48 Ark. 40; *Cobb v. State*, 45 Ga. 11; *Blemer v. People*, 76 Ill. 265; *Sublett v. Com.*, (Ky. 1896) 35 S. W. Rep. 543; *State v. Willis*, 78 Me. 70; *Com. v. Grey*, 2 Gray (Mass.) 502; *State v. Ellis*, 4 Mo. 476; *Whiteside v. State*, 4 Coldw. (Tenn.) 176; *Davis v. State*, 23 Tex. App. 637; *Thomas v. State*, 18 Tex. App. 214; *State v. Brookhouse*, 10 Wash. 87; *Clifford v. State*, 29 Wis. 327.

In *Complaints*. — *Com. v. Grey*, 2 Gray (Mass.) 502.

3. *Scruggs v. State*, 7 Baxt. (Tenn.) 39; *State v. Dolan*, 69 Me. 573; *Sturgeon v. Com.*, (Ky. 1896) 37 S. W. Rep. 679.

4. See article ARREST OF JUDGMENT, vol. 2, p. 793.

**Special Finding.** — It has also been held that while a motion in arrest will not lie if the verdict is special, such a verdict curing the defect, it is otherwise if the verdict is a general one of guilty. *State v. Leavitt*, 87 Me. 77; *Com. v. Holmes*, 119 Mass. 198, in which case the court said that when one count in an indictment charges two offenses, distinct in time and requiring different punishments, the objection of duplicity has been allowed in arrest of judgment, but when the two offenses are precisely alike, the only reason against joining them in one count is that it subjects the accused to confusion and embarrassment in his defense; and the objection is not open after a verdict of guilty on one of the offenses, but must be taken by a motion to quash or to compel the prosecutor to elect.

**Duplicity in a Complaint** is a formal defect which is cured by verdict. *State v. Holmes*, 28 Conn. 231; *State v. Miller*, 24 Conn. 530; *Kilbourn v. State*, 9 Conn. 560.

5. *Simons v. State*, 25 Ind. 331.

6. *Kilrow v. Com.*, 89 Pa. St. 489; *Hilderbrand v. State*, 5 Mo. 550; *Nash v. Reg.* 9 Cox C. C. 424, 10 Jur. N. S. 819.

7. *Tomlinson v. Territory*, 7 N. Mex. 195; *State v. Henry*, 59 Iowa 391. See also *Wiborg v. U. S.*, 163 U. S. 648.

8. *California*. — *People v. Quivise*, 56 Cal. 396.

*Georgia*. — *Gilbert v. State*, 65 Ga. 449.

*Indiana*. — *Simons v. State*, 25 Ind. 331; *McCullough v. State*, 132 Ind. 427; *Joslyn v. State*, 128 Ind. 160; *Kiley v. State*, 120 Ind. 65.

*Kansas*. — *State v. Goodwin*, 33 Kan. 542.

*Kentucky*. — *Sturgeon v. Com.*, (Ky.

or by motion to compel an election.<sup>1</sup>

**XVIII. JOINDER OF COUNTS AND OFFENSES—1. In General—Nature of Counts—Each Count a Separate Indictment.**—Each count in an indictment is considered to all intents and purposes a separate indictment.<sup>2</sup>

**Counts Connected by Words of Reference.**—While it is necessary that each should charge a complete offense,<sup>3</sup> and it is said to be the safer rule to state the whole of the offense in each count,<sup>4</sup> one count may by proper reference adopt the statements of another

1896) 37 S. W. Rep. 679; *Ellis v. Com.*, 78 Ky. 133.

*Maine.*—*State v. Palmer*, 35 Me. 9; *State v. Haines*, 30 Me. 65; *State v. Dolan*, 69 Me. 573; *State v. Putnam*, 38 Me. 296.

*Minnesota.*—*State v. Henn*, 39 Minn. 464.

*Missouri.*—*State v. Harrison*, 62 Mo. App. 112.

*New York.*—*People v. Tower*, 135 N. Y. 457.

*North Carolina.*—*State v. Simons*, 70 N. Car. 340.

*Oregon.*—*State v. Jarvis*, 18 Oregon 361.

*Pennsylvania.*—*Kilrow v. Com.*, 89 Pa. St. 489.

*Tennessee.*—*State v. Brown*, 8 Humph. (Tenn.) 89; *Scruggs v. State*, 7 Baxt. (Tenn.) 39.

*England.*—*Nash v. Reg.* 9 Cox C. C. 424, 10 Jur. N. S. 819.

See also the cases cited *supra*, XVII.

1. *The General Rule Forbidding Duplicity.*

**Demurrer, General or Special.**—It has been said that the objection may perhaps be taken by general demurrer. *Kilrow v. Com.*, 89 Pa. St. 489. On the other hand, a special demurrer has been required. *Kilbourn v. State*, 9 Conn. 563. And under statutes requiring demurrers to specify objections, duplicity must be expressly pointed out as the ground of objection. *People v. Tower* (Supreme Ct.), 17 N. Y. Supp. 395; *State v. Ah Sam*, 7 Nev. 127. See also *People v. Quivise*, 56 Cal. 396; *Ellis v. Com.*, 78 Ky. 133. See also as to the requirement generally prevailing in specifying objections, *infra*, XXI. 2. *Pointing Out Defects*, as well as the general rule at common law that duplicity was only a ground of special demurrer. See article **DUPPLICITY**, vol. 7, p. 235.

1. *State v. Henn*, 39 Minn. 464; *State v. Goodwin*, 33 Kan. 542;

*Scruggs v. State*, 111 Ala. 60; *Tomlinson v. Territory*, 7 N. Mex. 195.

**Objection to Admission of Evidence** will not avail for such a defect as a substitute for a demurrer or motion to compel an election. *State v. Henn*, 39 Minn. 464.

2. *Latham v. Reg.*, 9 Cox C. C. 516, 10 Jur. N. S. 1145; *State v. Wagner*, 118 Mo. 628; *State v. McAllister*, 26 Me. 374; *State v. Phelps*, 65 N. Car. 450; *Watson v. People*, 134 Ill. 378; *State v. Longley*, 10 Ind. 482.

**Defects in One Count** will not vitiate another good count. *State v. Hadlock*, 43 Me. 282.

**Informality of Counts.**—Where each of two charges was complete in itself, though there was nothing to indicate that there was more than one count further than that there was a blank space in the indictment, separating the two charges, it was held that the indictment contained two counts and should be so construed. *State v. Dow*, 73 Iowa 587. To the same effect see *State v. Stacy*, 103 Mo. 11; *State v. Ruby*, 68 Me. 543; *Pettes v. Com.*, 126 Mass. 242.

So where an objection was made on the ground of misjoinder of counts, it was held that the words "against the peace of the commonwealth, and contrary to the form of the statute in such case made and provided," being unnecessarily used in one place in each count, might, together with other unnecessary words in such counts, be rejected, and thus the indictment in the particular case would contain two and not four counts. *Com. v. Walker*, 163 Mass. 226.

3. *People v. Smith*, 103 Cal. 563; *State v. Longley*, 10 Ind. 482; *People v. Werbin*, 27 Hun (N. Y.) 311; *Com. v. Hill*, 2 Pearson (Pa.) 432; *State v. Johnson*, 45 S. Car. 483; *Jones v. Com.*, 86 Va. 950.

4. *Keech v. State*, 15 Fla. 603.



count for the purpose of avoiding repetition,<sup>1</sup>—and this is true, even if the count to which the words are directed is bad, or has been quashed, or a nol. pros. has been entered upon it,<sup>2</sup>—provided the united averments of the two counts constitute a complete accusation and statement of the offense,<sup>3</sup> and provided further, as expressly held in some cases, that the count which depends upon the reference to another count must contain apt words of reference to the matter in the count which is relied upon to supply the omitted statement.<sup>4</sup>

1. *Florida*. — *Keech v. State*, 15 Fla. 603.

*Illinois*. — *Watson v. People*, 134 Ill. 378.

*Indiana*. — *Redman v. State*, 1 Blackf. (Ind.) 429.

*Maine*. — *State v. Nelson*, 29 Me. 329; *State v. Lang*, 63 Me. 215; *State v. Pike*, 65 Me. 111; *State v. Smith*, 61 Me. 386.

*Missouri*. — *State v. Vincent*, 91 Mo. 662.

*New York*. — *People v. Graves*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 134.

*North Carolina*. — *Frazier v. Felton*, 7 Hawks (N. Car.) 231.

*Pennsylvania*. — *Sampson v. Com.*, 5 W. & S. (Pa.) 385.

*Tennessee*. — *State v. Lea*, 1 Coldw. (Tenn.) 175.

*Texas*. — *Boggs v. State*, (Tex. Crim. App. 1894) 25 S. W. Rep. 770; *Dancey v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 938.

**Objection Matter of Form.** — This is said not to be good pleading, though the objection is mere matter of form. U. S. v. Jolly, 37 Fed. Rep. 108.

2. *Wills v. State*, 8 Mo. 53, holding that a nol. pros. entered upon a count to which reference had been made in another count would not destroy the effect of the reference, because the count had not been stricken out or rendered null, but the court said that the result might have been different had a demurrer to such count been sustained. *People v. McLaughlin*, 2 N. Y. App. Div. 419; *Com. v. Hill*, 2 Pearson (Pa.) 432; *State v. Lea*, 1 Coldw. (Tenn.) 177; *Blitz v. U. S.*, 153 U. S. 308; *Crain v. U. S.*, 162 U. S. 625.

**Where the Time Is Properly Laid in One Count**, but in the second count the name of the month is incorrectly spelled, reference may be had to the first count, notwithstanding it had been dismissed by a nol. pros. *Hutto v. State*, 7 Tex.

App. 46. See also *State v. Gaston*, (Iowa 1895) 65 N. W. Rep. 415; *Wills v. State*, 8 Mo. 52. *Contra*, *People v. Werbin*, 27 Hun (N. Y.) 311. See generally, *supra*, XIII. 9. *Words of Reference*.

**Matters Adopted without Reference — Subject of Caption.** — A nol. pros. as to one count of an indictment only affects that count, and the caption of the indictment which refers to all the counts thereof is not affected thereby. Thus, where the caption shows the prosecution to be carried on in the name and by the authority of the state, a nol. pros. of one count will not affect the allegation that the prosecution was so carried on as to the other counts. *Davis v. State*, 19 Ohio St. 274; *West v. State*, 27 Tex. App. 472; *Duncan v. People*, 2 Ill. 456; *Greenwood v. Com.*, (Ky. 1889) 11 S. W. Rep. 811.

**Statute of Limitation — Matters in Avoidance.** — Where one count of an indictment distinctly states the facts which take the case out of the statute of limitations, another count would be good notwithstanding there is a nol. pros. as to the count making the statement. *Rosenberger v. Com.*, 118 Pa. St. 83.

3. *State v. Lea*, 1 Coldw. (Tenn.) 177.

4. *State v. Wagner*, 118 Mo. 626; *State v. Nelson*, 29 Me. 329; *State v. McAllister*, 26 Me. 374; *State v. Lea*, 1 Coldw. (Tenn.) 177.

But words of reference are not necessary where it sufficiently appears that the offense is charged in each count, as where there are two counts for entering a house with intent to steal, in which case, if the house is described in one count as it is in the other, it would be understood to be the same without the use of the word "said." *People v. Thompson*, 28 Cal. 215.

**Counts Rejected by the Grand Jury** may serve to furnish matter adopted by

**2. Greater Including Lesser Offense — General Rule.** — The charge of an offense of a lower grade may be embraced in the charge of a higher offense, when the higher involves the commission of the lower, and when the indictment contains all the substantial allegations necessary to let in evidence of the lower grade.<sup>1</sup>

**Felonies and Misdemeanors.** — The rule is applied to constituent misdemeanors when felonies are charged,<sup>2</sup> often expressly under statutes providing for conviction of the lesser offense included in

words of reference in another count. *Com. v. Hill*, 2 Pearson (Pa.) 432; *Blitz v. U. S.*, 153 U. S. 308.

1. *Alabama*. — *Smith v. State*, 103 Ala. 4; *Horn v. State*, 98 Ala. 23; *Morris v. State*, 97 Ala. 82.

*Arkansas*. — *Cameron v. State*, 13 Ark. 712; *Sweeden v. State*, 19 Ark. 212; *Bryant v. State*, 41 Ark. 359.

*California*. — *People v. Lowen*, 109 Cal. 381.

*Connecticut*. — *State v. Parmelee*, 9 Conn. 259.

*Florida*. — *Brown v. State*, 31 Fla. 207.

*Georgia*. — *Corley v. State*, 95 Ga. 465; *Jenkins v. State*, 92 Ga. 470; *Brown v. State*, 90 Ga. 454.

*Idaho*. — *State v. Ellington*, (Idaho 1895) 43 Pac. Rep. 61; *People v. Ah Choy*, 1 Idaho 317.

*Indiana*. — *Polson v. State*, 137 Ind. 519; *Mills v. State*, 10 Ind. 114; *State v. Throckmorton*, 53 Ind. 354.

*Iowa*. — *State v. Akin*, 94 Iowa 50; *State v. Nordman*, (Iowa 1897) 70 N. W. Rep. 621; *State v. Hutchison*, (Iowa 1895) 64 N. W. Rep. 610; *State v. Kyne*, 86 Iowa 616.

*Kansas*. — *State v. Triplett*, 52 Kan. 678; *In re Lloyd*, 51 Kan. 501; *State v. O'Kane*, 23 Kan. 248.

*Kentucky*. — *Barnard v. Com.*, 94 Ky. 285; *Fagan v. Com.*, (Ky. 1896) 38 S. W. Rep. 431.

*Louisiana*. — *State v. Miller*, 45 La. Ann. 1170; *State v. Stouderman*, 6 La. Ann. 286.

*Massachusetts*. — *Com. v. Kennedy*, 131 Mass. 585; *Com. v. Crowley*, 167 Mass. 434; *Com. v. Cooper*, 15 Mass. 187; *Com. v. Dean*, 109 Mass. 349; *Com. v. Goodhue*, 2 Met. (Mass.) 193.

*Michigan*. — *People v. Abbott*, 97 Mich. 484; *Hall v. People*, 47 Mich. 638; *People v. Courier*, 79 Mich. 366.

*Minnesota*. — *State v. Vadnais*, 21 Minn. 383 [citing *Reg. v. Button*, 11 Q. B. 929, 63 E. C. L. 929; *Reg. v. Neale*, 1 C. C. 36].

*Montana*. — *Territory v. Milroy*, 8

Mont. 364; *Territory v. Dooley*, 4 Mont. 298.

*Nevada*. — *State v. Collyer*, 17 Nev. 275.

*New York*. — *People v. Stockham*, 1 Park. Crim. Rep. (N. Y. Supreme Ct.) 424; *Lohman v. People*, 1 N. Y. 379; *People v. McDonnell*, (Ct. App.) 1 N. Y. Crim. Rep. 366.

*Oklahoma*. — *Gatliff v. Territory*, 2 Okla. 523.

*Oregon*. — *State v. Hanlon*, (Oregon 1897) 48 Pac. Rep. 353.

*Tennessee*. — *Hall v. State*, 7 Lea (Tenn.) 685; *Slaughter v. State*, 6 Humph. (Tenn.) 410.

*Texas*. — *Green v. State*, 8 Tex. App. 71; *Peterson v. State*, 12 Tex. App. 650.

*Virginia*. — *Wright v. Com.*, 82 Va. 189.

*Washington*. — *State v. Keen*, 10 Wash. 93; *State v. Greer*, 11 Wash. 244.

*Wisconsin*. — *State v. Shear*, 51 Wis. 460.

**The Converse Rule.** — An indictment for petit larceny will not support a verdict and judgment for grand larceny, notwithstanding the fine imposed is one which might have been imposed for petit larceny. *McCullough v. State*, 132 Ind. 429.

2. *Alabama*. — *Horn v. State*, 98 Ala. 23.

*Iowa*. — *State v. Kyne*, 86 Iowa 616; *State v. Hutchison*, (Iowa 1895) 64 N. W. Rep. 610; *State v. McAvoy*, 73 Iowa 557.

*Kansas*. — *State v. Triplett*, 52 Kan. 678; *State v. O'Kane*, 23 Kan. 248.

*Kentucky*. — *Barnard v. Com.*, 94 Ky. 285.

*Massachusetts*. — *Com. v. Drum*, 19 Pick. (Mass.) 479.

*Michigan*. — *People v. Abbott*, 97 Mich. 484; *People v. Courier*, 79 Mich. 366; *Hall v. People*, 47 Mich. 636; *People v. McDonald*, 9 Mich. 150.

*Minnesota*. — *State v. Vadnais*, 21 Minn. 383.

the greater one charged;<sup>1</sup> though at common law the rule was different and a conviction for a misdemeanor could not be had under the charge of a felony.<sup>2</sup>

**The Rule Qualified.** — But in order to include in the charge of a crime an offense of a lower degree than that charged, the greater must include all the ingredients of the lesser.<sup>3</sup>

**3. Joinder of Counts Charging One Offense.** — It is competent to vary the charge by means of several counts, when the offense is the same, for the purpose of meeting the different phases of the evidence which may be adduced at the trial;<sup>4</sup> and though it is

*Montana.* — *Territory v. Milroy*, 8 Mont. 364.

*New Jersey.* — *State v. Johnson*, 30 N. J. L. 185.

*New York.* — *People v. Connors*, 13 Misc. Rep. (New York County Ct. Sess.) 582; *Lohman v. People*, 1 N. Y. 379.

*Pennsylvania.* — *Hunter v. Com.*, 79 Pa. St. 508.

*Tennessee.* — *Hall v. State*, 7 Lea (Tenn.) 685.

*Vermont.* — *State v. Scott*, 24 Vt. 129; *State v. McLearn*, 1 Aik. (Vt.) 313; *State v. Coy*, 2 Aik. (Vt.) 181.

*Washington.* — *State v. Keen*, 10 Wash. 93.

*Wisconsin.* — *McKinney v. State*, 25 Wis. 378. See also *supra*, X. 3. c. *Feloniously*.

1. *Cameron v. State*, 13 Ark. 712; *Bryant v. State*, 41 Ark. 362; *State v. Kyne*, 86 Iowa 616; *State v. O'Kane*, 23 Kan. 248; *Barnard v. Com.*, 94 Ky. 285; *Com. v. Squire*, 1 Met. (Mass.) 259; *People v. Abbott*, 97 Mich. 484; *People v. Courier*, 79 Mich. 366; *Hall v. People*, 47 Mich. 636; *State v. Purdie*, 67 N. Car. 26; *Green v. State*, 8 Tex. App. 71; *McKinney v. State*, 25 Wis. 383.

2. *State v. O'Kane*, 23 Kan. 248; *Green v. State*, 8 Tex. App. 71; *Hunter v. Com.*, 79 Pa. St. 505; *U. S. v. Larned*, 4 Cranch (C. C.) 335, in which case the court was in doubt whether, if the facts stated in the indictment did not amount to a felony, the word "feloniously" might not be rejected as surplusage and judgment given as for a misdemeanor, but said that if the indictment did really charge a felony, the authorities were clear that judgment could not be given upon it as for a misdemeanor. *Citing* *Rex v. Westbeer*, 2 Stra. 1137; *R. v. Joyner*, Kel. 29, 2 Hale 170, 172, 192, 1 Hale 449; and other early authorities.

But in *England*, by the Act 7 Wm.

IV. and 1 Vict., c. 85, § 11, known as Lord Denman's Act, making it lawful for the jury, in case of felonies committed against the person, to acquit the defendant of the felony and find him guilty of a constituent misdemeanor, the old rule was practically abrogated. *State v. Fitzsimon*, 18 R. I. 236.

**Upon Acquittal of Felony — Holding for Misdemeanor.** — Where the defendant is acquitted of the felony charged, the court may hold him to be dealt with for the misdemeanor. *Young v. Com.*, 1 Rob. (Va.) 805.

3. *Bryant v. State*, 41 Ark. 359; *State v. O'Kane*, 23 Kan. 248; *State v. Porter*, 48 La. Ann. 1539; *Scott v. State*, 60 Miss. 269, holding that statutory murder did not include assault, and, therefore, a conviction for an assault with intent to commit murder under an indictment for statutory murder could not be sustained; *Territory v. Dooley*, 4 Mont. 298, wherein it was held that as the statute then under consideration did not authorize the charge of assault and battery with intent to commit murder, but only assault with such intent, though the indictment may recite a battery in connection with the consummation of the assault, such recital forms no part of the charge and therefore could not sustain a conviction of assault and battery, but conviction could be had only for an assault with intent to commit murder or for a simple assault; *State v. Shear*, 51 Wis. 462.

But it has also been held that it is not material upon conviction of a lower grade of the offense that the higher was not well charged. *State v. Triplett*, 52 Kan. 678. See also *Com. v. Kennedy*, 131 Mass. 584; *Lohman v. People*, 1 N. Y. 379.

4. *Alabama.* — *Tempe v. State*, 40 Ala. 350; *Oliver v. State*, 37 Ala. 134; *Carleton v. State*, 100 Ala. 130.

upon the principle of joinder of offenses that such joinder of

*Arizona*. — Territory *v.* Duffield, 1 Arizona 62.

*Arkansas*. — Bridges *v.* State, 37 Ark. 224; State *v.* Rapley, 60 Ark. 13.

*Florida*. — Keech *v.* State, 15 Fla. 603; Kennedy *v.* State, 31 Fla. 428; Murray *v.* State, 25 Fla. 528.

*Idaho*. — Territory *v.* Guthrie, 2 Idaho 398.

*Indiana*. — Merrick *v.* State, 63 Ind. 327; Bissot *v.* State, 53 Ind. 408; Mershon *v.* State, 51 Ind. 14; Joy *v.* State, 14 Ind. 139; Bell *v.* State, 42 Ind. 335; Engleman *v.* State, 2 Ind. 91.

*Iowa*. — State *v.* Brannon, 50 Iowa 372; State *v.* House, 55 Iowa 466; State *v.* Baldwin, 79 Iowa 714; State *v.* Pott 78 Iowa 656; State *v.* McPherson, 9 Iowa 53.

*Louisiana*. — State *v.* Cook, 20 La. Ann. 145.

*Maine*. — State *v.* Flye, 26 Me. 312.

*Maryland*. — State *v.* McNally, 55 Md. 563; State *v.* Bell, 27 Md. 675.

*Massachusetts*. — Com. *v.* Ismahl, 134 Mass. 202; Com. *v.* McLaughlin, 12 Cush. (Mass.) 612.

*Michigan*. — People *v.* Aikin, 66 Mich. 468.

*Missouri*. — State *v.* Price, 3 Mo. App. 586; State *v.* Green, 66 Mo. 643; State *v.* Mallon, 75 Mo. 356.

*Nebraska*. — Furst *v.* State, 31 Neb. 403.

*New Hampshire*. — State *v.* Rust, 35 N. H. 441.

*New York*. — People *v.* Adler, 140 N. Y. 331; People *v.* Dimick, 107 N. Y. 31; People *v.* Willson, 109 N. Y. 345; People *v.* McCarthy, 110 N. Y. 309; People *v.* Moore, 37 Hun (N. Y.) 87, 103 N. Y. 682; People *v.* Rugg, 98 N. Y. 537; Armstrong *v.* People, 70 N. Y. 38; Nelson *v.* People, 23 N. Y. 293; People *v.* Menken, 36 Hun (N. Y.) 90; Lanergan *v.* People, 6 Park. Cr. Rep. (N. Y. Ct. App.) 209; People *v.* Charbinau, (Ct. App.) 26 N. Y. St. Rep. 491; Taylor *v.* People, 12 Hun (N. Y.) 212; Kane *v.* People, 8 Wend. (N. Y.) 203.

*North Carolina*. — State *v.* Surles, 117 N. Car. 720; State *v.* Phillips, 104 N. Car. 786; State *v.* Harris, 106 N. Car. 682.

*Rhode Island*. — State *v.* Doyle, 15 R. I. 527.

*Tennessee*. — Foute *v.* State, 15 Lea (Tenn.) 715.

*Texas*. — Green *v.* State, 21 Tex. App. 64; Dill *v.* State, (Tex. Crim. App. 1895)

33 S. W. Rep. 126; Thompson *v.* State, 32 Tex. Crim. Rep. 265.

*Wisconsin*. — Newman *v.* State, 14 Wis. 393; State *v.* Leicham, 41 Wis. 565.

**By Statute.** — But while this is generally permissible upon the theory of the joinder of offenses, it is sometimes expressly authorized by statutes which require indictments or informations to contain only one offense, excepting from their operation the joinder of different offenses consisting of the same acts and of the same offense in different ways for the purpose of meeting the evidence, and under such statutes misjoinder and duplicity are practically identical. Reference may be had to the statutes in each state in addition to the following cases: State *v.* Rapley, 60 Ark. 13; Territory *v.* Guthrie, 2 Idaho 398; State *v.* Brannon, 50 Iowa 372; State *v.* Baldwin, 79 Iowa 714; State *v.* Potts, 78 Iowa 656; Com. *v.* Ismahl, 134 Mass. 202; and the cases in New York cited in the list at the head of this note.

#### **Under Different Sections of the Statute.**

— It is competent for the state to vary charges by means of several counts, where the offense is the same, in order to meet the proof, although the different counts relate to different sections of the statute. State *v.* Davis, 29 Mo. 397.

#### **Unnecessary Number of Counts.**

— In State *v.* Edmondson, 43 Tex. 165, the court said with regard to unnecessary repetition: "While under the liberal rule which has characterized the practice under the code the statement of the offense may be encumbered with superfluous reiteration, or different phases of its facts may be set forth in different counts, to do so is obviously a departure from the spirit and object of the code. If distinct and independent offenses are charged in the indictment, the objection of duplicity may be as applicable to it, if not more so, under the code than at common law."

#### **Count at Common Law and under Statute.**

— A count at common law may be joined with another under a statute. State *v.* Williams, 2 McCord L. (S. Car.) 301; State *v.* Thompson, 2 Strobb. L. (S. Car.) 12; Com. *v.* Kimball, 7 Gray (Mass.) 330; Com. *v.* Lewis, 140 Pa. St. 561; Com. *v.* Sylvester, 6 Pa. L. J. 283. But see *contra*, Combs *v.* Com., (Ky. 1894) 25 S. W. Rep. 276; Marler *v.* Com., (Ky. 1894) 24 S. W. Rep. 608.

counts is permissible,<sup>1</sup> it is also said to be unnecessary and improper to allege that the offenses charged are different;<sup>2</sup> nor is it necessary that the pleading should expressly state that the counts are intended to cover the same offense.<sup>3</sup>

**4. Same Acts Constituting Different Offenses.**—Where the same acts constitute different offenses, or where the act charged may be characterized by an unascertained fact, in some cases changing the punishment, they may be charged in separate counts.<sup>4</sup>

In *People v. Aikin*, 66 Mich. 468, it was held that while in an information for manslaughter under the statute the offense may be set out in several counts, another count charging a common-law manslaughter cannot be added, because the latter offense grows out of different facts and circumstances, and is totally different in the means or method of causing death, the one being the direct criminal act against which the statute has set its bar, and the other being the omission to perform a duty, which omission resulting in death the common law has made manslaughter as the penalty of the negligence.

1. *Baker v. State*, 4 Ark. 56; *Mershon v. State*, 51 Ind. 14; *Kane v. People*, 8 Wend. (N. Y.) 211, in which case Walworth, Ch., said: "It is every day's practice to charge a felony in different ways in several counts for the purpose of meeting the evidence as it may come out upon the trial; each of the counts on the face of the indictment purports to be for a distinct and separate offense."

2. *State v. Rust*, 35 N. H. 441.

In *State v. Doyle*, 15 R. I. 527, the court said: "Though it is usual to charge the offense as if the offense in such count was a distinct offense," yet charging the same offense in different counts "is matter of form and does not make the indictment bad under our statute."

3. *Com. v. Jacobs*, 152 Mass. 276; *Com. v. Ismahl*, 134 Mass. 202, in which it was held that Pub. Stat. Mass., c. 213, § 18, providing that "two or more counts describing different offenses depending upon the same facts or transactions may be set forth in the same complaint or indictment, if the complaint or indictment contains an averment that the different counts therein are different descriptions of the same acts," was not intended to impose new restrictions upon the pleader, but to enable him to join several counts describing different offenses which could

not be joined at common law; *Short v. State*, 63 Ind. 376, holding that where the prosecutor upon a motion by the defendant to compel an election stated that the offenses were the same and that he relied upon only one offense for conviction, the court was not bound to grant the motion.

In *Arkansas* it was held that the record must show that the counts were inserted for this purpose, because if from aught the record shows two separate offenses are charged, the indictment will be bad; but it was also held to be sufficient for the prosecuting officer to make a statement, when a demurrer is interposed, that the different counts of the indictment are for the same offense, and to make such statement appear of record. *State v. Jourdan*, 32 Ark. 204.

In *California* it was held that the charge must be made in such a way as to show clearly upon the face of the indictment or information that the matters or things set forth in the different counts are descriptive of one and the same offense. *People v. Garcia*, 58 Cal. 103.

4. *Alabama*.—*Grimes v. State*, 105 Ala. 86.

*Colorado*.—*Parker v. People*, 13 Colo. 155.

*Connecticut*.—*State v. Tuller*, 34 Conn. 298.

*Georgia*.—*Gilbert v. State*, 65 Ga. 449.

*Illinois*.—*Lyons v. People*, 68 Ill. 271.

*Indiana*.—*M'Gregg v. State*, 4 Blackf. (Ind.) 101; *Reed v. State*, (Ind. 1897) 46 N. E. Rep. 135.

*Louisiana*.—*State v. Scott*, 48 La. Ann. 295; *State v. McDonald*, 39 La. Ann. 959; *State v. Cook*, 42 La. Ann. 85; *State v. Malloy*, 30 La. Ann. 61; *State v. Pierre*, 38 La. Ann. 91.

*Massachusetts*.—*Com. v. McLaughlin*, 12 Cush. (Mass.) 612.

*Michigan*.—*Van Sickle v. People*, 29 Mich. 63; *People v. McKinney*, 10 Mich. 95.

## 5. Joinder of Counts for Distinct Offenses, and Election—

*a. JOINDER IN GENERAL.*—While it is said that the defendant ought not to be charged with different felonies in different counts of the same indictment,<sup>1</sup> as such a course might interfere with his full defense,<sup>2</sup> the joinder of different offenses in the same indictment, in separate counts, is not necessarily fatal to the pleading itself, as appears from various adjudications holding that such joinder is not ground for demurrer or arrest of judgment, but that the court may, in its discretion, quash the indictment or compel the prosecutor to elect upon which count he will proceed.<sup>3</sup>

*New York.*—*People v. Adler*, 140 N. Y. 331; *People v. Dimick*, 107 N. Y. 31; *People v. Dunn*, 90 N. Y. 104; *People v. Burns*, 53 Hun (N. Y.) 276; *People v. O'Donnell*, 46 Hun (N. Y.) 360; *People v. Callahan*, 29 Hun (N. Y.) 580; *Coats v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 662; *People v. Emerson*, 53 Hun (N. Y.) 437, 7 N. Y. Crim. Rep. 97; *People v. Rose*, 52 Hun (N. Y.) 33; *People v. Crotty*, (Supreme Ct.) 30 N. Y. St. Rep. 46; *People v. Infield*, (New York County Gen. Sess.) 1 N. Y. Crim. Rep. 146; *Hawker v. People*, 75 N. Y. 487; *People v. Rose*, (Buffalo Super. Ct.) 15 N. Y. Supp. 815; *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 272; *People v. Wilson*, 151 N. Y. 403.

*Ohio.*—*State v. Bailey*, 50 Ohio St. 636.

*Pennsylvania.*—*Hunter v. Com.*, 79 Pa. St. 508; *Com. v. Lewis*, 140 Pa. St. 561.

*Tennessee.*—*Wright v. State*, 4 Humph. (Tenn.) 197.

*Texas.*—*Dill v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 126.

*Utah.*—*U. S. v. West*, 7 Utah 437.

*Virginia.*—*Anthony v. Com.*, 88 Va. 847; *Doway v. Com.*, 9 Gratt. (Va.) 727.

*Wisconsin.*—*Jackson v. State*, 91 Wis. 253.

1. *Cash v. State*, 10 Humph. (Tenn.) 111.

2. In England, if two different felonies are charged in separate counts, it is said that such an indictment would be quashed. *State v. Tuller*, 34 Conn. 299.

3. *Colorado.*—*White v. People*, 8 Colo. App. 289.

*Connecticut.*—*State v. Tuller*, 34 Conn. 299.

*Florida.*—*Kennedy v. State*, 31 Fla. 428.

*Indiana.*—*State v. Smith*, 8 Blackf. (Ind.) 489; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186.

*Maryland.*—*State v. McNally*, 55 Md. 562.

*Michigan.*—*Hamilton v. People*, 29 Mich. 173.

*Nebraska.*—*Blodgett v. State*, (Neb. 1897) 69 N. W. Rep. 753; *Thompson v. People*, 4 Neb. 524; *Aiken v. State*, 41 Neb. 263.

*New York.*—*Johnson v. People*, 3 Hill (N. Y.) 178.

*Ohio.*—*Bailey v. State*, 4 Ohio St. 441.

*South Carolina.*—*State v. Scott*, 15 S. Car. 435; *State v. Tidwell*, 5 Strobb. L. (S. Car.) 1.

*Tennessee.*—*Foute v. State*, 15 Lea (Tenn.) 715.

*Vermont.*—*State v. Lockwood*, 58 Vt. 378; *State v. Hooker*, 17 Vt. 658.

*Wisconsin.*—*State v. Fee*, 19 Wis. 565.

*England.*—*Reg. v. Heywood*, 9 Cox C. C. 479.

*Contra.*—*Stephen v. State*, 11 Ga. 231, where a felony and a misdemeanor were joined and a demurrer was sustained; *Doyle v. State*, 77 Ga. 513; *Davis v. State*, 57 Ga. 66; *State v. Freels*, 3 Humph. (Tenn.) 230, where the judgment was arrested.

*The Question Discussed.*—In *Pointer v. U. S.*, 151 U. S. 403, Mr. Justice Harlan, delivering the opinion, said: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment, and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies,

**b. OFFENSES OF SAME KIND.**—It is frequently laid down as a general rule that offenses of the same class and grade,<sup>1</sup> or subject

at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor."

In *State v. Marvin*, 35 N. H. 26, the question is answered as follows: "In cases of felony it is said that regularly no more than one distinct offense should be charged in one indictment; and if the objection is taken before plea the court will quash the indictment. If the objection is not made till after plea, the court may compel the prosecutor to elect on which charge he will proceed; but this is only matter of precedence and discretion, which rests with the judge to exercise. 1 Chitty Crim. Law, 253; 2 East P. C. 515; *Rex v. Jones*, 984; 2 Campb. 132. But in point of law there is no objection to the insertion of charges for several distinct felonies of the same degree in one indictment. The same authorities, and *Rex v. Kingston*, 8 East 41. In cases of misdemeanor the joinder of several offenses is not in general an objection in any stage of the proceedings. 1 Chitty Crim. Law 254; *Rex v. Benfield*, 2 Burr. 984; *Roscoe's Ev.* 216."

**Election.**—If counts are improperly joined the court must be asked before trial to interfere and put the commonwealth to its election, but there is no ground of demurrer. *Com. v. Demain*, 6 Pa. L. J. 29; *State v. Smalley*, 50 Vt. 736; *State v. McNally*, 55 Md. 562.

There is no ground for quashing an indictment where the offenses are the same, but the motion should be to compel the defendant to elect. *U. S. v. Harman*, 38 Fed. Rep. 827.

**Election upon Demurrer.**—It has been held, where a demurrer is the proper method of raising the objection of misjoinder of offenses, that the prosecuting attorney may, upon such demurrer, be required to elect upon which count, or for which offense, he will prosecute. *State v. Jourdan*, 32 Ark. 204. And in *Mississippi* it was said in one case that the proper result could have been attained by striking out one of the charges upon demurrer to the indictment. *Hill v. State*, 72 Miss. 527.

**Under the Code**, in *New York*, where two offenses cannot be joined in the same indictment, as a general rule, demurrer is the proper method of raising the objection. *People v. McCarthy*, 110 N. Y. 309. So in other states where the rule as to joinder is like that in *New York*. *State v. Rhea*, 38 Ark. 555; *People v. De Coursey*, 61 Cal. 134; *People v. Quvise*, 56 Cal. 396.

**Objection by Demurrer—Waiver.**—Where a demurrer is provided as the manner of reaching such an objection, if not so taken the objection waived. *People v. Upton*, 38 Hun (N. Y.) 110.

**Uncertainty as to Misjoinder—Motion to Quash.**—If the court upon an inspection is not certain that there is a misjoinder of distinct felonies, a motion to quash should be overruled. *Glover v. State*, 109 Ind. 396.

1. *Arkansas*.—*Toliver v. State*, 35 Ark. 396.

*Georgia*.—*Williams v. State*, 72 Ga. 180.

*Louisiana*.—*State v. Cazeau*, 8 La. Ann. 114; *State v. Depass*, 31 La. Ann. 487; *State v. Wren*, 48 La. Ann. 803; *State v. Green*, 37 La. Ann. 382; *State v. Morgan*, 39 La. Ann. 214.

*Maine*.—*State v. Frazier*, 79 Me. 95; *State v. Andrews*, 17 Me. 103; *State v. Hood*, 51 Me. 363.

*Massachusetts*.—*Com. v. Hills*, 10 Cush. (Mass.) 530.

*Michigan*.—*People v. Warner*, 104 Mich. 337.

*Mississippi*.—*Grizzle v. State*, 37 Miss. 422; *Teat v. State*, 53 Miss. 458; *Wash v. State*, 14 Smed. & M. (Miss.) 120; *Sarah v. State*, 28 Miss. 267.

*Missouri*.—*Storrs v. State*, 3 Mo. 9.

*Nebraska*.—*Martin v. State*, 30 Neb. 507; *Blodgett v. State*, (Neb. 1897) 69 N. W. Rep. 751; *Hans v. State*, (Neb. 1897) 69 N. W. Rep. 838.

to the same mode of trial and the same punishment, or punishment of the same nature,<sup>1</sup> as well as distinct offenses with different degrees of punishment, the offenses themselves differing only in degree, but belonging to the same class of crimes, may be joined in separate counts.<sup>2</sup> And while in most of the cases wherein these general rules are laid down the offenses appear to have arisen out of the same transaction, in some states the offenses must necessarily arise out of the same transaction in order to authorize the joinder.<sup>3</sup>

*c. JOINDER OF FELONIES.* — In other cases, as well as in some of those cited to the general rule in the preceding section, it seems that a joinder of distinct and independent felonies of the same nature, even though they arise out of different transactions, may be allowed in separate counts of the same indictment, the court having a discretion to protect the defendant from confusion in his defense by compelling an election.<sup>4</sup>

*New York.* — *People v. Rynders*, 12 Wend. (N. Y.) 425.

*Tennessee.* — *Wright v. State*, 4 Humph. (Tenn.) 194; *Cash v. State*, 10 Humph. (Tenn.) 111; *Hampton v. State*, 8 Humph. (Tenn.) 71; *Smith v. State*, 8 Lea (Tenn.) 388; *Tucker v. State*, 8 Lea (Tenn.) 633.

*Utah.* — *U. S. v. West*, 7 Utah 437.

*Wisconsin.* — *Ketchingman v. State*, 6 Wis. 426; *Porath v. State*, 90 Wis. 527; *Jackson v. State*, 91 Wis. 253.

*United States.* — *U. S. v. O'Callahan*, 6 McLean (U. S.) 596; *U. S. v. Jones*, 69 Fed. Rep. 973.

*England.* — *Rex v. Johnson*, 2 Leach C. C. 1105.

1. *Alabama.* — *Howard v. State*, 108 Ala. 571; *Johnson v. State*, 29 Ala. 62; *Covy v. State*, 4 Port. (Ala.) 186.

*Arkansas.* — *Baker v. State*, 4 Ark. 56; *Orr v. State*, 18 Ark. 540.

*Georgia.* — *Stephen v. State*, 11 Ga. 225.

*Kansas.* — *State v. Hodges*, 45 Kan. 389; *State v. Emmons*, 45 Kan. 397.

*Kentucky.* — *Com. v. McChord*, 2 Dana (Ky.) 242.

*Louisiana.* — *State v. Crosby*, 4 La. Ann. 434; *State v. McLane*, 4 La. Ann. 435.

*Massachusetts.* — *Com. v. Hills*, 10 Cush. (Mass.) 534; *Carlton v. Com.*, 5 Met. (Mass.) 532; *Benson v. Com.*, 158 Mass. 164; *Com. v. Costello*, 120 Mass. 366.

*New York.* — *People v. Rynders*, 12 Wend. N. Y. 425; *People v. Gates*, 13 Wend. (N. Y.) 311.

2. *Lawless v. State*, 4 Lea (Tenn.) 176; *Tillery v. State*, 10 Lea (Tenn.) 36;

*Foute v. State*, 15 Lea (Tenn.) 715; *Cook v. State*, 16 Lea (Tenn.) 461; *Ayrs v. State*, 5 Coldw. (Tenn.) 27; *Waddell v. State*, 1 Tex. App. 720; *Barnwell v. State*, 1 Tex. App. 745; *U. S. v. Jones*, 69 Fed. Rep. 973.

Even where it is improper to join distinct felonies of different degrees it has been held that such a joinder will not be a sufficient objection when not taken before the trial, and after a general verdict of guilty such an objection will not be available. *Wash v. State*, 14 Smed & M. (Miss.) 120.

3. Thus, under statutes expressly providing that an indictment or information shall charge but one offense, but permitting that offense to be stated in different ways, or permitting the same acts to be charged though they constitute more than one offense, distinct transactions cannot be charged. *Territory v. Duffield*, 1 Arizona 62; *State v. McCormack*, 56 Iowa 586; *State v. Wood*, 13 Minn. 121; *People v. O'Donnell*, 46 Hun (N. Y.) 360; *State v. Smith*, 2 N. Dak. 515; *Henderson v. State*, 2 Tex. App. 89; *McKenzie v. State*, 32 Tex. Crim. Rep. 568. See also *Territory v. Willard*, 8 Mont. 331; *Crook v. State*, 59 Ark. 326.

**Count Rejected as Surplusage.** — If one of the counts in an indictment charges the offense to have been committed in a county other than that in which the indictment is found, such a count may be rejected as surplusage and will not render the indictment bad. *State v. Smouse*, 50 Iowa 43.

4. *Bailey v. State*, 4 Ohio St. 441; *Cash v. State*, 10 Humph. (Tenn.) 111;



*d.* DEGREES OF SAME OFFENSE. — Different degrees of the same offense may be charged in separate counts of the same indictment.<sup>1</sup>

*e.* JOINDER OF MISDEMEANORS. — In prosecutions for misdemeanors several distinct offenses of the same kind requiring punishments of like nature may be joined in separate counts of the same pleading.<sup>2</sup>

*State v. Tuller*, 34 Conn. 299, where the court said that "in England, if two different felonies are charged in separate counts, the court will quash the indictment, but that is not the practice here; the court, if two distinct transactions are joined, may direct the attorney to elect, and to nolle one of the counts;" *State v. Scott*, 15 S. Car. 436, holding that if distinct felonies not growing out of the same transaction are charged in separate counts, the practice is to require an election, even though no motion to that effect could be made by the accused; *State v. Nelson*, 14 Rich. L. (S. Car.) 172.

**Offenses of Different Character** cannot be incorporated in the same indictment. *Ayrs v. State*, 5 Coldw. (Tenn.) 27; *State v. Fitzsimon*, 18 R. I. 236; *U. S. v. Scott*, 4 Biss. (U. S.) 31.

And such a joinder of incongruous charges has been made the ground for granting a new trial, because "it can hardly be said that a party has had a 'full, fair, and impartial trial,' who has been forced to defend himself, on the same indictment, against two inconsistent and widely different offenses." *State v. Fitzsimon*, 18 R. I. 236.

1. *Baker v. State*, 4 Ark. 56; *Hoskins v. State*, 11 Ga. 92; *Estes v. State*, 55 Ga. 131; *Gilbert v. State*, 65 Ga. 449; *Curtis v. People*, 1 Ill. 256; *Manly v. State*, 7 Md. 137; *State v. Sutton*, 4 Gill (Md.) 494; *Burk v. State*, 2 Har. & J. (Md.) 429; *Brantley v. State*, 13 Smed. & M. (Miss.) 468; *Com. v. Shutte*, 130 Pa. St. 272; *Ayrs v. State*, 5 Coldw. (Tenn.) 29.

A count charging an assault with intent to kill and murder, and another charging an assault with intent to do great bodily harm less than the crime of murder, one a statutory offense and the other a common-law offense, but both felonies, though one is punishable by imprisonment for a certain number of years or imprisonment and fine, and the other punishable by imprisonment for life, may be joined in the same

information. One of these crimes includes the other, and the practice on the trial would be the same; while only one of the offenses exists at common law, both are defined by statute and penalties regulated therefor. *People v. Sweeney*, 55 Mich. 587.

2. *Kansas*. — *State v. Schweiter*, 27 Kan. 499; *State v. Chandler*, 31 Kan. 201; *State v. Goodwin*, 33 Kan. 538.

*Kentucky*. — *Com. v. McChord*, 2 Dana (Ky.) 242.

*Massachusetts*. — *Com. v. Tuttle*, 12 Cush. (Mass.) 505; *Com. v. Kimball*, 7 Gray (Mass.) 330.

*Missouri*. — *State v. Kibby*, 7 Mo. 317.

*Nebraska*. — *Martin v. State*, 30 Neb. 509; *Burrell v. State*, 25 Neb. 581.

*New Hampshire*. — *State v. Rust*, 35 N. H. 441.

*New Jersey*. — *Stephens v. State*, 53 N. J. L. 245.

*New Mexico*. — *U. S. v. Vigil*, 7 N. Mex. 296.

*New York*. — *Kane v. People*, 8 Wend. (N. Y.) 203; *People v. Costello*, 1 Den. (N. Y.) 83.

*Virginia*. — *Mitchell v. Com.*, 93 Va. 775.

*Wisconsin*. — *State v. Gummer*, 22 Wis. 441.

*England*. — *Rex v. Jones*, 2 Campb. 131; *Young v. Rex*, 3 T. R. 105.

**In a Complaint** two distinct offenses may be joined. *Barnes v. State* 19 Conn. 398; *Com. v. Dillane*, 11 Gray (Mass.) 67. *Contra*, *Tiedke v. Saginaw*, 43 Mich. 64.

Where a complaint before a justice charges more than one offense, as to one of which he has jurisdiction only to inquire and bind over, or discharge, this is not a misjoinder. *State v. Peck*, 32 Vt. 172.

**Statutory and Common Law**. — A count for a statutory misdemeanor may be joined with a count for a common-law misdemeanor, and the court may impose sentence on each count. *Com. v. Sylvester*, 6 Pa. L. J. 283.

**Several Misdemeanors under Different Statutes** may be joined in the same in-

*f.* JOINDER OF FELONY AND MISDEMEANOR. — The common-law rule against the joinder of a felony and a misdemeanor in the same indictment<sup>1</sup> was based upon substantially the same reasons as the rule which prohibited a conviction for a misdemeanor under an indictment for a felony.<sup>2</sup> But in the United States the reason for the old common-law rule does not generally prevail, and therefore it is permissible to join felonies and misdemeanors which form a part of the development of the same transaction,<sup>3</sup> though the practice is not universally approved.<sup>4</sup>

dictment. *Com. v. Liebtreu*, 1 Pearson (Pa.) 107.

**Punishments Positive and Discretionary.**

— It is no objection that the punishment for one of the misdemeanors charged is positive while that for another charged is discretionary. *Stone v. State*, 20 N. J. L. 404.

**Under a Statute Requiring only One Offense to Be Charged**, distinct misdemeanors which consist of the same acts may be charged in different counts. *People v. Lenhardt*, (New York County Gen. Sess.) 4 N. Y. Crim. Rep. 317. And the joinder of distinct misdemeanors in separate counts of an indictment cannot be made available as a ground of reversal of the judgment on error if the sentence is a single one and is appropriate to any one of the counts of the indictment. *Polinsky v. People*, 73 N. Y. 65. And the question of misjoinder cannot be raised by objection to the admission of evidence, and unless the defendant in such a case in some manner requests an election, or a verdict on but one charge, he cannot afterwards object to a single sentence on either. *People v. Dunn*, 90 N. Y. 104.

In *Texas*, where a statute similar to that in New York, above referred to, prevails, it is held that different misdemeanors may be charged in separate counts of an information. *Alexander v. State*, 27 Tex. App. 533; *Hall v. State*, 32 Tex. Crim. Rep. 474; *Stebbins v. State*, 31 Tex. Crim. Rep. 294.

**Form — Separate Counts.** — The objection that in an indictment for the illegal sale of intoxicating liquors each count after the first did not aver that the intoxicating liquors sold were "other intoxicating liquors" was held to be so trivial as not to be worthy of consideration. *Shoop v. People*, 45 Ill. App. 111.

1. *State v. Fitzsimon*, 18 R. I. 236; *Storrs v. State*, 3 Mo. 9; *Harman v. Com.*, 12 S. & R. (Pa.) 69; *Scott v.*

*Com.*, 14 Gratt. (Va.) 687; *Rex v. Fuller*, 1 B. & P. 180; *Rex v. Benfield*, 2 Burr. 980.

2. *Tillinghast, J.*, in *State v. Fitzsimon*, 18 R. I. 236.

**Two Indictments** for the same offense, one charging a felony and the other a misdemeanor, should not be preferred at the same time. *Rex v. Doran*, 1 Leach C. C. 538. And in such a case the court will order an election, and an acquittal on the one not prosecuted. *Rex v. Smith*, 3 C. & P. 412, 14 E. C. L. 374.

3. *James v. State*, 104 Ala. 20; *Herman v. People*, 131 Ill. 594; *Curtis v. People*, 1 Ill. 256; *Stevens v. State*, 66 Md. 202; *Burk v. State*, 2 Har. & J. (Md.) 428, wherein it was held that if the defendant pleads not guilty to two counts, one charging a misdemeanor and the other a felony, the prosecuting attorney may elect to proceed against him on one of the counts alone; *People v. Lenhardt*, (New York County Gen. Sess.) 4 N. Y. Crim. Rep. 318; *State v. Lincoln*, 49 N. H. 464; *Staeger v. Com.*, 103 Pa. St. 469; *State v. Stewart*, 59 Vt. 273; *Reg. v. Stockley*, 2 G. & D. 728, 3 Q. B. 238, 43 E. C. L. 715.

The practice of joining felonies and misdemeanors is permissible except where the offenses charged "are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage." *Henwood v. Com.*, 52 Pa. St. 424.

4. *Weathersby v. State*, 1 Tex. App. 646, wherein it was held that an indictment is not defective because it charges two separate and distinct offenses, one a felony and one a misdemeanor, in separate and distinct counts, but the court took occasion to express its disapprobation of such pleading when the joinder might be so easily avoided by the pleader's acquainting himself, in advance of the preparation of the indictment, with the nature of the offense

**6. Motion to Elect — Discretion of Court — In General.** — A motion to compel the state to elect upon which count it will proceed is addressed to the sound discretion of the court, as a general rule, and its action thereon will not be interfered with unless the discretion has been used to the manifest injury of the defendant.<sup>1</sup> It is too late to object to an indictment on the ground that it charges more than one offense, where the defendant goes to trial without requiring the prosecution to elect upon which charge it will proceed.<sup>2</sup> It appears from many cases that an election will not be compelled when the transaction is the same and the same offense is set out in different modes, or the several counts refer to the same acts and transactions,<sup>3</sup> and it has been said that only

for which the accused should be indicted and tried; *State v. Freels*, 3 *Humph. (Tenn.)* 230; *Davis v. State*, 57 *Ga.* 66; *Doyle v. State*, 77 *Ga.* 513, holding that such a joinder is not permissible, especially if the offenses are of a different nature.

1. *Alabama*. — *State v. Jones*, 5 *Ala.* 666.

*California*. — *People v. Shotwell*, 27 *Cal.* 394.

*Colorado*. — *Roberts v. People*, 11 *Colo.* 213.

*District of Columbia*. — *U. S. v. McBride*, 18 *D. C.* 371.

*Florida*. — *Murray v. State*, 25 *Fla.* 528.

*Georgia*. — *State v. Hogan*, *R. M. Charl. (Ga.)* 474.

*Indiana*. — *Engleman v. State*, 2 *Ind.* 91; *McGregor v. State*, 16 *Ind.* 9; *Griffith v. State*, 36 *Ind.* 406; *Miller v. State*, 51 *Ind.* 405; *Mershon v. State*, 51 *Ind.* 14; *Wall v. State*, 51 *Ind.* 453; *Snyder v. State*, 59 *Ind.* 105; *State v. Dufour*, 63 *Ind.* 567; *Beaty v. State*, 82 *Ind.* 228; *Dantz v. State*, 87 *Ind.* 398; *Myers v. State*, 92 *Ind.* 390; *Glover v. State*, 109 *Ind.* 391; *McCullough v. State*, 132 *Ind.* 427; *Weinzorpfli v. State*, 7 *Blackf. (Ind.)* 186.

*Maine*. — *State v. Flye*, 26 *Me.* 312; *State v. Hood*, 51 *Me.* 363.

*Maryland*. — *State v. Bell*, 27 *Md.* 675.

*Massachusetts*. — *Com. v. Sullivan*, 104 *Mass.* 553; *Com. v. Slate*, 11 *Gray (Mass.)* 60.

*Mississippi*. — *Strawhern v. State*, 37 *Miss.* 422.

*Missouri*. — *State v. Leonard*, 22 *Mo.* 449; *State v. Green*, 66 *Mo.* 643; *State v. Daubert*, 42 *Mo.* 242.

*New York*. — *Hawker v. People*, 75 *N. Y.* 487; *People v. Baker*, 3 *Hill (N.*

*Y.)* 159; *People v. Willson*, 109 *N. Y.* 345.

*North Carolina*. — *State v. Barber*, 113 *N. Car.* 711.

*Ohio*. — *Bailey v. State*, 4 *Ohio St.* 440.

*South Carolina*. — *State v. Nelson*, 14 *Rich. L. (S. Car.)* 169.

*England*. — *Reg. v. Trueman*, 8 *C. & P.* 277, 34 *E. C. L.* 605.

**The Court May Reserve Its Decision** upon a motion to compel an election until the state has introduced its testimony. *O'Brien v. People*, 48 *Barb. (N. Y.)* 274; *Korth v. State*, 46 *Neb.* 636.

2. *Wreidt v. State*, 48 *Ind.* 579; *Weinzorpfli v. State*, 7 *Blackf. (Ind.)* 186; *State v. Jacob*, 10 *La. Ann.* 141; *Hemingway v. State*, 68 *Miss.* 401; *Com. v. Hand*, 3 *Phila. (Pa.)* 403; *Com. v. Smith*, 162 *Mass.* 508.

**The Grounds of the Motion** should be set forth in the motion itself. *State v. Bassenger*, 39 *La. Ann.* 918.

3. *Alabama*. — *Butler v. State*, 91 *Ala.* 87; *Tanner v. State*, 92 *Ala.* 1; *Upshur v. State*, 100 *Ala.* 2; *Orr v. State*, 107 *Ala.* 35.

*Illinois*. — *Goodhue v. People*, 94 *Ill.* 46; *Bennett v. People*, 96 *Ill.* 602.

*Indiana*. — *Gandolpho v. State*, 33 *Ind.* 439; *Choen v. State*, 85 *Ind.* 209; *Kennegar v. State*, 120 *Ind.* 176.

*Kansas*. — *State v. Blakesley*, 43 *Kan.* 250.

*Maine*. — *State v. Flye*, 26 *Me.* 312.

*Missouri*. — *State v. Mallon*, 75 *Mo.* 356; *State v. Schmidt*, (*Mo.* 1897) 38 *S. W. Rep.* 938; *State v. Green*, 66 *Mo.* 643; *State v. Davis*, 29 *Mo.* 397.

*New Hampshire*. — *State v. Rust*, 35 *N. H.* 441.

*New York*. — *People v. Satterlee*, 5 *Hun (N. Y.)* 167; *Lanergan v. People*, 6 *Park. Cr. Rep. (N. Y. Ct. App.)* 209;

the improper joinder of counts can give the court the right to compel an election.<sup>1</sup>

**Distinct Felonies.** — While the foregoing rules apply to offenses generally, it will be seen from an inspection of the cases cited that many of the transactions involved felonies, and distinct questions have been raised upon the joinder of separate felonies in the same indictment; and while it has been held that the court in the exercise of its discretion may compel an election when separate felonies are joined, and such a course is necessary to prevent prejudice or embarrassment to the defendant in his defense,<sup>2</sup> it has also been held that the right to compel an election exists only when the charges arise out of different and distinct transactions;<sup>3</sup> and, on the other hand, that even where distinct felonies of the same nature are charged, the court may exercise its discre-

Nelson *v.* People, 23 N. Y. 293; Armstrong *v.* People, 70 N. Y. 38; People *v.* McCarthy, 110 N. Y. 309.

*North Carolina.* — State *v.* Phillips, 104 N. Car. 786.

*Ohio.* — Searles *v.* State, 6 Ohio Cir. Ct. Rep. 331.

*South Carolina.* — State *v.* Crawford, 38 S. Car. 330.

*Texas.* — Womack *v.* State, (Tex. Crim. App. 1894) 25 S. W. Rep. 772; Thompson *v.* State, 33 Tex. Crim. Rep. 472; Dill *v.* State, (Tex. Crim. App. 1895) 33 S. W. Rep. 126; Carr *v.* State, (Tex. Crim. App. 1896) 34 S. W. Rep. 949.

*Wisconsin.* — Porath *v.* State, 90 Wis. 527; Jackson *v.* State, 91 Wis. 253.

*United States.* — U. S. *v.* Dickinson, 2 McLean (U. S.) 325.

1. State *v.* Bailey, 62 Ark. 489; State *v.* Bunger, 14 La. Ann. 465; State *v.* Canterbury, 28 N. H. 195; Armstrong *v.* State, 28 Tex. App. 526; Smith *v.* State, 34 Tex. Crim. Rep. 123; Jackson *v.* State, 91 Wis. 253; Cottell *v.* State, 12 Ohio Cir. Ct. Rep. 467.

On the other hand, the court has been held to have a discretion even where the same transaction is set out, the different counts being used for the purpose of stating different means of committing the offense, Pierce *v.* U. S., 160 U. S. 355; as well as where several offenses, though distinct in point of law, spring out of the same transaction, or are so connected as to make substantial parts of the same transaction, Van Sickle *v.* People, 29 Mich. 63; McCollough *v.* State, 132 Ind. 427.

**Submission upon One Count Tantamount to Election.** — But even where it is held that a misjoinder of offenses gives the

defendant a right to compel an election, a submission of only one count by the court to the jury has been held to be tantamount to an election, and to obviate any objection which the defendant might have on account of the refusal of the court to compel such election. Smith *v.* State, 34 Tex. Crim. Rep. 123.

**Unnecessary Number of Counts.** — When the number of counts is unreasonably multiplied, the court, in superintending the course of the trial, may see that justice is done and oppression prevented. Com. *v.* Sullivan, 104 Mass. 553 [citing Com. *v.* Andrews, 2 Mass. 409; Com. *v.* Butterick, 100 Mass. 12, 1 Hale P. C. 531]. To the same effect are State *v.* Nelson, 29 Me. 329, and State *v.* Edmondson, 43 Tex. 165.

2. Smith *v.* State, 8 Lea (Tenn.) 388; Reg. *v.* Hinley, 2 M. & Rob. 524.

**Felonies of Same Nature.** — Separate and distinct felonies of the same general nature, requiring the same mode of trial and having affixed to them punishments of the same nature, may be joined in the same indictment; and under this limitation as to the nature and character of the offenses joined, there is no reason for holding any different rule applicable to felonies from that which is applicable to the joinder of misdemeanors. Com. *v.* Hills, 10 Cush. (Mass.) 534; Carlton *v.* Com., 5 Met. (Mass.) 532.

3. State *v.* Cazeau, 8 La. Ann. 114; Andrews *v.* People, 117 Ill. 195. Also M'Gregg *v.* State, 4 Blackf. (Ind.) 101.

Under such circumstances it is held that the prosecution must elect. State *v.* Woodard, 38 S. Car. 353; State *v.* Scott, 15 S. Car. 435.

tion in compelling an election,<sup>1</sup> although the offenses may have been committed at different times.<sup>2</sup>

**Different Misdemeanors.** — When different misdemeanors of the same nature are joined in separate counts of an indictment, the defendant has no right to compel an election as a general rule.<sup>3</sup>

**7. Effect of Election.** — When one count contains more than one substantive offense, or where several such offenses are charged in different counts, an election by the state to put the accused upon trial for one of them has been held to amount to a nolle prosequi or an entire abandonment of the other charges,<sup>4</sup> or to an acquittal.<sup>5</sup>

**8. Judgment on One Count — Effect on Misjoinder.** — Where there is an improper joinder of counts, the defendant cannot complain if he is convicted upon but one count, and the judgment is rendered upon that one.<sup>6</sup>

**9. Separate Indictments as Counts of One — Consolidation.** — Where the same offense is charged in varying form in different indict-

1. *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; *Wright v. State*, 4 Humph. (Tenn.) 197.

2. **The Practice Condemned.** — It is well settled that two offenses of the same character, though committed at different times, may be joined in the same indictment; but this is said to be bad practice, and the state, upon motion, may, in the discretion of the court, be compelled to elect upon which offense she will proceed, yet if no motion is made to that effect the judgment after verdict will not be arrested. *Teat v. State*, 53 Miss. 458; *Strawhern v. State*, 37 Miss. 422. But in *Hill v. State*, 72 Miss. 527, Wood, J., commenting upon these cases, said: "In fairness to one accused of crime, he should not be put to trial on one indictment for more than one offense, and two or more counts in the same indictment should be employed only for the purpose of charging one transaction in varying forms to meet the possible developments of the evidence on trial. \* \* \* The history of criminal jurisprudence and practice demonstrates, generally, that if every one prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were declined, and if adventurous forays into dangerous or unknown fields were shunned, and if the beaten paths were heedfully followed, there would be secured as many convictions of the guilty, and such convictions would be succeeded by few or no reversals."

3. *Com. v. Manson*, 2 Ashm. (Pa.) 38; *Mitchell v. Com.*, 93 Va. 775. See also

*supra*, XVIII. 5. *e. Joinder of Misdemeanors*, and cases cited.

But this rule is not universally applied, and sometimes, even though the offenses be misdemeanors, if they are not parts of one and the same act the state will be compelled to elect. *People v. Keefer*, 97 Mich. 15; *People v. Rohrer*, 100 Mich. 126.

4. **An Election at One Trial** concludes the state at a subsequent trial. *Elam v. State*, 26 Ala. 48.

**The Formal Parts of an Indictment** will be referred to the count upon which the state elected to try, notwithstanding other counts preceding it in the indictment. *State v. Dufour*, 63 Ind. 567.

5. Thus, in *North Carolina*, after a verdict upon a count upon which the state elected to rely, the entry of a nolle prosequi on the other counts was held to be a nullity, as the election aforesaid was equivalent to a verdict of not guilty on the other counts, though it was said to be improper to grant a motion to enter a verdict of not guilty, because no such verdict was actually rendered, and the record entries should be made only according to the fact in any matter to be entered of record. *State v. Sorrell*, 98 N. Car. 738.

6. *Reed v. State*, (Ind. 1897) 46 N. E. Rep. 135; *Myers v. State*, 92 Ind. 390; *State v. McPherson*, 9 Iowa 56; *Com. v. Chase*, 127 Mass. 7; *Com. v. Holmes*, 103 Mass. 440; *Com. v. Adams*, 127 Mass. 15; *Brantley v. State*, 13 Smed. & M. (Miss.) 468; *Reg. v. Ferguson*, 6 Cox C. C. 454, 1 Jur. N. S. 73.

**Dismissal of One Count** cures the defect. *State v. Buck*, 59 Iowa 382.

ments, it has been held that the several indictments will be treated as separate counts of one,<sup>1</sup> and it is sometimes expressly provided by statute that indictments containing charges which could have been joined in the same indictment may be consolidated.<sup>2</sup>

**XIX. JOINDER OF PARTIES** <sup>3</sup> — **Offenses That May Be Jointly Committed.**

— When an offense is one which may be committed by more than one person at the same time, the several persons engaged in its commission may be jointly charged.<sup>4</sup> But while the charge is made against the defendants jointly, it is nevertheless said to be a separate charge against each of the defendants, and either or both may be acquitted or convicted thereunder.<sup>5</sup> But it is not necessary that all the parties concerned in the commission of the

1. *State v. Johnson*, 5 Jones L. (N. Car.) 221; *State v. Watts*, 82 N. Car. 656; *State v. Brown*, 95 N. Car. 685; *State v. Lee*, 114 N. Car. 844.

2. U. S. Rev. Stat., § 1024; *Logan v. U. S.*, 144 U. S. 263; *McElroy v. U. S.*, 164 U. S. 76; *Turner v. U. S.*, 66 Fed. Rep. 280; *U. S. v. Folsom*, 7 N. Mex. 532.

In *Colorado* a like provision exists. *Cummins v. People*, 4 Colo. App. 71.

**Separate and Distinct Offenses** cannot be so consolidated. *McElroy v. U. S.*, 164 U. S. 76.

3. For joinder of principal and accessory, and questions connected therewith, see article ACCESSORIES AND THE LIKE, vol. 1, p. 66. For severance of trial, see article TRIALS.

4. *Alabama*. — *Elliott v. State*, 26 Ala. 80; *State v. Pile*, 5 Ala. 72.

*Arkansas*. — *Volmer v. State*, 34 Ark. 489.

*Kentucky*. — *Com. v. McChord*, 2 Dana (Ky.) 242.

*Massachusetts*. — *Com. v. Tryon*, 99 Mass. 442; *Com. v. Adams*, 7 Gray (Mass.) 44; *Com. v. Sloan*, 4 Cush. (Mass.) 52; *Com. v. Tower*, 8 Met. (Mass.) 527.

*Minnesota*. — *State v. Johnson*, 37 Minn. 494.

*Missouri*. — *State v. Rambo*, 95 Mo. 463.

*New Hampshire*. — *State v. Forcier*, 65 N. H. 42; *State v. Nowell*, 60 N. H. 200.

*New York*. — *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 273.

*Pennsylvania*. — *Com. v. Gillespie*, 7 S. & R. (Pa.) 469.

*Ohio*. — *Hess v. State*, 5 Ohio 11.

*Tennessee*. — *Fowler v. State*, 3 Heisk. (Tenn.) 154.

*England*. — *Reg. v. Williams*, 1 Salk. 384; *Rex v. Dixon*, 10 Mod. 335.

**In a Complaint.** — *Com. v. Sampson*, 97 Mass. 409.

**Defendants Arrested on Separate Complaints** may nevertheless be jointly informed against. *Stuart v. People*, 42 Mich. 255.

**Different Means Employed.** — Where two persons commit a joint assault with intent to murder, the one using a knife and the other a gun, a count in the indictment which charges them jointly is not objectionable for duplicity. *Shaw v. State*, 18 Ala. 547.

5. *Com. v. Brown*, 12 Gray (Mass.) 135; *Com. v. Griffin*, 3 Cush. (Mass.) 524; *State v. Edwards*, 60 Mo. 490; *State v. O'Brien*, 18 R. I. 105; *Watson v. State*, 28 Tex. App. 34; *Finney v. State*, 29 Tex. App. 184.

**In a Complaint.** — *State v. Wadsworth*, 30 Conn. 57.

**Exception.** — Generally, when two or more persons are jointly indicted, if one is found guilty judgment may be passed upon him, although one or more of the others may be acquitted, the exceptions to the rule being conspiracy and riot and other cases where the agency of two or more is of the essence of the offense. *Com. v. Griffin*, 3 Cush. (Mass.) 524.

**Where Two Parties Are Jointly Indicted as Partners**, as in an indictment against two persons as partners for violating the liquor law, the indictment is to be treated as against the parties individually, and the fact that they are stated to be partners does not alter the nature of the charge. *State v. Powell*, 3 Lea (Tenn.) 166. To the same effect is *State v. Brown*, 49 Vt. 437.

**An Irregularity as to One of the Defendants** will not impair the validity of the indictment as to the other. Thus in a case where commitment to prison or recognizance for appearance was neces-

offense should be embraced in the same indictment; and even where such a provision is made by statute it has been held merely directory, and an omission so to embrace them will afford no defense to the person indicted.<sup>1</sup>

**When the Act Is Not Capable of Joint Commission,** or if the offense is in fact severally committed, the charge should not be joint,<sup>2</sup> but it may be by separate counts in the same indictment charging the defendants severally,<sup>3</sup> or by a separate charge in one count,<sup>4</sup> subject, however, to the discretion of the court to quash, where the defendants are charged in different counts with different offenses of the same nature,<sup>5</sup> or where several distinct misdemeanors are severally charged against the several defendants.<sup>6</sup>

sary before the indictment could be found, and when two of the persons jointly indicted had not been committed to prison nor recognized, this fact did not affect the validity of the indictment as to the party who was properly indicted. *State v. Jackson*, 32 Me. 40.

**Charge that the Defendants Acted Together.**—Indictments charging two or more defendants with the same offense are sufficient in that respect without alleging that the defendants acted together. *Loggins v. State*, 32 Tex. Crim. Rep. 358.

**Effect of Demurrer.**—In *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 273, it was held that where two persons are jointly indicted, and demur to the indictment, the effect of the demurrer being to admit the truth of the charge, this inference of law destroys the point taken that the defendants should have been individually charged.

1. *State v. Davis*, 2 Sneed (Tenn.) 273; *State v. Steptoe*, 65 Mo. 640.

2. *Lindsey v. State*, 48 Ala. 169; *State v. Deaton*, 92 N. Car. 788; *U. S. v. Davis*, 33 Fed. Rep. 621; *U. S. v. Kazinski*, 2 Sprague (U. S.) 7; *Rex v. Philips*, 2 Stra. 921; *Reg. v. Dovey*, 2 Eng. L. & Eq. 532; *Reg. v. Nickless*, 8 C. & P. 757, 34 E. C. L. 623.

**Defect Cured by Dismissal.**—In *U. S. v. McDonald*, 3 Dill. (U. S.) 543, an indictment charged officers of the internal revenue jointly with private persons with conspiracy to defraud the government, etc., and it was held that while, under the statutes making the offense committed by one class of persons widely different from the same offense when committed by another class, they could not be jointly charged, the prosecuting officer could cure the defect by dismissing the indictment either as to one or the other.

3. *State v. Atchison*, 3 Lea (Tenn.) 731; *State v. Roulstone*, 3 Sneed (Tenn.) 109; *State v. Hall*, 97 N. Car. 474; *State v. Bridges*, 24 Mo. 355.

4. *Com. v. McChord*, 2 Dana (Ky.) 242, where the court said: "It is said in the books, as argued by the counsel for the defendants, that an indictment against separate offenders should charge the offenses to have been committed *separaliter*, unless there be a separate count for each distinct offense. But the verbal exactness and technical strictness of old times are not now required, especially in indictments for misdemeanors and other minor offenses. Common sense is now the common law in such cases, as well as in those which are purely civil. If, in this case, the indictment plainly import, according to the common-sense construction, a several charge against each defendant, then it should be deemed as several as if each defendant had been charged in a separate count, and the omission of the word 'severally' or 'separately' should not be fatal or material." To the same effect, see *Lewellen v. State*, 18 Tex. 538; *Griffin v. Mills*, 39 N. J. L. 587.

5. *Com. v. Gillespie*, 7 S. & R. (Pa.) 469; *Rex v. Kingston*, 8 East 41.

6. Thus two persons may commit assault and battery upon each other at the same time, and each would be guilty of a single separate offense, but the offenses being misdemeanors of the same nature, the offenders may be joined in the same indictment if severally charged; but it is not proper to do so, because the court has a discretion to quash the indictment. *State v. Lonon*, 19 Ark. 577; *State v. Nail*, 19 Ark. 563.

**Distinct Offenses Committed at Different Times by Different Parties,** independently

**XX. NOLLE PROSEQUI—1. By Whom Entered.**—A nolle prosequi is entered by the attorney-general or other appropriate prosecuting officer representing the people in a criminal prosecution.<sup>1</sup>

**As an Exercise of Discretion.**—It is a discretion which is reposed in the prosecuting officer, and he cannot be compelled to exercise his prerogative either by the court or by any one connected with the cause,<sup>2</sup> but the order is usually taken upon motion by the

of each other, cannot be joined in the same indictment, *Elliott v. State*, 26 Ala. 80; *State v. Daubert*, 42 Mo. 242; and it is sometimes held that there can be no joinder where the act is not joint, *State v. Hall*, 97 N. Car. 474.

Three parties cannot be jointly indicted for failing to work on the public road, because the failure of each is a separate and independent offense. *State v. Wainwright*, 60 Ark. 280.

1. *Reynolds v. State*, 3 Ga. 53; *State v. Pierre*, 38 La. Ann. 91; *Com. v. Wallace*, 108 Mass. 13; *State v. Mathews*, 98 Mo. 126; *State v. Tufts*, 56 N. H. 137; *State v. Smith*, 49 N. H. 155; *State v. Hickling*, 45 N. J. L. 154; *State v. Thompson*, 3 Hawks (N. Car.) 613; *U. S. v. Stowell*, 2 Curt. (U. S.) 170.

2. *State v. Mathews*, 98 Mo. 126; *State v. Hickling*, 45 N. J. L. 154; *State v. Frost*, 1 Brev. (S. Car.) 385; *Com. v. Dulany*, 1 Cranch (C. C.) 82; *Elworthy v. Bird*, 2 Bing. 258, 9 E. C. L. 404; *Reg. v. Dunn*, 1 C. & K. 730, 47 E. C. L. 730; *Reg. v. Allen*, 1 B. & S. 850, 101 E. C. L. 850.

**Forceful Illustration by Lord Holt.**—An instructive and forceful illustration of the right of the prosecuting attorney, unrestrained by any power of the court, is recorded in a conversation relating to the commitment for seditious language of certain persons belonging to a sect called "Prophets." Lacy, one of the friends of the persons committed, assumed to intercede for them, and upon his visit to Lord Holt the following colloquy is reported. "Lacy: 'I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a nolle prosequi for John Atkins, his servant, whom thou hast cast into prison.' Chief Justice Holt: 'Thou art a false prophet, and a lying knave. If the Lord God had sent thee it would have been to the attorney-general, for He knows that it belongeth not to the chief justice to grant a nolle prosequi; but I, as chief justice, can grant a warrant to commit thee to bear him company.'" 2 Campbell's Lives of

the Chancellors 173, *cited in Wharton's Crim. Pl. & Pr.* (9th ed.) 268.

**The Prosecutor** has no right to withdraw an indictment without the consent of the prosecuting officer, *Com. v. Dulany*, 1 Cranch (C. C.) 82; and there is no duty upon such officer to consult the prosecutor or to call upon him to show cause why such a step should not be taken, *Reg. v. Allen*, 1 B. & S. 850, 101 E. C. L. 850.

**Commander of Military District.**—In *State v. McLane*, 31 Tex. 261, the commander of a military district addressed a note to the district judge requiring him to instruct the district attorney to enter a nolle prosequi against the indictment pending against the defendants, and upon the refusal of the district attorney to do so the district judge ordered the indictment dismissed. Upon appeal by the district attorney from this order the Supreme Court said: "We are apprised that the reconstruction acts authorize the commanders of their respective military districts to organize military commissions for the purpose of trying offenders, criminals, or disturbers of the peace. And it is probable that Lieutenant Plummer, commanding twenty-third sub-district, conceived it to be his duty to exercise the power in this sub-district which the commander of the fifth military district could exercise. But however much this military gentleman might have desired the acquittal of the parties indicted, and however unjust or oppressive might to him appear the charge of the grand jury, the officer appointed by the state authorities to conduct its causes is the one, and the only one, who can assume the power to dismiss a criminal cause. The district judge has no more right to conduct a criminal than a civil cause. He may, if he choose, suggest to the district attorney, or to an attorney appearing in a civil suit, that a dismissal of the suit would be advisable."

**Required as Condition to Other Orders.**—While in the absence of a statute the



prosecuting officer and with leave of the court.<sup>1</sup> Though it appears in some cases that no leave is necessary where the nol. pros. is entered before trial,<sup>2</sup> it has been held that after the indictment passes under the control of the court a nol. pros. cannot be entered without the consent and under the advice of the court.<sup>3</sup> The order is in most cases readily granted,<sup>4</sup> and it seems to have been the practice in some cases for the court to enter the nol. pros. at the instance of the prosecuting officer.<sup>5</sup>

**2. Scope of Nol. Pros.** — A nolle prosequi may be entered as to the whole pleading, or any count or substantive part of a count thereof,<sup>6</sup>

court cannot peremptorily compel a nol. pros. to be entered, it may be required or imposed in certain cases as a condition to the granting of some order which the court might otherwise withhold. *State v. Hickling*, 45 N. J. L. 154.

1. *Statham v. State*, 41 Ga. 511, which case was controlled by a statute, but the court said that it knew of no law independent of the statute authorizing a nol. pros. to be entered without the concurrence of the court; *Anonymous*, 1 Va. Cas. 139; *People v. McLeod*, 1 Hill (N. Y.) 377; *State v. Moody*, 69 N. Car. 531, holding that it is within the control of the court, but is usually and properly left to the discretion of the prosecuting officer; *Ex p. Donaldson*, 44 Mo. 149; *U. S. v. Shoemaker*, 2 McLean (U. S.) 115.

**Consent of Court Conclusive.** — By the *Georgia Code*, § 4649, a nolle prosequi may be entered by the solicitor-general in any criminal case, with the consent of the court, after an examination of the case in open court. This being so, the consent of the court is conclusive upon the validity of a nolle prosequi which the court has allowed the solicitor-general to enter before putting the accused on trial. The latter, when arraigned upon a bill of indictment subsequently found and returned by the grand jury for the same act or offense, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by nol. pros. *Lascelles v. State*, 90 Ga. 347.

2. *Com v. Cain*, 102 Mass. 488; *Reynolds v. State*, 3 Ga. 53; *State v. Hickling*, 45 N. J. L. 154; *U. S. v. Schumann*, 7 Sawy. (U. S.) 439.

3. *State v. Roe*, 12 Vt. 93; *State v. I. S. S.*, 1 Tyler (Vt.) 178. And see cases cited in the preceding note.

4. *State v. Hickling*, 45 N. J. L. 154. The court may interfere where the

power is used oppressively, *State v. Thompson*, 3 Hawks (N. Car.) 613; or it may withhold leave for the purpose of granting time to the government to protect itself from collusion, *U. S. v. Watson*, 7 Blatchf. (U. S.) 60.

5. *Kistler v. State*, 64 Ind. 372; *Lindsay v. People*, 63 N. Y. 143; *People v. Bennett*, 49 N. Y. 141, wherein it was held that the court had no power to enter a nol. pros. except upon motion of the district attorney, and, further, that the necessity of procuring consent is of comparatively recent statutory regulation, and that the attorney-general may still enter a nol. pros. without consent.

6. *State v. Bean*, 77 Me. 487; *Com. v. Tuck*, 20 Pick. (Mass.) 357; *Com. v. Jenks*, 1 Gray (Mass.) 493; *Com. v. Wallace*, 108 Mass. 13; *Jennings v. Com.*, 105 Mass. 586; *State v. Eno*, 8 Minn. 220; *Dunham v. State*, 9 Tex. App. 330; *U. S. v. Peterson*, 1 Woodb. & M. (U. S.) 320; *U. S. v. Keen*, 1 McLean (U. S.) 429; *Rex v. Butterworth*, R. & R. C. C. 520.

**Contra.** — In *Tennessee* it was held that where the indictment charges one offense which in itself embraces another, as where a felonious assault is charged, or assault with intent to commit murder, a nol. pros. as to the felony left nothing upon which to try the defendant for the assault. *Grant v. State*, 2 Coldw. (Tenn.) 216; *Brittain v. State*, 7 Humph. (Tenn.) 159. And at one time a decision in *New York* seemed to indicate a similar view, though that question was not involved. *People v. Porter*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 525. But a later case in *Tennessee* modifies what appears to be a positive holding in the two cases above cited. *Ferrell v. State*, 2 Lea (Tenn.) 27, where the court refers to them and says: "It is now assigned as error that the effect of the agreement to strike out was to put an end to the in-

or as to any one or more of the parties.<sup>1</sup>

**3. Effect — In General.** — A nolle prosequi is not a final disposition of the case and will not bar another prosecution for the same offense. It is not an acquittal,<sup>2</sup> but it is like a nonsuit or discon-

dictment, so that no judgment could be rendered against the defendant. The cases cited in support of this position are *Brittain v. State*, 7 Humph. (Tenn.) 159, and *Grant v. State*, 2 Coldw. (Tenn.) 216. The indictment in each of these cases was similar to the present, and the attorney-general entered a nolle prosequi as to the felony in the one case, and dismissed the indictment so far as it charged a felony in the other, and the court held in both cases that the effect was to leave nothing upon which the prisoner could be tried for a lower offense. But the court said in the first of these cases that it would be competent, perhaps, for the attorney-general, with the assent of the court, to strike out the words that charge the malice and felony, leaving only such as would charge the inferior offense. For, in that event, there would be a subsisting indictment upon which the party might be arraigned and charged. This is precisely what, in effect, was done in the case before us. The indictment remained as if the jury had acquitted the defendant of the higher, and convicted him of the lower offense." From this case it appears that the reason for the decision in the first two Tennessee cases as indicated by Mr. Bishop, 1 Bish. New Cr. Proc. (4th ed.), § 1392, to wit, that the conviction of the lower grade could not in Tennessee be had upon a charge of the higher, the higher offense charged being a felony and the constituent offense being a misdemeanor, is not correct, and this misapprehension on the part of that learned writer is further apparent from an inspection of *Hall v. State*, 7 Lea (Tenn.) 686, holding directly contrary to his statement.

**A Substantive Part of the Offense Charged Must Be Left.** — Thus, in an indictment for rape, nol. pros. may be entered as to the offense charged, and conviction had for the assault, but not for a distinct assault. *Com. v. Dean*, 109 Mass. 349.

**Striking Out a Count as an amendment** was held not to be permissible in *Alabama*, but being equivalent to a nol. pros. was not reversible. *Salm v. State*, 89 Ala. 56.

**Aggravating Circumstances.** — A nol.

pros. may be entered as to aggravating circumstances alleged where a sufficient charge remains without them. *State v. Struble*, 71 Iowa 11; *State v. Evans*, 40 La. Ann. 217; *Com. v. Briggs*, 7 Pick. (Mass.) 177; *Baker v. State*, 12 Ohio St. 215.

**Remaining Count Left for Trial.** — After a motion to quash is interposed and a nol. pros. presented as to one count of an indictment, thereby removing the grounds for a motion to quash, the defendant is left to be tried on the remaining count, *State v. Buchanan*, 1 Ired. L. (N. Car.) 59; *State v. Woulfe*, 58 Ind. 17; *Aaron v. State*, 39 Ala. 75; and evidence which had been introduced before the nol. pros. was entered may be referred to the remaining count in so far as it is pertinent, *U. S. v. Biebusch*, 1 McCrary (U. S.) 42.

**Effect to Confer Jurisdiction.** — Where the prosecution was for assault and battery with intent to commit rape, it was held that as the jurisdiction for assault and battery was exclusively in a justice of the peace, a conviction could not be had for assault and battery in the Circuit Court, notwithstanding a nol. pros. as to the intent to commit rape of which the Circuit Court did have jurisdiction. *Nelson v. State*, 2 Ind. 249. But in *New York* a different view was entertained, it having been held that the Court of General Sessions had no jurisdiction to try an indictment for rape and under such indictment to convict for assault and battery, but that to warrant a trial at the Sessions the district attorney should have entered a nolle prosequi on the count for rape. *People v. Abbot*, 19 Wend. (N. Y.) 201. See also *People v. Porter*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 525.

1. *State v. Woulfe*, 58 Ind. 17; *State v. McComb*, 18 Iowa 43; *State v. Bean*, 77 Me. 487; *State v. Beauchleigh*, 92 Mo. 490; *State v. Clump*, 16 Mo. 385; *State v. Phipps*, 76 N. Car. 203; *Com. v. Casey*, 14 Pa. Co. Ct. Rep. 389; *State v. Jackson*, 7 S. Car. 283.

2. *Alabama*. — *O'Brien v. State*, 91 Ala. 27; *State v. Blackwell*, 9 Ala. 79. *Iowa*. — *U. S. v. Switzer*, 1 Morr. (Iowa) 302.

*Kansas*. — *State v. Child*, 44 Kan. 420.

tinuance in a civil suit, and leaves the matter in the same condition in which it was before the commencement of the prosecution.<sup>1</sup> Until arraignment and impaneling of the jury the power to nol. pros. rests in the discretion of the prosecuting attorney,<sup>2</sup> but after the trial has begun this right is suspended, as hereinbefore seen, and a nolle prosequi without the consent of the defendant is, as a general rule, held to be equivalent to an acquittal.<sup>3</sup>

*Maine.* — *State v. Nutting*, 39 Me. 361.

*Massachusetts.* — *Com. v. Wheeler*, 2 Mass. 172.

*Missouri.* — *Ex p. Donaldson*, 44 Mo. 149; *State v. Primm*, 61 Mo. 166.

*North Carolina.* — *State v. McNeill*, 3 Hawks (N. Car.) 183.

*South Carolina.* — *Teague v. Wilks*, 3 McCord L. (S. Car.) 461; *Smith v. Shackelford*, 1 Nott & M. (S. Car.) 36; *Heyward v. Cuthbert*, 4 McCord L. (S. Car.) 354; *State v. Haskett*, 3 Hill L. (S. Car.) 95.

*Virginia.* — *Wortham v. Com.*, 5 Rand. (Va.) 669; *Lindsay v. Com.*, 2 Va. Cas. 345.

*United States.* — *U. S. v. Shoemaker*, 2 McLean (U. S.) 114.

**Relation to Pardon.** — A nol. pros. is not equivalent to a pardon. *Com. v. Wheeler*, 2 Mass. 173.

**After a New Trial Granted**, a nol. pros. may be entered and is not an acquittal. *Com. v. Smith*, 98 Mass. 10; *State v. Rust*, 31 Kan. 509 [*citing State v. Redman*, 17 Iowa 329, and *Clarke v. State*, 23 Miss. 261]; *Reg. v. Leatham*, 7 Jur. N. S. 674.

**After Reversal** on appeal nol. pros. may be entered and is no bar to a new indictment. *Hughes v. Com.*, 17 Gratt. (Va.) 565.

**Nol. Pros. Ordered by Supreme Court upon Reversal.** — In *Michigan* it was held that where the defendant was entitled to an acquittal upon one count of an indictment because no evidence was adduced thereunder, and upon another count thereof because the facts in evidence, if they made out any offense, did not make out the offense which was charged therein, it should be certified to the Circuit Court, not only that the verdict should be set aside, but that a nol. pros. should be entered. *People v. Gaige*, 23 Mich. 95.

**After Disagreement and Discharge of Jury** a nol. pros. may be entered, and is not a bar to another prosecution. *People v. Pline*, 61 Mich. 247. See, to the same effect, *State v. Shirer*, 20 S. Car. 400.

#### Appeal from Conviction on Complaint.

— After a conviction on a complaint in the District Court, and an appeal by the defendant to the Superior Court, a nol. pros. may be entered in the latter and it is not an acquittal. *Com. v. McClusky*, 151 Mass. 488.

#### Nol. Pros. on Account of Loss of Papers.

— Where the papers in a case are purloined, a nol. pros. may be entered and a new indictment or information brought. *State v. Pierre*, 38 La. Ann. 91.

**Nol. Pros. by Agreement.** — In *Bowden v. State*, 1 Tex. App. 138, a nol. pros. was entered as to a defendant jointly indicted with another, with the concurrence of the court, upon an agreement made by the defendant that he would regularly attend the court and testify against his co-defendant. Another indictment was found against him at a subsequent term upon which he was tried and convicted, his plea in abatement and in bar setting up the aforesaid agreement and nol. pros. not being permitted to avail him, and it was held that the second indictment was wrongfully found and that he should not have been indicted or tried after the nol. pros. had been entered, as long as the agreement between him and the estate was subsisting, and he was only prevented from performing his part thereof because he had not had an opportunity to do so.

**Disposition of Costs.** — For the effect of a nol. pros. upon the disposition of costs in criminal cases, see article FINES AND COSTS IN CRIMINAL CASES, vol. 8, p. 753.

1. *State v. Main*, 31 Conn. 576, as well as the cases in the preceding note.

2. *Com. v. Scott*, 121 Mass. 33; *Clarke v. State*, 23 Miss. 261. See *supra*, XX. 1. *By Whom Entered*.

3. *Alabama.* — *Grogan v. State*, 44 Ala. 12; *O'Brien v. State*, 91 Ala. 27.

*Connecticut.* — *U. S. v. Porter*, 3 Day (Conn.) 286.

*Georgia.* — *Franklin v. State*, 85 Ga. 570; *Jackson v. State*, 76 Ga. 564; *Reynolds v. State*, 3 Ga. 53.

While some of the cases supporting this rule were decided under statutes, others were not, and still others hold that a nolle prosequi may be entered without operating as a bar at any time during the trial, with the consent of the court,<sup>1</sup> or at any time

*Indiana*. — *Joy v. State*, 14 Ind. 139.

*Louisiana*. — *State v. Paterno*, 43 La. Ann. 514.

*Massachusetts*. — *Com. v. McCormick*, 130 Mass. 61; *Com. v. Hart*, 149 Mass. 77; *Com. v. Kimball*, 7 Gray (Mass.) 330; *Com. v. Scott*, 121 Mass. 33.

*Michigan*. — *People v. Kuhn*, 67 Mich. 465.

*Missouri*. — *Ex p. Donaldson*, 44 Mo. 149.

*New Hampshire*. — *State v. Smith*, 49 N. H. 155.

*Ohio*. — *Baker v. State*, 12 Ohio St. 218; *Mount v. State*, 14 Ohio 295.

*United States*. — *U. S. v. Shoemaker*, 2 McLean (U. S.) 115; *U. S. v. Schumann*, 7 Sawy. (U. S.) 439; *U. S. v. Farring*, 4 Cranch (C. C.) 465; *U. S. v. Schumann*, 2 Abb. (U. S.) 526.

**Not Prejudicial in the Same Case.** — But the defendant cannot complain of error in the same proceeding in which such a nol. pros. is entered, as he cannot be prejudiced if the nol. pros. in such a case is an acquittal. *Barnett v. State*, 54 Ala. 580; *Com. v. Stedman*, 12 Met. (Mass.) 445.

Thus, in *Cross v. North Carolina*, 132 U. S. 140, the jury reported that upon certain counts of an indictment they had agreed to a verdict of guilty, but that upon others they could not agree, whereupon they were sent out and the court permitted a nolle prosequi to be entered upon the counts upon which they had reported a disagreement. The Supreme Court of North Carolina expressed its disapproval of the mode adopted for ascertaining the opinion of the jury before an agreement had been reached, but held that the nol. pros. was equivalent to an acquittal on those counts and therefore worked no injury to the defendant; and the Supreme Court of the United States, upon error to the state court, affirmed the judgment of the latter, saying: "We are of opinion that there was nothing in all this amounting to a deprivation of the liberty of the defendants without due process of law. At most it was a mere error in procedure or practice that did not affect the substantial rights of the accused. What was permitted to be done was to the end simply that the

jury might return a verdict upon those counts in the indictment upon which they were agreed."

But where the count upon which such a nol. pros. is entered charges a lesser offense, to which evidence in the case is applicable, the error is prejudicial and reversible. *State v. Miller*, 100 Mo. 621.

**Statutory Provision to Avoid Variance.** — A nol. pros. entered under a statute permitting it when the evidence adduced at the trial indicates a variance is not a bar to another prosecution for the same offense. *Willingham v. State*, 14 Ala. 540; *State v. Dunham*, 9 Ala. 77. But in such a case the entry of the order should show that the nolle prosequi was entered before the jury had retired. *Coleman v. State*, 71 Ala. 312.

**Submission to the Jury.** — In *Newson v. State*, 2 Ga. 61, it was held that submission to the jury so as to prevent the entering of a nol. pros. without the defendant's consent, under a statute to that effect, means the act of presenting the case to the jury through the pleadings and evidence, and that the submission to the jury is as complete when the process begins as when it concludes.

**Waiver.** — It has been held, however, that if a nol. pros. is entered with advice and consent of the court after the trial has been commenced, and the defendant does not claim a verdict, he waives his right, and such a nol. pros. is not a bar to another prosecution. *State v. Garvey*, 42 Conn. 233.

1. *Wilson v. Com.*, 3 Bush (Ky.) 106; *Com. v. Seymour*, 2 Brews. (Pa.) 567, where the indictment was held demurrable; *Walton v. State*, 3 Sneed (Tenn.) 689, where it was held that a nol. pros. upon a bad indictment, though entered after jury sworn, was not an acquittal; *Jackson v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 1002, holding that after announcement of ready for trial and investigation begun a nol. pros. will not operate as a former jeopardy, but the court distinctly says: "We are not discussing a case in which the jury had been impeached and sworn, and a plea for the defendant had been entered, and a nol. pros. entered on a good indict-

before the jury are charged.<sup>1</sup>

**Prosecution on Same Indictment or Information.**—Some doubt and conflict of opinion have existed, as to the right to try the defendant in the same proceeding in which a nolle prosequi has been entered, though from the cases in which the point was directly involved,<sup>2</sup>

ment;" *State v. Hodgkins*, 42 N. H. 474, holding that after plea of not guilty a nol. pros. may be entered and will not operate as a bar, but the court states the broad proposition that there is no acquittal unless there is a trial on the merits, and upon that ground the case was decided; *State v. Champeau*, 52 Vt. 313, *citing* *State v. I. S. S.*, 1 Tyler (Vt.) 178, and *State v. Roe*, 12 Vt. 93. But both these latter cases only go to the extent of holding that the beginning of the trial suspends the right of the prosecuting officer to enter a nol. pros. independently of the court, and that thereafter the cause is under the control of the court, and its consent must be had to the entry of a nol. pros., and in neither of them was the question presented whether a nol. pros. during the trial would operate as an acquittal.

1. *State v. M'Kee*, 1 Bailey L. (S. Car.) 651.

2. *State v. Shilling*, 10 Iowa 106, in which case an information in three counts was filed before a justice of the peace. Two of the counts were withdrawn before the justice, and the defendant was tried and convicted under the third. He appealed to the District Court, where he was tried on the two counts which had been withdrawn before the justice. It was held that the right of the state again to indict or file a second information for the offense contained in the counts upon which the nol. pros. had been entered was a right which could not be denied, but that there was no principle justifying the trial of the defendant in the same proceeding upon those counts after they had been withdrawn, and that for that proceeding the counts withdrawn cease to have any validity or any legal existence, and that to try the defendant upon such counts was to try him without any indictment or information; *Kistler v. State*, 64 Ind. 371, holding that the voluntary dismissal of an indictment by the court, with the consent of the prosecuting attorney and in the absence of the defendant, is equivalent to a nolle prosequi, and the defendant cannot be rearrested thereon; *Bacon v. Towne*, 4 Cush. (Mass.) 235, wherein

the court said that a nolle prosequi is no discharge of the crime and no bar to a new indictment, "even if it precludes the government from suing out new process requiring the party to answer to the same indictment, which may be more doubtful," *citing* *Goddard v. Smith*, 6 Mod. 262, 1 Salk. 21, and *Morgan v. Hughes*, 2 T. R. 225. From a reading of *Goddard v. Smith*, above cited, it does not appear that the court went to the full length of deciding that new process might issue on the same indictment, nor does *Morgan v. Hughes*, 2 T. R. 225, support such a proposition, but the only point decided in this connection was that in a declaration in malicious prosecution it was not sufficient simply to allege that the plaintiff was discharged from his imprisonment, Buller, J., saying: "It should have been shown on the face of the record that the prosecution was at an end. Saying that the plaintiff was 'discharged' is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution;" *Reg. v. Allen*, 1 B. & S. 850, 101 E. C. L. 850, in which case Mr. Justice Crompton, referring to *Goddard v. Smith*, 6 Mod. 262, above cited, said that the court in that case only decided that the entry of the nolle prosequi is not a decision on the merits, though the court said in the course of the argument that the attorney-general might issue new process upon the indictment, but he (Mr. Justice Crompton) was of the opinion that a nolle prosequi put an end to the prosecution; *Reg. v. Ridpath*, 10 Mod. 153, wherein there was a mistake in the pleading, and upon the filing of the new information the court, in considering the effect of a nol. pros. on the recognizance of the defendant

as well as from the tenor of the authorities generally upon the effect of a nolle prosequi as a bar, as hereinbefore set out, the general rule seems to be that a new prosecution may be

and his sureties, held that the nol. pros. was not a discharge. But in *Reg. v. Allen*, 1 B. & S. 856, 101 E. C. L. 856, Mr. Justice Crompton said that the court in *Reg. v. Ridpath*, 10 Mod. 153, above cited, must have held that the original information was at an end, because there cannot be two prosecutions for the same offense at the same time.

**Contra.** — In *State v. Thornton*, 13 Ired. L. (N. Car.) 257, a bill of indictment was nol-prossed by the attorney-general, and an alias *capias* was issued against the defendant under which he entered into a recognizance to appear at the succeeding term. No other bill upon the same charge was sent to the jury, and the defendant opposed the proposition of the attorney-general to try him upon the same bill, upon the idea that although the nol. pros. did not discharge the defendant from answering upon another indictment, it was an effectual discharge from any liability under the bill then found; but the court held that a nol. pros. in a criminal proceeding is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to leave the court without entering into a recognizance, but it does not operate as an acquittal, and he may afterwards be indicted for the same offense, or fresh process may be issued against him on the same indictment. *State v. Thompson*, 3 Hawks (N. Car.) 613. To the same effect, see also *State v. Howard*, 15 Rich. L. (S. Car.) 280, citing *State v. Haskett*, 3 Hill L. (S. Car.) 95.

**Custody after Nol. Pros.** — After a nol. pros. the defendant cannot be held on the same indictment or information. *Venters v. State*, 18 Tex. App. 198; *Willingham v. State*, 14 Ala. 540; *Henry v. Com.*, 4 Bush (Ky.) 428. But it has also been stated that he may be held for a new indictment by order of court, *State v. Primm*, 61 Mo. 166; or for a new information, as sometimes expressly provided by statute, *State v. Hansen*, 10 Wash. 235. But in *Venters v. State*, 18 Tex. App. 210, the court suggests that if a case should arise in which nolle prosequi should

be entered at successive terms to successive indictments for the purpose of depriving the prisoner of a "speedy trial," proper relief would be found. See also *supra*, VI. 5. *Second or New Information.*

**Setting Aside Nolle Prosequi Taken in Progress of Trial.** — In *State v. Nutting*, 39 Me. 361, a nolle prosequi was entered as to certain portions of the indictment at the trial, and subsequently, during the progress of the trial, the entry of the nolle prosequi was stricken from the docket on the motion of the prosecuting attorney. It was insisted that as the nolle prosequi had been entered as to a part of the indictment, the government was thereby estopped and could not proceed upon the indictment as originally found. The court held that as the orders were made while the cause was on trial and the prisoner in custody, and as the prisoner's witnesses had not been discharged, and none of his rights had been impaired, and he had come prepared to meet the indictment as it was originally found, and he was tried upon such indictment so found, there was no error in the action of the court in vacating the nolle prosequi, though the question as to what would have been the result had the prisoner been discharged from custody, or whether a new *capias* might properly have issued to bring him in at a subsequent time to be tried upon an indictment upon which a nol. pros. had been entered, was not decided.\*

In *Parry v. State*, 21 Tex. 746, a nol. pros. was entered at one term against one of joint defendants, and after the trial and conviction of the co-defendants an order granting a new trial was entered in which the court ordered the nol. pros. above mentioned to be set aside and the indictment to be reinstated. At a subsequent term the defendants severed, and were tried and convicted. A motion in arrest of judgment upon the ground that a nol. pros. had been entered in a former term and erroneously set aside was overruled, the Supreme Court saying: "We see nothing to prevent the defendant from consenting that the entry be set aside during the term, as the record abundantly shows he did."

instituted, but the nol. pros. puts an end to the one in which it is entered.<sup>1</sup>

**Curative Effect.** — A nolle prosequi destroys all basis for quashing an indictment as to the counts upon which the order is entered.<sup>2</sup>

**After Verdict** a nolle prosequi may be entered, thereby reducing the criminality of the charge.<sup>3</sup>

**XXI. OBJECTIONS** — 1. **How Made Generally.** — Objections to the sufficiency of an indictment or information<sup>4</sup> are usually made by motion to quash or demurrer before the trial, or by motion in arrest after the trial,<sup>5</sup> and the practice is generally regulated by statutes designating the manner of objection and the defects to be reached by the respective methods prescribed.

1. **Nol. Pros. of Indictment on Presentment** destroys the presentment. *U. S. v. Hill*, 1 Brock. (U. S.) 156.

2. *State v. Smith*, 67 Me. 328; *Com. v. Andrews*, 132 Mass. 263; *State v. Buchanan*, 1 Ired. L. (N. Car.) 59; *State v. Lockwood*, 58 Vt. 378.

**Misjoinder and Duplicity.** — A nol. pros. will cure the objection of a misjoinder of counts. *Heller v. People*, 2 Colo. App. 459; *Com. v. Cain*, 102 Mass. 487; *Com. v. Kimball*, 7 Gray (Mass.) 330; *State v. Merrill*, 44 N. H. 625; *State v. Jones*, 82 N. Car. 685; *U. S. v. Scott*, 4 Biss. (U. S.) 31; or duplicity in a count, *State v. Bean*, 77 Me. 486; *Com. v. Holmes*, 119 Mass. 198; *State v. Merrill*, 44 N. H. 626; *State v. Miller*, 24 Conn. 522; *State v. Cooper*, 101 N. Car. 684; *Kilrow v. Com.*, 89 Pa. St. 489. *Contra*, *Thomas v. State*, 111 Ala. 51, wherein it was held that an indictment charging two offenses in one count is bad for duplicity, and an election to proceed for one would not cure the defect, although the result would be different if the two offenses were charged in separate counts.

3. *Com. v. Jenks*, 1 Gray (Mass.) 493; *Com. v. Briggs*, 7 Pick. (Mass.) 177; *State v. Bruce*, 24 Me. 71; *State v. Burke*, 38 Me. 574.

Where a general verdict is rendered and there is no evidence to support one count, a nol. pros. may be entered as to the count unsupported by the evidence. *State v. Whittier*, 21 Me. 341. But where the offense was charged in different ways in separate counts, it was held that though there could be but one conviction, if the verdict is upon each count there is a mistrial, and the error could not be cured by a nol. pros. on all but one count, as it did not appear which was supported by the evi-

dence and each might have been supported by different evidence. *Com. v. Fitchburg R. Co.*, 120 Mass. 381.

**Nol. Pros. on Whole of Good Indictment.** — Where the indictment is sufficient a nol. pros. as to the whole indictment after verdict is a bar to another indictment. *State v. Smith*, 67 Me. 328.

4. **Rules Applicable to Indictment and Information Alike.** — The rules applicable to indictments are also applicable to informations, sometimes by express statute. *State v. Smith*, 12 Mont. 378.

5. *Heller v. People*, 2 Colo. App. 459; *People v. Smith*, 94 Mich. 644; *People v. Millan*, 106 Cal. 320; *People v. Chuey Ying Git*, 100 Cal. 437; *State v. McCaffery*, 16 Mont. 33; *People v. Tower*, 135 N. Y. 457; *State v. Harrison*, 62 Mo. App. 112; *U. S. v. Harmon*, 45 Fed. Rep. 414; *State v. Atkinson*, 33 S. Car. 100; *State v. Garvis*, 18 Oregon 360.

**Objection During Trial.** — A defendant has no right to insist that objections to the form and sufficiency of an indictment should be discussed or recited during the trial of the facts before the jury, but such objections should be discussed upon a motion to quash the indictment, or upon a motion in arrest of judgment. To permit the discussion of such objections during the progress of the case before the jury would be inconvenient and embarrassing, and would introduce much confusion into the administration of public justice; but the court may entertain such questions during the trial in the exercise of a sound discretion, though this should rarely be done, and only under circumstances of an extraordinary nature. *Per Story, J.*, in *U. S. v. Gooding*, 12 Wheat. (U. S.) 460.

**Objections to Evidence.** — Objections to

**Waiver.**—Exceptions to an indictment or information must usually be made before trial on the general issue. If they are formal, or such as may arise upon demurrer, plea in abatement, or motion to quash, they must generally be made and adjudicated preliminary to the trial, and if not thus made they will, in contemplation of law, be waived,<sup>1</sup> unless no offense within the juris-

the indictment cannot be raised by objecting to the introduction of evidence at the trial. *U. S. v. Harmon*, 45 Fed. Rep. 414; *State v. Risley*, 72 Mo. 610; *State v. Hart*, 34 Me. 40; *People v. Apple*, 7 Cal. 289; *Rice v. State*, 3 Kan. 142. Compare *State v. Brown*, 47 Ohio St. 109.

But the defect may be such as to require an objection to the introduction of the evidence. Thus in *Shafer v. State*, 74 Ind. 90, an objection was taken to the indictment because property was inaccurately described, and it was held that such an objection must be made to the testimony as to that portion which was not properly described.

**Motion to Direct Verdict.**—If the defendant wishes to raise the point that the indictment does not state a public offense, he should not raise the question after trial by a motion to direct a verdict, because if a verdict is directed by the court for such a reason, and a good offense is in fact stated in the indictment, the rights of the state are gone and the defendant cannot again be tried for the offense charged, whereas there is no hardship on the defendant in requiring him to present such a question in a motion to quash before the trial, or a motion in arrest afterwards. *State v. Beach*, (Ind. 1896) 43 N. E. Rep. 949. See also *State v. Brown*, 47 Ohio St. 109.

1. *Georgia*.—*Horne v. State*, 37 Ga. 90; *Thomas v. State*, 69 Ga. 747; *Hill v. State*, 41 Ga. 502; *Wise v. State*, 24 Ga. 31.

*Illinois*.—*Curtis v. People*, 1 Ill. 256; *Guykowski v. People*, 2 Ill. 476; *Conolly v. People*, 4 Ill. 474; *Winship v. People*, 51 Ill. 296; *Stone v. People*, 3 Ill. 326.

*Indiana*.—*Campton v. State*, 140 Ind. 442; *Trout v. State*, 107 Ind. 578.

*Kansas*.—*State v. Pryor*, 53 Kan. 657.

*Kentucky*.—*Moore v. Com.*, (Ky. 1896) 35 S. W. Rep. 283.

*Louisiana*.—*State v. Scott*, 48 La. Ann. 293; *State v. Crenshaw*, 45 La. Ann. 496; *State v. Polite Jim*, 48

La. Ann. 267; *State v. Durbin*, 22 La. Ann. 162; Rev. Stat. 1870, § 1047.

*Maine*.—*State v. Leavitt*, 87 Me. 72.

*Massachusetts*.—*Com. v. Schaffner*, 146 Mass. 512.

*Michigan*.—*People v. Smith*, 94 Mich. 644.

*Minnesota*.—*State v. Garvey*, 11 Minn. 154.

*Missouri*.—*State v. Harrison*, 62 Mo. App. 112; *State v. West*, 21 Mo. App. 311.

*Nebraska*.—*Aiken v. State*, 41 Neb. 263.

*New York*.—*People v. Weldon*, 111 N. Y. 569; *People v. Williams*, (Supreme Ct.) 18 N. Y. St. Rep. 403.

*North Carolina*.—*State v. Dunn*, 109 N. Car. 839; *State v. Barnes*, 7 Jones L. (N. Car.) 21; *State v. Roberts*, 2 Dev. & B. L. (N. Car.) 540.

*North Dakota*.—*State v. Kent*, 5 N. Dak. 516.

*Pennsylvania*.—*Com. v. Hughes*, 11 Phila. (Pa.) 430; *Com. v. Newcomer*, 49 Pa. St. 478.

*Wyoming*.—*Wilbur v. Territory*, 3 Wyoming 268.

*United States*.—*Durland v. U. S.*, 161 U. S. 306; *Frisbie v. U. S.*, 157 U. S. 160.

*England*.—*Reg. v. Fenwick*, 4 Cox C. C. 139, 2 C. & K. 915, 61 E. C. L. 915; *Heymann v. Reg.* (in error), L. R. 8 Q. B. 102, 28 L. T. 162, 21 W. R. 357, 12 Cox C. C. 383.

See also, generally, article ABATEMENT IN PLEADING, vol. I, p. I.

**Construction of Statute.**—In *State v. Davidson*, 2 Coldw. (Tenn.) 185, it was held that a statute providing that a defendant who pleaded not guilty and was convicted could not object on motion in arrest, or be entitled to a new trial or a reversal of the judgment for any of the following causes, enumerating nine causes, meant that he should not be entitled to interpose such objection for any one of such causes, but that if more than one of such causes concurred they could be made available.

**Imperfect Statement.**—If an indictment



diction of the court is stated, such a defect being fatal at any stage, and not being waived by failure to take advantage thereof at any preliminary stage of the proceedings.<sup>1</sup>

**Statutes of Jeofails.** — In connection with the general rule last stated may be considered the statutory provisions now common that the proceedings on an indictment or information shall not be stayed or reversed for matters not affecting substantial rights.<sup>2</sup>

ment or information contains all the essential evidence of the offense, though imperfectly stated, the objection must be made *in limine*. *Bright v. State*, 90 Ind. 343; *Graeter v. State*, 105 Ind. 273; *Baker v. State*, 134 Ind. 658; *Nichols v. State*, 127 Ind. 410; *Stewart v. State*, 113 Ind. 509; *Trout v. State*, 107 Ind. 578; *Phillips v. State*, 86 Ga. 427; *Bostock v. State*, 61 Ga. 639; *Jordan v. State*, 60 Ga. 657; *Reeves v. State*, 29 Fla. 527; *State v. Marshall*, 2 Kan. App. 792; *State v. Bruce*, 5 Oregon 68; *U. S. v. Pridgeon*, 153 U. S. 48; *Coffin v. U. S.*, 162 U. S. 664.

**On Change of Venue** objections to form not affecting the substance of the charge cannot be made. *Caldwell v. State*, 41 Tex. 90.

**Upon New Trial.** — The granting of a new trial reverts to the plea of not guilty, and objections which are waived by such plea in the first trial cannot be taken advantage of in the second. *Curtis v. Com.*, 87 Va. 589.

1. *People v. Ross*, 103 Cal. 425; *Reyes v. State*, 34 Fla. 181; *State v. Marshall*, 2 Kan. App. 792; *State v. Garvey*, 11 Minn. 154; *Newcomb v. State*, 37 Miss. 397; *People v. Winner*, 80 Hun (N. Y.) 130; *People v. Gregg*, 59 Hun (N. Y.) 107. See also article EXCEPTIONS AND OBJECTIONS, vol. 8, p. 201.

2. *Arkansas*. — *Read v. State*, 63 Ark. 618.

*California*. — *People v. Fowler*, 88 Cal. 137; *People v. Carroll*, 92 Cal. 570; *People v. Biggins*, 65 Cal. 564.

*Colorado*. — *Holt v. People*, 23 Colo. 1; *Packer v. People*, 8 Colo. 361.

*Florida*. — *Kennedy v. State*, 31 Fla. 428.

*Illinois*. — *McElhanon v. People*, 92 Ill. 372; *Curtis v. People*, 1 Ill. 258.

*Indiana*. — *Cronkrite v. State*, 11 Ind. 309; *Rivers v. State*, 144 Ind. 16; *Mountjoy v. State*, 78 Ind. 174; *Qualter v. State*, 120 Ind. 93; *Rosenstein v. State*, 9 Ind. App. 292; *Musgrave v. State*, 133 Ind. 303; *Shafer v. State*, 26

Ind. 191; *Dukes v. State*, 11 Ind. 557; *Greenley v. State*, 60 Ind. 141; *Meiers v. State*, 56 Ind. 336; *Veatch v. State*, 56 Ind. 584; *Sage v. State*, 127 Ind. 17; *Fisher v. State*, 2 Ind. App. 365; *State v. Patterson*, 116 Ind. 48.

*Iowa*. — *State v. White*, 32 Iowa 19; *State v. DeBord*, 88 Iowa 103; *State v. Gillick*, 7 Iowa 287; *State v. Carney*, 20 Iowa 82; *State v. Brandt*, 41 Iowa 593; *State v. Knight*, 19 Iowa 94; *State v. Beckey*, 79 Iowa 368; *State v. Gurluck*, 14 Iowa 444; *State v. Emleigh*, 18 Iowa 122; *State v. White*, 32 Iowa 17.

*Kansas*. — *State v. Knadler*, 40 Kan. 360; *State v. Adams*, 20 Kan. 317; *State v. Otey*, 7 Kan. 69.

*Kentucky*. — *Blyew v. Com.*, 91 Ky. 200.

*Maryland*. — *Wedge v. State*, 12 Md. 235.

*Missouri*. — *State v. Turlington*, 102 Mo. 642; *State v. Foster*, 61 Mo. 550; *State v. Sweeney*, 68 Mo. 97; *State v. Coulter*, 46 Mo. 565.

*New York*. — *People v. Dimick*, 107 N. Y. 13; *People v. Richards*, 44 Hun (N. Y.) 289; *Schrumpf v. People*, 14 Hun (N. Y.) 10; *People v. Fernandez*, 35 N. Y. 49; *Stokes v. People*, 53 N. Y. 165; *Coleman v. People*, 58 N. Y. 555; *People v. Burns*, 33 Hun (N. Y.) 300; *Cox v. People*, 80 N. Y. 500; *People v. Reavey*, 38 Hun (N. Y.) 421; *People v. Rockhill*, 74 Hun (N. Y.) 241; *People v. Peck*, (Supreme Ct.) 2 N. Y. Crim. Rep. 314, 96 N. Y. 650.

*North Dakota*. — *State v. Hasledahl*, 3 N. Dak. 36.

*Ohio*. — *Bartlett v. State*, 28 Ohio St. 671.

*South Dakota*. — *State v. Brennan*, 2 S. Dak. 384.

*Texas*. — *U. S. v. Ewan*, 40 Fed. Rep. 451; *Thomas v. State*, 18 Tex. App. 220.

*United States*. — *Babcock v. U. S.*, 34 Fed. Rep. 873; *Frisbie v. U. S.*, 157 U. S. 160; *Price v. U. S.*, 165 U. S. 311; *U. S. v. Bornemann*, 35 Fed. Rep. 824; *Caha v. U. S.*, 152 U. S. 211; *U. S. v. Tuska*, 14 Blatchf. (U. S.) 6.

The Court May Permit the Withdrawal of a Plea for the purpose of receiving and hearing a demurrer.<sup>1</sup>

**2. Pointing Out Defects.**—It is now usually the statutory practice to require objections, whether they are such as may be raised on demurrer or on motion to quash, to be specific,<sup>2</sup> unless the indictment or information is fatally defective in not stating the offense;<sup>3</sup> and where, by code or statute, permissible objections

1. *People v. Villarino*, 66 Cal. 228; *Reg. v. Purchase*, C. & M. 617, 41 E. C. L. 335, *Reg. v. Sheals*, 3 Crawf. & Dix. C. C. 330.

In *Rex v. Cordy*, 3 C. & P. 425, 14 E. C. L. 377, it being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the judge before plea pleaded, to save the public time it was directed that the trial proceed, the court saying that if the prisoner should be convicted on evidence which, in his opinion, was applicable to this count only, he would consider it as demurred to and would allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance.

In *Massachusetts* the court refused to permit the withdrawal of a plea, but entertained a motion to quash. *Com. v. Chapman*, 11 Cush. (Mass.) 425.

In *Maryland* it was said to be the better opinion and more according with the justice of the matter that the prisoner has the right to withdraw a plea of not guilty and demur. *Cochrane v. State*, 6 Md. 400.

**Technical Objections.**—The withdrawal of a plea and filing of a demurrer have been refused where the objections sought to be reached were of a technical character, not affecting the merits of the case. *Reg. v. Brown*, 2 Cox C. C. 127; *Reg. v. Odgers*, 2 M. & Rob. 479.

**Demurrer and Plea at One Time.**—In *Kentucky* it was held that a demurrer could be filed pending a plea, no provision of the code making this method objectionable. *Ellis v. Com.*, 78 Ky. 130; *Stroud v. Com.*, (Ky. 1892) 19 S. W. Rep. 976. So in *Missouri* it was said in speaking of the order of a motion to quash that at common law a defendant in a prosecution for felony might at the same time enter a plea of not guilty and demur to the sufficiency of the indictment. *State v. Reeves*, 97

Mo. 672. See further *Reg. v. Phelps*, C. & M. 180, 41 E. C. L. 103; *Reg. v. Adams*, C. & M. 299, 41 E. C. L. 167.

2. *Gibson v. State*, 79 Ga. 345; *Com. v. Smith*, (Ky. 1894) 27 S. W. Rep. 810; *Com. v. Lane*, 157 Mass. 462; *Com. v. Jenks*, 138 Mass. 484; *Com. v. Murray*, 135 Mass. 530; *State v. Van Houten*, 37 Mo. 357; *State v. Berry*, 62 Mo. 595; *State v. Ah Sam*, 7 Nev. 127; *State v. Harkin*, 7 Nev. 381; *Edgar v. State*, 96 Tenn. 690; *Robeson v. State*, 3 Heisk. (Tenn.) 266, where an indictment which set forth several offenses in the alternative was quashed on motion, though the motion did not set out the grounds thereof, the court saying: "Such only is the proper practice, but for reasons suggested by the record we do not feel bound by the rule in this case."

**Frivolous Objection.**—An objection on motion to quash that the indictment is an absurdity on its face is frivolous and should be disregarded. *State v. Belew*, 79 Mo. 585.

**Sufficiency of Specification.**—A demurrer raising the objection that the indictment does not substantially conform to certain sections of the Criminal Practice Act, and under this allegation specifying that two of the direct and certain essentials mentioned in one of such sections are wanting in the indictment, is a sufficient specification of the grounds of the objection, and satisfies the mandate of the statute requiring that the demurrer shall "distinctly specify the grounds of objection to the indictment, or it must be disregarded." *People v. Hill*, 3 Utah 354.

In the **Absence of Statute** a motion to quash need not specify objections to an affidavit and information. *Dyer v. State*, 85 Ind. 526; *Davis v. State*, 69 Ind. 130.

3. Thus, under the statute in *Missouri* (Rev. Stat. 1879, § 1818), "a demurrer or motion to quash an indictment shall distinctly specify the grounds of objection to the indictment; unless it does so it shall be dis-

are enumerated and the method of raising them prescribed, the practice of adopting other methods will not be sanctioned, and objections which are not taken in the way provided will be regarded as waived.<sup>1</sup>

**3. Motion to Quash** — *a.* **GENERAL RULES** — As an Exercise of Discretion. — The motion to quash is not a proceeding as of right, but the power is generally vested in the discretion of the court to refuse to quash, and to compel the defendant to resort to his other remedies by demurrer or by motion in arrest of judgment,<sup>2</sup>

regarded, nor shall by any reason be held to sustain such demurrer or motion not specified therein." Under this statute an objection on demurrer or motion to quash that there was no offense charged in the indictment is sufficiently specific in this particular. It is like a demurrer to a petition in a civil action stating simply that the petition does not state facts sufficient to constitute a cause of action. *State v. Belew*, 79 Mo. 585; *State v. Weeks*, 77 Mo. 496.

1. *Alabama*. — *Henderson v. State*, 109 Ala. 40.

*California*. — *People v. Schmidt*, 64 Cal. 260; *People v. Josephs*, 7 Cal. 129; *People v. Markham*, 64 Cal. 157.

*Indiana*. — *Blaker v. State*, 130 Ind. 203.

*Maryland*. — *Cowman v. State*, 12 Md. 250.

*Mississippi*. — *Gates v. State*, 71 Miss. 874.

*New York*. — *People v. Clements*, 107 N. Y. 210; *People v. Conroy*, 97 N. Y. 63; *People v. Richards*, 44 Hun (N. Y.) 288; *People v. Carr*, (Supreme Ct.) 3 N. Y. Crim. Rep. 582; *People v. Cooper*, (Oswego County Oyer & T. Ct.) 3 N. Y. Crim. Rep. 119; *People v. Wise*, (Albany County Ct. Sess.) 3 N. Y. Crim. Rep. 303; *People v. Wise*, (Albany County Ct. Sess.) 3 N. Y. Crim. Rep. 304; *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 110; *People v. Peck*, (Supreme Ct.) 2 N. Y. Crim. Rep. 317; *People v. Durrin*, (Warren County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 334; *People v. Upton*, 38 Hun (N. Y.) 107; *People v. Menken*, 36 Hun (N. Y.) 99; *People v. O'Donnell*, 46 Hun (N. Y.) 360; *People v. Tower*, 135 N. Y. 457.

*Texas*. — *State v. Schwartz*, 25 Tex. 766.

*Utah*. — *U. S. v. Cutler*, 5 Utah 608.

But it has been held that while it is irregular to set aside an indictment when the exceptions to it are not presented in writing at the proper time,

yet such irregularity will not afford ground to disturb the judgment if the indictment is clearly defective. *State v. Wilburn*, 25 Tex. 738.

**General Demurrer** — **Waiver of Specific Objections**. — An objection that the indictment does not show that it was found by a grand jury having proper authority is waived unless it is taken by demurrer or by a motion at the proper time, and a general demurrer on the ground that the facts charged in the indictment did not constitute a public offense will have the effect of waiving the other question, as the statute provides the only way in which it can be taken. *State v. Roderigas*, 7 Nev. 333.

2. *Arkansas*. — *State v. Mathis*, 3 Ark. 84.

*Maine*. — *State v. Stuart*, 23 Me. 111; *State v. Barnes*, 29 Me. 561; *State v. Haines*, 30 Me. 65; *State v. Burke*, 38 Me. 574; *State v. Taggart*, 38 Me. 298; *State v. Putnam*, 38 Me. 296; *State v. Maher*, 49 Me. 569; *State v. Hurley*, 54 Me. 562.

*Massachusetts*. — *Com. v. Eastman*, 1 Cush. (Mass.) 214; *Com. v. Hawkins*, 3 Gray (Mass.) 463.

*Missouri*. — *State v. Fletcher*, 18 Mo. 427; *State v. Myers*, 20 Mo. 411; *State v. Conrad*, 21 Mo. 271.

*New Jersey*. — *State v. Dayton*, 23 N. J. L. 49; *State v. Beard*, 25 N. J. L. 384.

*New York*. — *People v. Eckford*, 7 Cow. (N. Y.) 535; *People v. Wright*, 9 Wend. (N. Y.) 193.

*North Carolina*. — *State v. Smith*, 1 Murph. (N. Car.) 213; *State v. Roach*, 2 Hayw. (N. Car.) 352; *State v. Brannen*, 8 Jones L. (N. Car.) 208.

*Ohio* — *Ex p. Bushnell*, 8 Ohio St. 600.

*Pennsylvania*. — *Com. v. Haggerty*, 3 Brews. (Pa.) 285; *Respublica v. Cleaver*, 4 Yeates (Pa.) 69.

*South Carolina*. — *State v. Shirer*, 20 S. Car. 400.

*Texas*. — *Click v. State*, 3 Tex. 282.

and the refusal to quash is not, therefore, as a general rule, reversible error.<sup>1</sup> But under the statutes in some states exception will lie to the overruling of a motion to quash, and under this condition of the law it seems that the discretionary power of the court is abrogated.<sup>2</sup> In the exercise of its discretion the court is guided by certain rules.<sup>3</sup> It is generally held that where there is any doubt as to the propriety of quashing an indictment the court will not quash it, but will leave the defendant to his other means of objection,<sup>4</sup> but where it is plain that no judgment could be rendered in case of conviction, or that the judgment would be arrested, the indictment will be quashed.<sup>5</sup>

**The Quashing of a Good Indictment** is generally held to be subject to correction in some form.<sup>6</sup>

*Virginia.* — *Richards v. Com.*, 81 Va. 110.

*United States.* — *Durland v. U. S.*, 161 U. S. 306; *U. S. v. Stowell*, 2 Curt. (U. S.) 156.

**Complaints.** — *State v. McCarty*, 4 R. I. 82.

1. See cases cited in preceding note.

**Necessity for the Exercise of Discretion.**

— In *State v. Brannen*, 8 Jones L. (N. Car.) 208, the trial court refused to quash an indictment, because it was deemed sufficient, and it was held that in such a case an appeal would lie and the cause would be sent back, so that the court might proceed on the motion according to its discretion.

2. *Com. v. McGovern*, 10 Allen (Mass.) 194; *Nichols v. State*, 46 Miss. 286.

**Refusal to Quash — When Harmless Error.** — If the court erroneously overrules a motion to quash one count of an indictment and there is a special verdict of guilty upon the other count, this is equivalent to an acquittal upon the count upon which the motion to quash was overruled, and the error is harmless. *Harlan v. State*, 134 Ind. 340.

3. *Click v. State*, 3 Tex. 282; *State v. Mathis*, 3 Ark. 84.

**A Court May Impose Terms** upon the prosecutor before allowing him to quash his own indictment, *Rex v. Webb*, 3 Burr. 1468; as by requiring the disclosure of the name of the prosecutor and that the substituted indictment shall stand in the same order as the one quashed. *Rex v. Glenn*, 3 B. & Ald. 373, 5 E. C. L. 319.

**Effect on Recognizance.** — In *State v. Mathis*, 3 Ark. 84, it was held that if the motion to quash comes from the

defendant more strictness is applied than if the application is made by the prosecutor, for the reason that if an indictment is quashed the recognizance of the defendant is ineffectual.

4. *Com. v. Hawkins*, 3 Gray (Mass.) 464; *State v. Fletcher*, 18 Mo. 427; *State v. Myers*, 20 Mo. 411; *People v. Davis*, 56 N. Y. 95; *State v. Smith*, 1 Murph. (N. Car.) 213; *Ex p. Bushnell*, 8 Ohio St. 600; *Respublica v. Cleaver*, 4 Yeates (Pa.) 69; *Com. v. Haggerty*, 3 Brews. (Pa.) 285; *Bell v. Com.*, 8 Gratt. (Va.) 600; *U. S. v. Wardell*, 49 Fed. Rep. 914.

5. *State v. Roach*, 2 Hayw. (N. Car.) 352; *State v. Robinson*, 29 N. H. 274; *State v. Jackson*, 89 Mo. 561; *State v. Wishon*, 15 Mo. 505.

6. **Appeal or Writ of Error.** — A judgment quashing an indictment may be corrected on appeal, *State v. Hood*, 6 La. Ann. 179; *State v. Young*, 30 S. Car. 406; on writ of error, *Com. v. Wallace*, 114 Pa. St. 405; *Reg. v. Wilson*, 6 Q. B. 620, 51 E. C. L. 620; *People v. Stone*, 9 Wend. (N. Y.) 191; or by writ of error or appeal, *State v. Cunningham*, 51 Mo. 479.

**An Exception Must be Saved** to the ruling of the court quashing an indictment. *Laycock v. State*, 136 Ind. 217; *State v. Fortune*, 10 Mo. 466; *State v. Thruston*, 83 Mo. 271; *Chavis v. State*, 33 Tex. 446; *Laycock v. State*, 136 Ind. 217, where it is said that no bill of exceptions is necessary. *Contra*, *Baker v. People*, 105 Ill. 452.

**Appealability of Order.** — It is held in some cases that the order sustaining a motion to quash is appealable as a final judgment. *State v. Logan*, 1 Nev. 509; *State v. Young*, 30 S. Car. 406. See also *People v. Logan*, 1 Nev. 110.

*b.* TO WHAT DEFECTS DIRECTED. — A motion to quash is in the nature of a demurrer,<sup>1</sup> and according to the weight of authority reaches only matters apparent upon the face of the record,<sup>2</sup> but this rule is not universal.<sup>3</sup>

**Mandamus.** — In *People v. Swift*, 59 Mich. 541, it was held that there was a serious objection to the using of a writ of error for such a purpose under the practice in *Michigan*; that it involved delay, and did not lead as readily as a mandamus to a trial on the merits; and that a mandamus was the more appropriate method; *citing Reg. v. Justices*, 2 Q. B. Div. 516.

**Effect of Appeal or Error.** — It has been held that if an appeal is taken the defendant may be held in custody or required to give bail; if a writ of error be resorted to he must be discharged, and if the case is reversed and remanded for trial he may be again arrested on a writ issued for that purpose. *State v. Cunningham*, 51 Mo. 479.

**Quashal of One Count — Acquittal on the Other.** — In *State v. Leapfoot*, 19 Mo. 375, it was held that quashal of one count would not afford ground for reversal, the defendant having been acquitted on the remaining count.

So where there are two counts, one charging an offense which embraces that charged in the other, and the defendant is tried and acquitted on the count charging the greater offense, no error can be predicated upon quashal of the count charging the lesser offense. *State v. Throckmorton*, 53 Ind. 354.

1. *State v. Young*, 30 S. Car. 406, where it was said that under the former practice motion to quash was granted for some fault in the form of an indictment, but that when the indictment was regular in form, defendant was put to plead; but by statute, motion to quash and demurrer will lie for all defects in the pleading. See also *People v. Winner*, 80 Hun (N. Y.) 130; *Nichols v. State*, 46 Miss. 286; *State v. Rickey*, 9 N. J. L. 293. The same practice prevails in other states, as appears from the statutes as well as from various cases involving questions of criminal law.

In *North Carolina* it seems that the court will not quash an indictment for an imperfect statement, but will hold the prisoner so that a new bill curing the defect may be found, *State v. Skid-*

more, 109 N. Car. 795; *State v. Flow-ers*, 109 N. Car. 841; and will only quash where the prosecution cannot be sustained. *State v. Colbert*, 75 N. Car. 368.

2. *Connecticut.* — *Wickwire v. State*, 19 Conn. 477.

*Florida.* — *Broward v. State*, 9 Fla. 422.

*Georgia.* — *Jackson v. State*, 64 Ga. 346.

*Indiana.* — *Mathis v. State*, 94 Ind. 563; *Cooper v. State*, 79 Ind. 206; *Swiney v. State*, 119 Ind. 478.

*Massachusetts.* — *Com. v. Fredericks*, 119 Mass. 199; *Com. v. Donahue*, 126 Mass. 51.

*Nebraska.* — *Whitner v. State*, 46 Neb. 144.

*New Jersey.* — *State v. Rickey*, 9 N. J. L. 293; *State v. Zeigler*, 46 N. J. L. 307.

*Ohio.* — *Whiting v. State*, 48 Ohio St. 220.

*Oklahoma.* — *Royce v. Territory*, (Okla. 1897) 47 Pac. Rep. 1083.

*Pennsylvania.* — *Com. v. Church*, 1 Pa. St. 105.

*United States.* — *U. S. v. Pond*, 2 Curt. (U. S.) 265.

**Complaints.** — *Wickwire v. State*, 19 Conn. 477; *State v. Ward*, 60 Vt. 142; *Reg. v. Burnby*, 5 Q. B. 348, 48 E. C. L. 348, 8 Jur. 240.

3. See *State v. Nutting*, 39 Me. 359; *Low's Case*, 4 Me. 439; *Smith v. State*, (Miss. 1895) 18 So. Rep. 116; *State v. Wall*, 15 Mo. 208; *People v. Moore*, 65 How. Pr. (Niagara Oyer & T. Ct.) 177; *Com. v. Leisenring*, 2 Pearson (Pa.) 467, holding that the rule in *Com. v. Church*, 1 Pa. St. 105, cited in the preceding note, applied only to the particular case before the court, and that the statement therein seeming to cover all cases was a mere *dictum*; *Com. v. Bradney*, 126 Pa. St. 199; *Com. v. Bartilson*, 85 Pa. St. 488; *State v. Maloney*, 12 R. I. 251; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765. See also *State v. Webster*, 30 Ark. 171.

**By Statute**, sometimes, the motion to quash is the proper remedy only for matters *dehors* the pleading, making an issue to be tried by the court. *Gates v. State*, 71 Miss. 874.

*c.* SCOPE OF MOTION. — One good count is sufficient to withstand a motion directed to the whole pleading,<sup>1</sup> the rule sometimes being carried to the extent of holding that a motion to quash is not the proper remedy under these conditions.<sup>2</sup> On the other hand, the right to have such a pleading quashed as to the defective parts thereof has been upheld,<sup>3</sup> if the motion is directed to the defective portion,<sup>4</sup> and sometimes even upon a general motion.<sup>5</sup>

*d.* ORDER OF MOTION — *Before Plea.* — A motion to quash should be made before pleading to the indictment or information,<sup>6</sup> at least, for all objections except such as can be made on motion in arrest.<sup>7</sup>

**Admission of Facts by Prosecuting Officer.** — In *State v. Cain*, 1 Hawks (N. Car.) 352, the motion to quash was sustained on the admission of facts by the prosecuting attorney.

**Affidavits Contradicting Allegation in Indictment.** — In *People v. Clews*, 57 How. Pr. (Chautauqua County Sess.) 245, it was held that on the hearing of a motion to quash, the defendant would not be permitted to introduce affidavits contradicting the allegations in the indictment unless by the consent of the prosecuting attorney.

1. *Alabama.* — *State v. Coleman*, 5 Port. (Ala.) 32.

*Arkansas.* — *State v. Mathis*, 3 Ark. 84.

*Indiana.* — *State v. Staker*, 3 Ind. 570; *Dukes v. State*, 11 Ind. 557; *Dantz v. State*, 87 Ind. 398; *Jarrell v. State*, 58 Ind. 293; *Bryant v. State*, 106 Ind. 550.

*Louisiana.* — *State v. Laque*, 37 La. Ann. 853.

*Massachusetts.* — *Com. v. Lapham*, 156 Mass. 480.

*Missouri.* — *State v. Rector*, 11 Mo. 28; *State v. Wishon*, 15 Mo. 503.

*New Jersey.* — *State v. Hickman*, 8 N. J. L. 300.

*New York.* — *Kane v. People*, 3 Wend. (N. Y.) 363.

*North Carolina.* — *State v. Buchanan*, 1 Ired. L. (N. Car.) 59; *State v. Mangum*, 116 N. Car. 998.

*Ohio.* — *Stoughton v. State*, 2 Ohio St. 562.

*West Virginia.* — *State v. Cartright*, 20 W. Va. 32.

**Application to Parts of One Count.** — In *Com. v. Kennedy*, 131 Mass. 587, the indictment purported to be for an assault with intent to ravish, but sufficiently charged only the assault. A motion to quash was directed to the

whole. It was held that as the indictment was good for the assault, there was no way of knowing that the state would proceed for any other offense.

2. *Rose v. State*, Minor (Ala.) 29; *State v. Rector*, 11 Mo. 28; *Reg v. Withers*, 4 Cox C. C. 17.

3. *State v. Cadle*, 19 Ark. 613; *Good v. State*, 61 Ind. 69; *State v. Rutherford*, 13 Tex. 24. See also *U. S. v. Bickford*, 4 Blatchf. (U. S.) 338.

4. *State v. Coleman*, 5 Port. (Ala.) 32; *Collins v. People*, 39 Ill. 233; *State v. Wishon*, 15 Mo. 505; *Scott v. Com.*, 14 Gratt. (Va.) 687.

5. *Jones v. State*, 6 Humph. (Tenn.) 436; *State v. Woodward*, 21 Mo. 266, holding that the old practice did not prevail in *Missouri*.

6. *Collins v. People*, 39 Ill. 233; *West v. State*, 48 Ind. 483; *Epps v. State*, 102 Ind. 544; *State v. Burlingham*, 15 Me. 104; *Com. v. Chapman*, 11 Cush. (Mass.) 423; *People v. Walters*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 661; *State v. Barbee*, 93 N. Car. 498; *Pickett v. State*, 22 Ohio St. 405; *Com. v. Ramsey*, 1 Brews. (Pa.) 422; *Com. v. Haggerty*, 3 Brews. (Pa.) 285. See also article ARRAIGNMENT AND PLEA, vol. 2, p. 760.

**Motion to Quash Complaint.** — On appeal from the judgment of a justice of the peace on a complaint, the motion to quash is too late. *State v. McCarty*, 4 R. I. 82.

The record must show that the motion was made and acted upon. *Johnson v. State*, 13 Ind. App. 299.

7. *Millen v. State*, 60 Ga. 620; *People v. Winner*, 80 Hun (N. Y.) 130; *Carper v. State*, 27 Ohio St. 572.

**After Submission to Jury** a motion to quash is too late. *Thomasson v. State*, 22 Ga. 499.

**After Entry of Judgment** a motion to

**After Plea.** — But the court may often, as a matter of grace, permit the defendant to interpose a motion to quash even after he has pleaded to the merits.<sup>1</sup>

**Withdrawal of Plea.** — After a plea of not guilty, and the selection and swearing of a jury, it is held to be irregular to entertain a motion to quash without a formal withdrawal of such plea.<sup>2</sup> It is said, however, that the court will always permit a plea to be withdrawn for the purpose of interposing the motion.<sup>3</sup>

**e. PRESENCE OF ACCUSED AT HEARING.** — A person accused of crime need not be present upon the argument of a motion to quash on his behalf.<sup>4</sup>

quash is too late. *State v. Caverly*, 51 N. H. 446; *State v. Barbee*, 93 N. Car. 498; *State v. Jarvis*, 63 N. Car. 556.

**Objection to Introduction of Evidence** will not be allowed to take the place of a motion to quash. *State v. Jessup*, 42 Kan. 423.

1. *Com. v. Smith*, 162 Mass. 508; *Mentor v. People*, 30 Mich. 91; *Territory v. Barrett*, (N. Mex. 1894) 42 Pac. Rep. 66; *People v. Judson*, 11 Daly (N. Y.) 47; *State v. Sheppard*, 97 N. Car. 401; *Com. v. Ramsey*, 1 Brews. (Pa.) 422; *Richards v. Com.*, 81 Va. 110; *State v. Riffe*, 10 W. Va. 794.

**After a New Trial Granted** it is too late to ask leave to withdraw a plea for the purpose of interposing a motion to quash. *Com. v. Fitchburg R. Co.*, 126 Mass. 472.

**After a Mistrial** the defendant is too late with his application to withdraw his plea for the purpose of moving to quash. *State v. Lichliter*, 95 Mo. 402.

**After Jury Sworn.** — In *Com. v. Frey*, 50 Pa. St. 249, it was held, under the statute in *Pennsylvania*, that after the jury is sworn the court has no power to quash the indictment.

2. *Joy v. State*, 14 Ind. 139; *Nicholls v. State*, 5 N. J. L. 621.

**Contra.** — In *Missouri* it is held that the motion to quash may be filed, with the consent of the court, while a plea of not guilty is pending, and will not have the effect of withdrawing such a plea. *State v. Reeves*, 97 Mo. 668.

**Operation of Motion as Withdrawal of Plea.** — The filing of a motion to quash, with the permission of the court, after a plea of not guilty has been held to operate as a withdrawal of the plea. *Mentor v. People*, 30 Mich. 91.

**Re-entry of Plea.** — If a motion to quash is interposed upon an agreement that the trial shall proceed upon the merits in the event that such motion is

overruled, the effect of overruling the motion is to re-enter the plea, and a trial on the merits under such circumstances is regular. *Morton v. People*, 47 Ill. 468. See also *Hensche v. People*, 16 Mich. 46, holding that the defendant cannot complain that his plea of not guilty was not entered after the overruling of his motion to quash; the court saying that though the plea should have been entered, a trial without it on the merits would amount to a mere defect of form, the defendant having had as full benefit of the plea as if it had been re-entered.

**Motion by Prosecutor.** — The court will not, at the instance of the prosecutor, quash a defective indictment after plea before another good indictment is found. *Rex v. Wynn*, 2 East 226.

3. *Nicholls v. State*, 5 N. J. L. 621.

**In Nevada** it seems that the court is bound to permit the withdrawal of a plea and the entry of a motion to quash when the application is made in good faith and it is necessary to protect the defendant. *State v. Collyer*, 17 Nev. 275.

**In Maryland** it was said that the practice of quashing indictment after jury sworn obtains in most of the courts in that state. *State v. Williams*, 5 Md. 82.

4. *Epps v. State*, 102 Ind. 539; *Luther v. State*, 27 Ind. 47; *People v. Vail*, 57 How. Pr. (Rensselaer Oyer & T. Ct.) 81. See generally, as to the necessity of the presence of the defendant at the trial of a criminal charge, article TRIALS.

But in *Louisiana* it was held that a motion to quash could not be heard in the absence of the defendant, he being a fugitive. The court said, in this case, that the state has a right to the presence of the defendant who is in-

*f.* EFFECT OF QUASHAL. — Upon quashing an indictment or information the defendant may, nevertheless, be detained for further proceedings against him.<sup>1</sup>

**4. Demurrer — a. NATURE.** — A demurrer to the indictment or information, in criminal procedure, is like the demurrer in civil proceedings,<sup>2</sup> and lies only for defects appearing on the face of the pleading to which it is directed, and not for objections which, if available at all, are matters of defense to be introduced on the trial.<sup>3</sup>

dicted for a felony. *State v. Marion*, 15 La. Ann. 495.

1. *State v. Roach*, 2 Hayw. (N. Car.) 352; *State v. Allen*, 94 Ind. 442; *Nicholls v. State*, 5 N. J. L. 621. So also where a judgment is reversed for fatal defect in an indictment, *Peter v. State*, 3 How. (Miss.) 433; *Jones v. State*, 11 Smed. & M. (Miss.) 315; *U. S. v. Town-Maker, Hempst.* (U. S.) 299; unless a second indictment would be barred. *Redfield v. State*, 24 Tex. 134.

**Quashal Before Second Finding.** — An indictment need not be quashed before the finding of a second indictment. *Perkins v. State*, 66 Ala. 457. See also, *supra*, II. 8. c. (2) *Pending Another Indictment*.

2. *State v. Barrett*, 54 Ind. 436. See generally article DEMURRERS, vol. 6, p. 292.

**Effect of Demurrer as Admission.** — A demurrer admits the facts stated in an indictment to be true. *State v. Fearson*, 2 Md. 310; *Com. v. Kelcher*, 3 Metc. (Ky.) 484; *Holmes v. State*, 17 Neb. 73; *People v. Kelly*, (Supreme Ct.) 3 N. Y. Crim. Rep. 272.

The *protestando* in a demurrer to an indictment is wholly unavailable, and the fact protested against is admitted the same as if there had been no protestation, the only purpose being to preserve the liberty of disputing the fact protested against in some other proceeding, and such being the intent, even if the protestation is repugnant or unsustained, it will merely be rejected as surplusage. *State v. Beasom*, 40 N. H. 372.

**Legal Conclusions** are not admitted by a demurrer. *Com. v. Trimmer*, 84 Pa. St. 18. See generally article LEGAL CONCLUSIONS.

**Demurrer to Plea — Relation Back.** — A demurrer in a criminal case opens for review all the pleadings and reaches the first error therein. Thus a demurrer to a plea will reach a fatal

defect in an indictment. *Spielman v. State*, 27 Md. 524.

**In Writing.** — It is often expressly provided by statute that a demurrer shall be in writing, *People v. Hill*, 3 Utah 354; and no error can be predicated upon an overruling of a demurrer which is not in writing. *McGarr v. State*, 75 Ga. 158; *Sanders v. State*, 60 Ga. 126; *Wimbish v. State*, 70 Ga. 718; *State v. Risley*, 72 Mo. 610.

3. *Butler v. State*, 22 Ala. 46; *Bass v. State*, 29 Ark. 143; *McRae v. State*, 71 Ga. 97; *Minor v. State*, 63 Ga. 320; *State v. Briggs*, 68 Iowa 420; *People v. Fredericks*, 106 Cal. 554.

**Effect of Oyer.** — In *Butler v. State*, 22 Ala. 46, the question of a variance between an instrument and the allegations of an indictment for forgery was raised on demurrer. The court held that the question was not presented in the record because it did not appear that oyer had been craved of the instrument, and without this the court could not look to see whether or not there was a variance.

**Objection to Caption.** — It is said that on demurrer the Superior Court will look into the whole record, and that objections might be taken to the caption as well as to the body of the indictment, and therefore the caption showing that an indictment was found in an inferior court without jurisdiction will be bad on demurrer to the indictment. *Rex v. Fearnley*, 1 Leach C. C. 425, 1 T. R. 316; *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

In *Missouri* it was held that the caption was no part of the indictment, so as to subject the indictment to demurrer, referring, however, to matters which were embraced in the old commencement of an indictment. *State v. Meinhardt*, 73 Mo. 565. See *supra*, V. 2. *Caption and Commencement*.

**Joinder in Demurrer** is necessary under the rules of common-law pleading. 1 Chitty Crim. Law 440. See



**b. SCOPE.** — A demurrer to the whole indictment will be overruled if one count thereof sufficiently charges an offense.<sup>1</sup>

**c. ACTION UPON** — (1) *Generally* — **Duty of Court.** — When a demurrer is interposed to an indictment or information it is the duty of the court to pass upon it, either allowing or disallowing it.<sup>2</sup>

**Trial without Action.** — If a party goes to trial upon other issues without invoking the action of the court upon his demurrer or other defense, it is a waiver of such defense and no ground for reversal.<sup>3</sup>

**Withdrawal of Demurrer.** — The court may permit the withdrawal of a demurrer at any time before judgment.<sup>4</sup>

(2) *Effect of Overruling.* — **The Common-law Doctrine** was that a

generally article DEMURRERS, vol. 6, p. 312.

*The failure of the record to show a joinder in demurrer is immaterial to the rights of the defendant, and cannot be objected to after demurrer overruled and trial on the general issue.* Com. v. McCormack, 126 Mass. 258.

1. *Rose v. State, Minor* (Ala.) 29; *Ingram v. State*, 39 Ala. 247; *Gibson v. State*, 79 Ga. 345; *Wheeler v. State*, 42 Md. 563; *Gates v. State*, 71 Miss. 874; *Hendricks v. Com.*, 75 Va. 934; *State v. McClung*, 35 W. Va. 280. See also *People v. Perez*, 87 Cal. 122.

**Absence of Demurrer from Record** — **Presumption.** — In *Cheatham v. State*, 59 Ala. 40, the record on appeal not containing the demurrer which had been interposed in the court below, it was presumed that the demurrer was to the whole indictment, the one count thereof being good, and was properly overruled.

**Effect of Sustaining Demurrer to One Count.** — If a demurrer is sustained to a bad count, a good count is left unaffected. *Turner v. State*, 40 Ala. 21.

**Appeal from Order.** — Where the state is entitled to appeal from an order sustaining a demurrer to an indictment, it is not, by reason of such right, entitled to appeal from an order sustaining a demurrer to one count only. *State v. Stegman*, 90 Mo. 486. See also *People v. Martin*, 47 Cal. 112.

**Amendment.** — Sustaining a demurrer to one count of an indictment does not amount to an amendment of the indictment, and has never been so considered. *State v. McKiernan*, 17 Nev. 229.

2. *State v. Drésser*, 54 Me. 569; *People v. Biggins*, 65 Cal. 566, wherein it

was held that under a statute providing that "upon considering the demurrer the court must give judgment either allowing or disallowing it, and an order to that effect must be entered upon the minutes," while it would have been more regular to have entered an order expressly allowing the demurrer, yet an order allowing the prosecution to confess that the demurrer was well taken, followed by a direction that the district attorney file another information, was an order under the statute "to the effect" that the demurrer be allowed.

3. *Ayrs v. State*, 5 Coldw. (Tenn.) 30; *Pritchett v. State*, 2 Sneed (Tenn.) 285; *State v. Williams*, 35 S. Car. 344. To the same effect see *State v. Barrett*, 54 Ind. 434.

**After Demurrer Sustained.** — After a demurrer to an indictment was sustained, the defendant waived the insufficiency of the indictment on account of which the demurrer was interposed and went to trial. By this action, if there were any defects in setting out the defense with technical certainty the defendant waived them, and on the trial was estopped from making such points as the judge sustained on demurrer, and which the solicitor-general was in the act of putting on record by an order quashing the indictment when the waiver was made. *Thomas v. State*, 71 Ga. 47.

4. *State v. Barrett*, 54 Ind. 436; *U. S. v. Watkins*, 3 Cranch (C. C.) 441. See also *R. v. Houston*, 3 Crawf. & Dix. 310.

**The Court May Impose Conditions** upon granting leave to withdraw a demurrer. *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

general demurrer confessed the truth of the facts stated in the pleading attacked as insufficient in law, and upon overruling such a demurrer, the judgment was final against the defendant,<sup>1</sup> at least when the indictment charged a misdemeanor.<sup>2</sup>

In the United States the defendant may generally plead over or withdraw his demurrer with leave if he does not wish final judgment against him;<sup>3</sup> though it is sometimes said that he may not plead over in misdemeanors as a matter of right, and without showing sufficient ground for leave to do so;<sup>4</sup> and upon overruling a demurrer on a charge of felony, the defendant generally has a right to plead over.<sup>5</sup> Under the practice in some states the

1. 2 Hale's P. C. 257.

2. *Rex v. Gibson*, 8 East 107; *Rex v. Taylor*, 3 B. & C. 612, 10 E. C. L. 199; *Reg. v. Birmingham, etc.*, R. Co., 3 Q. B. 224, 43 E. C. L. 708.

In Felonies the rule seems to have been different. *Johnson v. People*, 22 Ill. 314. Some of the earlier English authorities seem to support this view. 2 Hale's P. C. 225, 257. See also *Rex v. Gibson*, 8 East 111; *Rex v. Taylor*, 3 B. & C. 612, 10 E. C. L. 199; *Rex v. Birmingham*, 3 Q. B. 224, 43 E. C. L. 708. But it was later decided that in felony the judgment should be final against the defendant. *Reg. v. Faderman*, 3 C. & K. 359, 4 Cox C. C. 359.

3. *McCuen v. State*, 19 Ark. 630; *State v. Norton*, 89 Me. 290; *Com. v. Gloucester*, 110 Mass. 491; *Com. v. Eastman*, 1 Cush. (Mass.) 189; *State v. Passaic County Agricultural Soc.*, 54 N. J. L. 260; *People v. Cole*, (Fulton County Oyer & T. Ct.) 2 N. Y. Crim. Rep. 108; *People v. Taylor*, 3 Den. (N. Y.) 91; *People v. Cooper*, (Oswego County Oyer & T. Ct.) 3 N. Y. Crim. Rep. 119; *People v. Crotty*, (Supreme Ct.) 30 N. Y. St. Rep. 46; *Bennett v. State*, 2 Yerg. (Tenn.) 473; *State v. Shaw*, 8 Humph. (Tenn.) 32; *State v. Wilkins*, 17 Vt. 151; *Com. v. Foggy*, 6 Leigh (Va.) 638.

**Trial without Plea of Guilty.** — It has been held that where a court overrules a demurrer to an indictment, it is no ground for arresting the judgment on the merits that the court proceeded to trial without the entry of a plea of not guilty. *State v. Greene*, 66 Iowa 11.

**Error, How Available.** — The overruling of a demurrer is not a ground for a new trial, but a bill of exceptions should be taken in order to have any error in such cases brought before the Supreme Court. *Flemister v. State*, 81 Ga. 770.

In *Woody v. State*, 32 Ga. 596, it was held that if the defendant rests his defense upon a technical exception, not well founded, and submits to a verdict of guilty upon the overruling of his demurrer to the indictment, the Supreme Court cannot aid him.

**Pleading Over to an Indictment** after demurrer overruled does not waive error in the action of the court in overruling a demurrer. *State v. Ball*, 30 W. Va. 382. See also *People v. Callahan*, 29 Hun (N. Y.) 580; *People v. Stearns*, 21 Wend. (N. Y.) 409; *State v. Polk*, 91 N. Car. 652.

**Upon a Failure and Refusal to Plead** the court may enter final judgment, *State v. Abrisch*, 42 Minn. 202, citing *People v. Taylor*, 3 Den. (N. Y.) 91, but under a statute providing that the court may enter judgment if the defendant refuses to plead upon overruling his demurrer, the court may enter a plea of not guilty and proceed to the trial upon the merits. *People v. King*, 28 Cal. 266; *People v. Jocelyn*, 29 Cal. 563. See also *People v. Stearns*, 21 Wend. (N. Y.) 409.

**If a Demurrer is Interposed upon Two Grounds**, and the court sustains it on one ground and overrules it on the other, there is an end of the indictment, and the defendant has no ground of appeal from such a judgment. *State v. Hoffman*, 67 Iowa 281.

4. *Bennett v. State*, 2 Yerg. (Tenn.) 472.

5. *State v. Merrill*, 37 Me. 329; *Com. v. Leisenring*, 11 Phila. (Pa.) 392.

But the judgment is sometimes *respondet ouster* in misdemeanor, *McGuire v. State*, 35 Miss. 366; or judgment for the state, unless the defendant reserves the right to plead over at the time he demurs, both in misdemeanors and felonies. *State v. Dreser*, 54 Me. 569.

right to plead over is so enlarged that no judgment can be entered against the defendant upon a demurrer, but a trial must be had upon the merits.<sup>1</sup>

(3) *Effect of Sustaining.* — When a demurrer to an indictment or information is sustained the judgment is final, discharging the defendant if the exception is in bar,<sup>2</sup> and statutes have been enacted in several of the *United States* to that effect, but giving to the court the power to direct a new indictment or information to be preferred if he is of opinion that the objections can be thus overcome.<sup>3</sup> And the judgment sustaining a demurrer is a bar

1. *Ross v. State*, 9 Mo. 696; *Thomas v. State*, 6 Mo. 457; *Hirn v. State*, 1 Ohio St. 16.

2. *Rex v. Lyon*, 2 Leach C. C. 608.

**On Formal Exceptions**, however, the defendant, says Chitty, only obtains delay, "for the judgment is that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him." 1 Chitty's *Crim. Law* 443.

**Under Statute.** — In *Arkansas* a statute (Gantt's Dig., § 1841) providing that "if the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant discharged from any further prosecution for the offense," was construed not to apply to matters of abatement, and if an indictment is held bad on demurrer on such grounds it will not bar another prosecution. *State v. Gill*, 33 Ark. 131. See also, under a similar statute from which the *Arkansas* statute was copied, *Com. v. Anthony*, 2 Metc. (Ky.) 399, where it was held that a judgment sustaining a demurrer upon the ground of misjoinder of offenses was no bar to a future prosecution.

**Matter in Abatement — As to One Defendant.** — If the indictment is quashed for matter in abatement it will only be quashed as to the defendants pleading the matter, and will not affect those properly indicted. 1 Chitty's *Crim. Law* 450, cited in *State v. Webster*, 30 Ark. 171, wherein the same rule was applied to a demurrer.

3. **Necessity of Order.** — The direction for resubmission must be made or the defendant will be entitled to be discharged. *People v. Clements*, (Washington County Oyer & T. Ct.) 5 N. Y. *Crim. Rep.* 297; *People v. Jordan*, 63 Cal. 219.

The direction for resubmission must be a matter of record and must be made at the same time when the demurrer is allowed, and should regularly be made in the order or judgment allowing the demurrer. The absence of such order allowing the demurrer is a complete bar to another prosecution for the same offense. *State v. Comfert*, 22 Minn. 271.

**Necessity for Opinion of Court.** — The court may order a new indictment or information without expressing any opinion as to whether the objections will be obviated thereby, though the statute gives the power when the court is of such opinion. *People v. O'Leary*, 77 Cal. 30.

**Dismissal by County Attorney.** — The dismissal of an indictment at the instance of the county attorney, after demurrer has been interposed thereto, is not equivalent to a sustaining of the demurrer, by the court so as to require an order of court directing a resubmission to the same or another grand jury. *State v. Peterson*, 61 Minn. 73.

**To What Grand Jury Resubmission Made.** — An act permitting a court to resubmit to the same or the next succeeding grand jury, upon allowing a demurrer, means the first jury after such action in sustaining the demurrer. *People v. Hill*, 3 Utah 334.

**Resubmission to One Jury — Action by Another.** — Where the court directs resubmission to one grand jury, it has been held that another cannot act by virtue of such order, *People v. Clements*, (Washington County Oyer & T. Ct.) 5 N. Y. *Crim. Rep.* 288; but in *Nevada*, under an act providing that a resubmission may be made to the same or another grand jury, it was held that the fact that several successive grand juries failed to indict did not operate as a bar to the indictment finally presented. *Ex p. Job*, 17 Nev. 184.

only for the same offense.<sup>1</sup>

**5. Motion to Set Aside.** — When certain grounds are specified by statute to justify a motion to set aside, those are usually held to be the only objections which may be so raised,<sup>2</sup> although courts have in some cases, in furtherance of justice, entertained other grounds,<sup>3</sup> and such motion is said to be the exclusive method of raising the particular objections designated for it in the statutes.<sup>4</sup>

**Error in Refusing to Resubmit.** — Under the statute in *Kentucky*, where a demurrer to an indictment is sustained the attorney for the commonwealth is entitled to have the case, by an order of the court, submitted to another grand jury, unless the demurrer is sustained because it appears that the offense was not committed within the jurisdiction of the court, or the indictment improperly charges more than one offense, or because it contains matter which is a legal defense or bar to the indictment; and if the court refuses the motion of the prosecuting attorney to resubmit the case to the grand jury upon a demurrer being sustained for other causes than those above specified, such action is error for which the judgment will be reversed. *Com. v. Shelby*, (Ky. 1897) 38 S. W. Rep. 490.

1. *People v. Richards*, 44 Hun (N. Y.) 288.

2. *State v. Smith*, 74 Iowa 584; *State v. Gut*, 13 Minn. 341; *People v. Petrea*, 92 N. Y. 145; *People v. Clements*, (Washington County Oyer & T. Ct.) 5 N. Y. Crim. Rep. 288; *State v. Justus*, 11 Oregon 180; *State v. Whitney*, 7 Oregon 386; *State v. Security Bank*, 2 S. Dak. 538.

**Nature of Motion.** — The motion to set aside is said to be in the nature of a plea in abatement. *Com. v. Smith*, 10 Bush (Ky.) 480; *Moore v. Com.*, (Ky., 1896) 35 S. W. Rep. 283, wherein the motion was not allowed to quash an objection for duplicity. But it is also sometimes considered as a motion to quash. *State v. McCaffery*, 16 Mont. 33.

**When Made — Appearance.** — Under the provisions of the *New York* Code of Criminal Procedure, it was held that after an indictment is found the defendant must be before the court — if in the case of a felony, in person, or, in the case of a misdemeanor, either in person or by counsel — and the motion to set aside must be made to the time of his arraignment or at such time as the court may appoint to hear it, and it is not a sufficient appearance that an at-

torney presents himself only for the purpose of making the motion. *People v. Equitable Gas Light Co.*, (New York County Gen. Sess.) 6 N. Y. Crim. Rep. 189.

**Finality of Order on Motion to Dismiss.** — It has been held that an order sustaining a motion to set aside an indictment is a final judgment and appealable. *People v. Stacey*, 34 Cal. 307.

But in *Kentucky* the decision of the trial court upon a motion to set aside is by statute final, and not subject to exception or appeal. *Com. v. Simons*, (Ky. 1896) 37 S. W. Rep. 949.

**3. In New York** it has been held that the court has an inherent right, in furtherance of justice, to set aside an indictment when there was no evidence before the grand jury to support it, notwithstanding this is not one of the grounds specified in the Code of Criminal Procedure. *People v. Vaughan*, (Kings County Ct.) 19 Misc. Rep. 298; *People v. Brickner*, (Monroe County Oyer & T. Ct.) 8 N. Y. Crim. Rep. 217; *People v. Clark*, (New York County Oyer & T. Ct.) 8 N. Y. Crim. Rep. 169, 179; *People v. Edwards*, (Oneida County Oyer & T. Ct.) 25 N. Y. Supp. 480.

**In Minnesota** it was said that the motion to set aside seemed to be intended to take the place of the plea in abatement, and that an objection which could formerly have been taken by the latter method could now be taken on motion to set aside, though not specified as one of the grounds in the statute. *State v. Brecht*, 41 Minn. 52; *State v. Froiseth*, 16 Minn. 296, wherein a motion was entertained because the defendant was required to testify before the grand jury, although this was not a statutory ground for such motion.

4. *People v. Stacey*, 34 Cal. 308; *State v. Kimball*, 29 Iowa 267; *Com. v. Smith*, 10 Bush (Ky.) 480; *State v. Smith*, 12 Mont. 378; *State v. McCaffery*, 16 Mont. 33.

**Right to Withdraw Plea.** — In *State v. Hale*, 44 Iowa 96, it was held that the

**6. Objection to Complaints.**—Objections to a complaint before a justice of the peace must be specifically assigned <sup>1</sup> at the proper time,<sup>2</sup> and if the defendant goes to trial without raising them he cannot thereafter complain,<sup>3</sup> unless the complaint states no offense against the laws of the state.<sup>4</sup>

defendant has a right to withdraw a plea of not guilty for the purpose of filing a motion to set aside an indictment.

1. *People v. Heffron*, 53 Mich. 530; *Com. v. Certain Intoxicating Liquors*, 105 Mass. 177.

2. **On Habeas Corpus** objections cannot, as a general rule, be taken to the sufficiency of a complaint. *Ex p. McNulty*, 77 Cal. 164; *In re Lewis*, 31 Kan. 71.

3. *Smith v. State*, 19 Com. 493; *State v. Holmes*, 28 Conn. 231; *State v. Miller*, 24 Conn. 530; *Kilbourn v. State*, 9 Conn. 560; *Kingman v. Berry*, 40 Kan. 625; *State v. Allison*, 44 Kan. 423; *State v. Knowles*, 34 Kan. 393; *Com. v. Wolcott*, 110 Mass. 69; *State v. Norton*, 45 Vt. 259.

**On Appeal from Justice of the Peace.**—Formal objections to a complaint must  
10 Encyc. Pl. & Pr. — 37

be raised in the court in which it is filed and in which the trial is had, and cannot be raised for the first time on appeal from such court to a court entertaining appellate jurisdiction in such cases. *Com. v. Doherty*, 116 Mass. 14; *Com. v. Brigham*, 108 Mass. 457; *Com. v. Blanchard*, 105 Mass. 173; *Com. v. Desmond*, 103 Mass. 446; *Com. v. Emmons*, 98 Mass. 7; *Com. v. Norton*, 13 Allen (Mass.) 550; *Com. v. Keefe*, 143 Mass. 468; *Com. v. Flannigan*, 137 Mass. 561; *Com. v. Cameron*, 141 Mass. 83; *People v. Telford*, 56 Mich. 542.

**Withdrawal of Plea — Discretion.**—The court may refuse to permit the withdrawal of a plea of not guilty for the purpose of entertaining a special plea. *Com. v. Blake*, 12 Allen (Mass.) 188.

4. *People v. Heffron*, 53 Mich. 530.

Volume X.

## INDORSING PAPERS.

### CROSS-REFERENCES.

As to *Indorsement by Clerk on Filing Paper*, see article *FILING*, vol. 8, p. 927.

*Amending Indorsement on Writ*, see article *AMENDMENTS*, vol. 1, p. 662.

*Indorsing Summons in Divorce Cases*, see article *DIVORCE*, vol. 7, p. 105.

*Indorsement of Particular Papers*, see the special titles in this work, as *BILLS OF EXCEPTIONS*, vol. 3, p. 374; *DEPOSITIONS*, vol. 6, p. 471; *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 303; *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8, p. 584; *INDICTMENTS*, *ante*, p. 344; *INJUNCTIONS*; *RETURNS*; *SERVICE OF PROCESS*; *SUMMONS*, *etc.*

**General Requirement.** — In order to facilitate the business of the court and for the convenience of all concerned, all papers served or filed during the progress of a cause should be appropriately indorsed with the name of the case, where pending, the character of the paper, and the name of the attorney filing the same, and this is sometimes prescribed by statutory enactment, but more often it seems by rule of court.<sup>1</sup>

Thus in New York there is a provision that the papers served or filed in a case must be properly indorsed or subscribed with the name of the attorney or attorneys, or the name of the party if

1. See the statutes and rules of the various states pertaining to this subject.

In South Carolina it is provided that in all issues to be tried by the court or a jury the plaintiff shall, at least fourteen days before court, file in the clerk's office the summons and complaint in the cause, indorsing thereon the nature of the issue and the number of the docket upon which the same shall be placed; and if the plaintiff fails so to do, the defendant, seven days before court, may file copies of said papers with a like indorsement, and the clerk shall thereupon place said cause upon its appropriate docket, and

it shall stand for trial without any further notice of trial or notice of issue. S. Car. Code Civ. Proc., § 276. Under this provision an indorsement on the summons and complaint, "Issues of fact for a jury. Docket No. 1," was deemed sufficient. *Threatt v. Brewer Min. Co.*, 42 S. Car. 92. And in an action to foreclose a mortgage an indorsement on the complaint, "Complaint for foreclosure of real property, Cal. 2," was held sufficient. The indorsement of the words "Cal. 2," by the clerk, at the request and in the presence of the attorney for the plaintiff, is the same as if done by the plaintiff. *Camden Bank v. Thompson*, 46 S. Car. 499.

he appears in person, and his or their office address or place of business.<sup>1</sup> But the omission of these is not a jurisdictional

1. See article ADDRESS, vol. I, p. 236.

Under this rule there have been several decisions holding that a notice and entry of judgment which is not indorsed or subscribed, both with the name of the attorney and his office address or place of business, is irregular and ineffectual to limit the time of appeal. *Yorks v. Peck*, 17 How. Pr. (N. Y. Supreme Ct.) 192; *Langdon v. Evans*, 29 Hun (N. Y.) 652; *Kelly v. Sheehan*, 76 N. Y. 325; *Kilmer v. Hathorn*, 78 N. Y. 228; *Fortsmann v. Shulting*, 107 N. Y. 644. And see article JUDGMENTS.

But in *Evans v. Backer*, 101 N. Y. 289, it was held that the omission to indorse upon the papers served or filed the post-office address or place of business of the attorney serving them, as required by this rule, is a mere irregularity, which does not necessarily vitiate either the paper or its service, and though this omission may entitle the party served either to return the paper or move to set it aside, yet he cannot, after receiving it without objection, safely disregard the office which the paper is designed to fill. The court proceeded to distinguish some of the above cases in the following language: "In *Kelly v. Sheehan*, 76 N. Y. 325, this court held that an omission to make such indorsement upon a notice of the entry of judgment which was intended to limit the right of appeal rendered it ineffectual for that purpose. It was there held that a notice upon which it was intended to build a claim for a penalty or forfeiture must be regular in every respect, and that in such case the party should be held to strict practice. The reason of this decision is quite obvious, and does not require the extension of its principle to cases not within its spirit. In *Kilmer v. Hathorn*, 78 N. Y. 228, the objection was described as a technicality, and its use in that case was justified upon the ground that it defeated a point equally technical raised by the adverse party. The case of *Rae v. Beach*, 76 N. Y. 164, is not an authority on the point. The notice in that case did not give the information which is expressly required by statute as the condition of the maintenance of the action, viz., the entry of the order or judgment."

So it was said in another case: "The omission to give the office address or place of business of the plaintiff, who appeared in person, as required by Standing Rule No. 2, was a mere irregularity occurring after the order was properly granted; and it was error to dismiss the proceedings for that reason. It was not necessary to make the indorsement upon the papers intended to be filed or served prior to their presentation to the judge. That formal and clerical act could have been done at any time prior to the service. If the service of the order was not good and sufficient because the same was not properly indorsed, the plaintiff could have made another service of a copy of the original order, supplying the omission, before the return day named in the order, and thus keep the proceedings on foot. The rule was enacted for the convenience of the opposing party and his attorney; and a noncompliance therewith is a mere irregularity and does not necessarily vitiate the service of the order." *Dorsey v. Cummings*, 48 Hun (N. Y.) 76.

A notice of entry of a judgment or order may be indorsed upon the copy of said judgment or order served therewith, and where the papers so served, taken as a whole, contain an indorsement showing the name and address of the attorney of the prevailing party as prescribed by the rule, it is sufficient. *Harnett v. Westcott*, 56 N. Y. Super. Ct. 129, affirmed in 30 N. Y. St. Rep. 1014.

And where upon a copy of a judgment served was indorsed the name of the attorney with his post-office and business address, and below was indorsed a notice of judgment signed by the attorney without giving any address, it was held that this was a sufficient compliance with the rule of practice requiring papers served to be indorsed or subscribed by the attorney with his address, etc. *People v. Keator*, 101 N. Y. 610; *Falker v. New York, etc., R. Co.*, 100 N. Y. 86.

Where a paper bore on its back an indorsement of the title of the cause and a statement that it was a copy, "certified order affirming order of reference," to which was subscribed the name of the attorney for respondent with the number of his office, and

defect and may be cured by amendment.

was addressed to and served on the attorney for appellant, and upon the face of the paper appeared the certificate of the clerk of common pleas that the paper was an extract from the minutes of the court, and that it was a copy of an order made at the general term of the court; it was held that this statement showed that the order had been entered, and entered in the office of the clerk of common pleas, and was such a written notice of judgment as would limit the time to appeal. Dev-

lin *v.* New York, 62 How. Pr. (N. Y. C. Pl.) 166.

Upon an order denying a motion to compel the defendant's attorneys to receive a notice of appeal were indorsed the words, "Copy order striking out amended complaint and dismissing cause." It was held that this amounted to written notice that the order had been entered by the clerk; no particular form of words or notice being prescribed. Baker *v.* Hatfield, 29 Hun (N. Y.) 670.



## INDUCEMENT.

As to *Stating Matters of Inducement*, see articles *COMPLAINTS AND PETITIONS IN CODE PLEADING*, vol. 4, p. 606; *COVENANT*, vol. 5, p. 363; *DEPARTURE*, vol. 6, p. 467; *DUPLICITY*, vol. 7, p. 241; *FALSE REPRESENTATIONS AND DECEIT*, vol. 8, p. 906; *INDICTMENTS*, ante, p. 344; *LIBEL AND SLANDER*; and the various particular articles in this work.

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*Infants in Foreclosure Suits*, see article *FORECLOSURE OF MORTGAGES*, vol. 9, p. 84.  
And see generally articles *ABDUCTION*, vol. 1, p. 50; *BASTARDY*, vol. 3, p. 266; *KIDNAPPING; PARENT AND CHILD*.

**I. ACTIONS AND SUITS GENERALLY — 1. Chancery Jurisdiction Over Infants.** — From the earliest period chancery courts have been invested with a broad and comprehensive jurisdiction over the person and property of infants,<sup>1</sup> and this jurisdiction cannot now be questioned.<sup>2</sup> Indeed, it is one of the peculiar duties of courts of equity to protect the rights of infants,<sup>3</sup> and equity has plenary jurisdiction for that purpose.<sup>4</sup>

1. *Ames v. Ames*, 148 Ill. 338; *Cowls v. Cowls*, 8 Ill. 435; *Grattan v. Grattan*, 18 Ill. 167; *King v. King*, 15 Ill. 187; 2 Story's Equity Jurisprudence, c. 85.

2. *Cowls v. Cowls*, 8 Ill. 437.

In *Shumard v. Phillips*, 53 Ark. 37, the question was raised, but not decided, whether chancery jurisdiction over the persons and estates of minors was repealed by the Constitution of 1874.

3. *Lee v. Lee*, 55 Ala. 595; *Hartmann v. Hartmann*, 59 Ill. 103; *White v. Glover*, 59 Ill. 459; *Loyd v. Malone*, 23 Ill. 43; *Allman v. Taylor*, 101 Ill. 185; *Ames v. Ames*, 148 Ill. 333; *Grattan v. Grattan*, 18 Ill. 167; *Cowls v. Cowls*, 8

Ill. 435; *Smith v. Sackett*, 10 Ill. 535; *Lynch v. Rotan*, 39 Ill. 14; *Johnson v. Noble*, 24 Mo. 252; *Davidson v. Bowden*, 5 Sneed (Tenn.) 129. See also *infra*, I. 2. *Infants as Wards of Court*.

**Probate and Equity Jurisdiction.** — Equity jurisdiction over infants is not taken away by the like power conferred by statute on the Probate Court. *State v. Grisby*, 38 Ark. 406; *Bowles v. Dixon*, 32 Ark. 96.

4. See cases cited in preceding note.

In the exercise of such jurisdiction equity may cause to be done whatever may be necessary to preserve the estates of minors. *Cowls v. Cowls*, 8 Ill. 435, followed in *Lynch v. Rotan*, 39 Ill. 14.



The Mere Fact of Infancy is sufficient to sustain the jurisdiction of the court, although no other ground of chancery jurisdiction exists.<sup>1</sup>

**2. Infants as Wards of Court.** — Whenever a suit is instituted in the court of chancery relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection.<sup>2</sup>

The Court Protects the Infant Fully and will not allow his rights to be prejudiced by any act either of his own or of any other person.<sup>3</sup>

**1. Jurisdiction of Money Demand.** — *Armstrong v. Miller*, 6 Ohio 118, holding that chancery may maintain a bill against a guardian brought by the heirs of his ward, although the demand be merely for money.

**Guardian's Settlement.** — *Clements v. Ramsey*, (Ky. 1887) 4 S. W. Rep. 311, holding that an action by an infant against his guardian and sureties for failure of the guardian to make settlement and pay over money due the infant is properly brought in equity, as the chancellor is charged *ex officio* with the care of infants.

**Retaining Bill as to Infant and Dismissal as to Coplaintiffs.** — In *Grimes v. Wilson*, 4 Blackf. (Ind.) 331, it appeared that two persons, one of whom was an infant, had separate claims not in privity, that of the adult being for a cause of action not cognizable in equity, while that of the infant was there cognizable. It was held that the bill was objectionable, but that in consideration of the infancy of one of the plaintiffs it should not have been dismissed as to him, but the cause should have been ordered to stand over, that the name of the adult plaintiff might be stricken from the bill and that the infant might proceed alone.

**Always a Remedy in Equity.** — The rights of infants are always guarded in equity, and whenever they are invaded or endangered a remedy is applied. *White v. Glover*, 59 Ill. 459.

**2. Alabama.** — *Proctor v. Scharpf*, 80 Ala. 228.

**Arkansas.** — *Kempner v. Dooley*, 60 Ark. 526; *Branch v. Mitchell*, 24 Ark. 431.

**Georgia.** — *Sharp v. Findley*, 71 Ga. 654.

**Illinois.** — *Lloyd v. Kirkwood*, 112 Ill. 329; *Johnston v. Johnston*, 138 Ill. 385; *Miner v. Miner*, 11 Ill. 43; *Hartmann v. Hartmann*, 59 Ill. 103; *Cowls v.*

*Cowls*, 8 Ill. 435; *Grattan v. Grattan*, 18 Ill. 167; *King v. King*, 15 Ill. 187; *Ames v. Ames*, 148 Ill. 338.

**Missouri.** — *Revely v. Skinner*, 33 Mo. 100.

**New York.** — *Rogers v. McLean*, 34 N. Y. 539.

**South Carolina.** — *Bulow v. Witte*, 3 S. Car. 322.

As it has been very happily expressed, "when the court assumes authority over the person or property of an infant, it acts throughout with all the anxious cares and vigilance of a parent." *Revely v. Skinner*, 33 Mo. 100.

**When Infant Becomes Ward of Court.** — In *Greenman v. Harvey*, 53 Ill. 386, it was held that a minor does not become a ward of court until the service of process, but in *Butler v. Freeman*, Ambl. 301, it was said that merely filing a bill is sufficient to make an infant a ward of the court.

**3. Proctor v. Scharpf**, 80 Ala. 228; *Pace v. Pace*, 19 Fla. 438; *Smith v. Sackett*, 10 Ill. 534.

**Placing Infant on Other Side of Case.** — The court can order the infant placed on the other side of the case if it is shown that he is on the wrong side. *Le Fort v. Delafield*, 3 Edw. Ch. (N. Y.) 32; *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148. See also *infra*, I. 9. *Making Infants Defendants Instead of Plaintiffs, Because More Advantageous.*

**Reference to Ascertain Whether Suit Is Beneficial.** — "Numerous instances are to be found where the court has interfered and instituted an inquiry by a reference in order to ascertain whether a suit is for the benefit of an infant." *Bowen v. Idley*, 1 Edw. Ch. (N. Y.) 148.

**Infant Not Compelled to Testify.** — An infant cannot be compelled in equity to testify in a case in which he is a party, and the court may suppress his deposition freely given, if unfavorable

Numerous illustrations of the applications of this rule will appear in succeeding sections of this article.<sup>1</sup>

**In All Cases the Court Is in Effect the Guardian,** the person named as guardian *ad litem*, or other person legally representing the infant, being but an agent to whom the court, in appointing him, has delegated the execution of the trust, and through such agent the court performs its duty of protecting the rights of the infant.<sup>2</sup>

**3. Amicus Curiae.** — The court will permit any relative or friend to intervene as an *amicus curiae* for his protection.<sup>3</sup>

**4. Election for Infant.** — Where an infant is put to his election by a bequest, the court will order a reference to the master to inquire as to the relative value of the two estates, and will direct the election to be made of that which appears the more advantageous to the infant.<sup>4</sup>

**5. Laches Not Imputable to Infants.** — In accordance with the rule before stated that an infant cannot be prejudiced by any act of his own or of any other person, his rights cannot be affected by laches.<sup>5</sup>

to his cause. *Moore v. Moore*, 4 Sandf. Ch. (N. Y.) 37; *Serle v. St. Eloy*, 2 P. Wms. 386. But see *Bennett v. Welch*, 15 Ind. 332.

**Dismissing Bill Where Remedy at Law Is More Beneficial.** — In an action to set aside a deed of trust, void because of usury, the court said: "Since some of the complainants are infants, and were therefore incapable of submitting, by their bill, to do equity, the court below should not have sustained the demurrer to the bill, but if necessary should have directed an amendment. But on the facts disclosed by the face of the bill, the court should have refused to permit the suit to be brought for the infants in chancery. If, by reason of the invalidity of the deed of trust and note given by Salter to Taylor & Co., the infants have in law the right to recover the lands, this legal advantage should not be lost by a resort to a court of equity, in which relief can only be secured by submitting to pay the amount of the principal sum received by Salter, with interest thereon." *Salter v. Embrey*, (Miss. 1895) 18 So. Rep. 373.

**Refusing Partition When Not Beneficial.** — Infants have no absolute right to a partition of lands owned jointly by themselves and others, and where a partition would not be for their benefit it will be refused. *Ames v. Ames*, 148 Ill. 338; *Hartmann v. Hartmann*, 59 Ill. 103. See also *infra*,

1. See *infra*, I. 3. *Amicus Curiae*; I. 5.

*Laches Not Imputable to Infants*; I. 6. *Admissions or Consent of Infants*; I. 9. *Making Infants Defendants Instead of Plaintiffs, Because More Advantageous*.

2. *Cole v. Superior Ct.*, 63 Cal. 86; *Ames v. Ames*, 151 Ill. 280; *Rogers v. McLean*, 34 N. Y. 539.

**Duty of Court.** — The court is bound to look officially to the interests of infants, whether protected by their guardians or not. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69; *Burt v. McBain*, 29 Mich. 261.

As to the control and duty of court as to guardians *ad litem*, see *infra*, III. 3. *h. Guardians ad Litem*.

3. *Green's Estate*, 3 Brews. (Pa.) 427.

4. *McQueen v. McQueen*, 2 Jones Eq. (N. Car.) 16, where the court directed a reference to ascertain whether it would be for the benefit of the infant to accept a legacy charged with the payment of a sum of money.

5. *Tucker v. Bean*, 65 Me. 352; *Smith v. Sackett*, 10 Ill. 534; *Morgan v. Herrick*, 21 Ill. 481; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Dow v. Jewell*, 21 N. H. 470; *Chandler v. McKinney*, 6 Mich. 217; *Smell v. Dee*, 2 Salk. 415. And see in general Am. and Eng. Encyc. of Law, tit. *Laches*.

**Delay of Twenty-five Years Excused by Infancy.** — "The circumstance that first attracts attention is that the bill is filed to set up and enforce a parol agreement for the conveyance of lands nearly a quarter of a century after it is said to have been made. In most

**6. Admissions or Consent of Infants.** — On the same principle no decree can be taken against an infant on his own admissions or consent.<sup>1</sup>

**7 Submission of Agreed Controversy Under Statute.** — A general guardian has no power to submit a cause of action either on behalf of, or against an infant so as to give the court jurisdiction to adjudicate upon the rights of the infant.<sup>2</sup>

**8. Attainment of Majority Pending Suit.** — Where, during the pendency of an action, an infant party comes of age, the action does not abate,<sup>3</sup> but the next friend or guardian *ad litem* merely steps out of the case, and the infant, if plaintiff, may be admitted to prosecute in his own name,<sup>4</sup> and if a defendant,

cases this would be a conclusive objection to the relief prayed. But the delay is excused in this case by the fact that complainant only reached her majority the year before the bill was filed, and may never have become fully aware of her rights before that time. Laches is not to be imputed to a minor or other person incompetent to act on his own behalf." *Dragoo v. Dragoo*, 50 Mich. 575.

**Notice of Facts Alleged in Cross-bill.** — As bearing upon the question of laches, an infant is not charged with notice of facts alleged in or of a written instrument referred to in a cross-bill to which he is not made a party, and which is afterwards dismissed without prejudice and without any litigation on its merits, although he was a party to the suit in which the cross-bill was filed. *Wilson v. Holt*, 83 Ala. 528. Compare *Pillow v. Sentelle*, 49 Ark. 430.

1. *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Smith v. Smith*, 13 Mich. 258; *Daingerfield v. Smith*, 83 Va. 81. See also *infra*, III. 3. j. (3) *Admissions and Waivers*.

2. *Coughlin v. Fay*, 68 Hun (N. Y.) 521. In this case the court said: "We are aware of no way in which the court can acquire jurisdiction of infants except by action brought on behalf of the infant by a guardian *ad litem*, or by the service of a summons as prescribed by the code upon the infant."

In *Fisher v. Stilson*, 9 Abb. Pr. (N. Y. Supreme Ct.) 33, the court said: "Infants cannot make a valid agreement to submit the question of difference without action. They must appear in the controversy by guardians appointed for that purpose. (Code, § 115.) And there is no statute that

authorizes the appointment of a guardian for an infant to appear for him in a controversy without action. Section 115 of the code clearly shows that there must be an action to give the court or a judge jurisdiction to appoint a guardian for an infant in a legal or equitable controversy. It therefore follows that the court cannot determine this case, nor cause the infants to be brought in. And no judgment can be rendered in the case. The parties must settle the controversy between them and the infants mentioned in the case, by action."

3. *Reed v. Lane*, (Iowa 1895) 65 N. W. Rep. 380.

**Infant Not Dismissed from Cause on Reaching Majority.** — When an infant comes of age after the commencement of suit and after the appearance of a guardian *ad litem* for him, the fact that he has attained his majority will not dismiss him from the cause, nor relieve him from the duties or responsibilities of the suit. *Deering v. Hurt*, (Tex. 1886) 2 S. W. Rep. 42.

4. *Patton v. Furthmier*, 16 Kan. 29. When the infant arrives at majority during the pendency of the suit, he may enter the fact upon the record and thenceforward conduct the suit alone, *Holmes v. Adkins*, 2 Ind. 398; *Shuttlesworth v. Hughey*, 6 Rich. L. (S. Car.) 329; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167; or at most on amendment by striking out the name of the next friend, *Lasseter v. Simpson*, 78 Ga. 61; or where the infant has sued in his own name without objection he may proceed without amendment. *Woodman v. Rowe*, 59 N. H. 453.

**Action by Tutrix — Joinder of Infants on Coming of Age.** — Where an action is brought under the "Abandoned or Captured Property Act," 12 U. S. Stat.

he is entitled from that time on to conduct his defense in person,<sup>1</sup> and if necessary to protect his rights he may plead anew.<sup>2</sup> If he undertakes the management of the suit he is bound by a judgment thereafter entered,<sup>3</sup> even if he had theretofore appeared as plaintiff without a next friend,<sup>4</sup> or

at L., p. 820, for minor children by their tutrix, appointed under the laws of Louisiana, and some of them become of age before the hearing, they will be joined as parties claimant in their own right and the petition will be amended accordingly. *Stanton's Case*, 4 Ct. of Cj. 456.

**Admitting Former Infant to Prosecute Not a Making of New Parties.** — In *Clements v. Ramsey*, (Ky. 1887) 4 S. W. Rep. 311, the court said: "While this action was pending, and when ready for trial, the fact was suggested and shown of record that the infant plaintiff had arrived at age, and he was therefore permitted to prosecute the action in his own name. It is objected that such a proceeding is making a party plaintiff to an action without an amended pleading, and no time given the defendants to respond. There was in fact no party plaintiff made to the action. Forest Ramsey had been the plaintiff from its inception. He had instituted the action in his name by a next friend, who stood responsible for the costs; but when he arrived at age the next friend was no longer a necessary party, and the action abated in fact as to him, and proceeded to judgment in the name of the real plaintiff, and with whom the litigation had been from the bringing of the action up to the rendering of the judgment."

1. *Mitchell v. Berry*, 1 Metc. (Ky.) 602; *Marshall v. Wing*, 50 Me. 62; *Stupp v. Holmes*, 48 Mo. 89; *Bursen v. Goodspeed*, 60 Ill. 277; *Patton v. Furthmier*, 16 Kan. 29. See *Sims v. New York Dentistry College*, 35 Hun (N. Y.) 344.

**Judgment Without Entry of Appearance as Adult.** — An infant was, by his general guardian, made a party defendant to an action of ejectment, upon the verdict in which the lower court rendered judgment in his favor, and the Supreme Court against him after he came of age, but without any entry showing appearance by him as an adult, and he filed a bill for the recovery of the land within three years after he came of age. It was held that the judgment

in ejectment was no bar to the new suit. *Boro v. Harris*, 13 Lea (Tenn.) 36.

**2. Filing New Answer.** — Upon an infant defendant's coming of age he may disregard the answer set for him by his guardian *ad litem* and file an entirely new answer for himself. *Thompson v. Maxwell Land Grant, etc., Co.*, 3 N. Mex. 269. And he is entitled as a matter of right to an order for leave to do so upon showing to the satisfaction of the court that such new answer is necessary to protect his rights, and so amend his answer. *Winston v. Campbell*, 4 Hen. & M. (Va.) 477. And see *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536; *Coffin v. Heath*, 6 Met. (Mass.) 76.

**The Plaintiff Can Then Amend his bill and waive an answer under oath.** *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353.

**3. Effect on Guardian Ad Litem's Liability for Costs.** — In *Sparmann v. Keim*, 6 Abb. N. Cas. (N. Y. Super. Ct.) 353, it was held that where an infant plaintiff assumes management of his cause, and is defeated, and judgment is entered for costs, the guardian *ad litem* is not liable to pay such judgment. See also *Wice v. Commercial F. Ins. Co.*, 2 Abb. N. Cas. (N. Y. C. Pl.) 325; *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434.

**4. Hicks v. Beam, 112 N. Car. 642; *Smart v. Haring*, 14 Hun (N. Y.) 276.**

**Appeal on Other Grounds Cures Error in Appearance by Attorney.** — In *Childs v. Lanterman*, 103 Cal. 388, it was held that a judgment against an infant in an action in which he has appeared by attorney will be considered as affirmed if after he comes of age he takes any action in reference thereto which is consistent only with assuming its validity; and if he thereafter moves the court for a new trial, and failing therein, appeals to the Supreme Court from the order and judgment, he cannot, after the affirmation of the judgment, maintain a motion to set aside the findings and judgment, and to strike out the answer filed in his behalf, on the ground of his infancy at

defended without a guardian *ad litem*.<sup>1</sup>

**9. Making Infants Defendants Instead of Plaintiffs, Because More Advantageous.** — In all cases in equity where it is sought to affect the interests of infants, and more especially their interests in real estate, by an attempt to charge it, or to make partition, or to sell it, whether the application be by a stranger or by adult co-tenants or others claiming the right to do so, the infant must be made a party defendant.<sup>2</sup> But it has been said that a proceeding which divests the minor of an estate in land is not necessarily against

the time the answer was filed and the trial had, and for the want of authority in the attorney to appear in his behalf.

1. The judgment is not erroneous for failure to appoint a guardian *ad litem* if pending the suit the infant becomes of age and afterwards pleads. *Marshall v. Wing*, 50 Me. 62; *Hauberger v. Root*, 5 Pa. St. 109; *Childs v. Lanterman*, 103 Cal. 387.

2. *Davidson v. Bowden*, 5 Sneed (Tenn.) 129; *Winchester v. Winchester*, 1 Head (Tenn.) 460; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

**Reason of Rule.** — "It often happens that where infants are joint owners, with adult parties, of real property, the interests of the latter are in direct opposition to the true interests of the former, and that what might be beneficial to the one would not be so to the other. The attitude of defendants in a suit in equity is in various respects more advantageous and safe for infants than that of plaintiffs. Any one as next friend may volunteer his services to sue for them as plaintiffs; and sometimes it has happened that the persons assuming this relation have been prompted to do so by very unworthy motives. But, as defendants, it is the solemn duty of the court to select a suitable person as guardian *ad litem* to defend the rights of infants; whose duty it is to make a proper defense, and who is responsible, it seems, for the propriety and conduct of such defense. *Knickerbacker v. DeFreest*, 2 Paige (N. Y.) 304, 1 Dan. Ch. Pr. 204. An infant defendant is not bound by the decree against him in the same manner as an infant plaintiff in general is. 1 Dan. Ch. Pr. 92, and note. Neither is an infant defendant bound by the answer or admission of the guardian *ad litem*. *Ib.* 214, 217. And the facts necessary to entitle the plaintiff to relief must be proved against the infant by evidence derived from other sources than the

answer or admission made by the person conducting the suit for him. *Ib.* 218; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367. In regard to the effect of these objections, and the latter mainly — the joining the infants as plaintiffs instead of making them defendants — we think it constitutes error, for which the decree might be reversed, on appeal, or writ of error; perhaps it would be regarded as error apparent on the face of the decree, for which a bill of review would lie. But we are not prepared to say that it ought to be permitted to invalidate the title of a *bona fide* purchaser, other objections aside." *Davidson v. Bowden*, 5 Sneed (Tenn.) 134.

"An infant defendant has in general a day given him after attaining twenty-one, to show cause, if he can, against the decree, and is in some other respects privileged beyond an adult; but according to the general practice an infant complainant has no such privilege, and is as much bound as one of full age. Therefore, in all cases in equity in which it is sought to charge the real estate of the infant, he ought to be made a defendant, and not a complainant, although he may be interested in the charge when raised." *Simpson v. Alexander*, 6 Coldw. (Tenn.) 629, citing *Daniel's Chancery Practice*, vol. 1, p. 92.

**Partition on Application of Infant under Statute.** — In *Simpson v. Alexander*, 6 Coldw. (Tenn.) 625, it was said, *arguendo*, that where the proceeding was under Code, § 3262, providing for partition of lands held in common, the suit might be prosecuted by infants as plaintiffs, for the reason that the statute did not provide that such suits should "be conducted as other suits in equity," but the general rule was enforced because the bill in that case was more than a mere bill for partition. *McClain and Andrews, JJ.*, did not concur as to this construction of the statute.

his interest so that he must in every possible contingency be made a defendant.<sup>1</sup>

**10. Conduct of Suits — Disability of Infants — a. IN GENERAL.** — An infant is entitled to sue on any cause of action accruing to him, and, conversely, may be sued on any cause of action accruing against him;<sup>2</sup> but he is not considered as having sufficient discretion to conduct the suit in person, and therefore the law provides a competent representative to conduct the suit for him. It is a general rule that actions by infants must be prosecuted in the name of the infant by his guardian, or by a third person who is styled the next friend or *prochein ami*,<sup>3</sup> and an action against an infant must be brought against him in his proper person, but must be defended by a guardian *ad litem*,<sup>4</sup> though this rule is not without exception.<sup>5</sup>

**1. Bill to Enforce Ancestor's Contract.** — *Burger v. Potter*, 32 Ill. 66, holding that infant heirs at law, in an action by the executors of a deceased vendor of land to compel the vendee to pay the unpaid purchase money, may properly be joined as complainants suing by next friend, and it is not necessary that they be made defendants on the ground that the scope of the bill is to divest them of title to land, and is *prima facie* against their interests. Such a view is incorrect. The bill prays the aid of the court to carry out the contract of their ancestor which they could be compelled to perform by proper proceedings and proof. See in general, upon this subject, article HEIRS AND DEVISEES, *ante*, p. 20.

**2. An Action to Compel the Determination of a Claim to Real Property** is not maintainable against an infant under the New York statute. *Weiler v. Nembach*, 114 N. Y. 36.

**3.** See article NEXT FRIEND. See also article APPEARANCES, vol. 2, p. 671.

**Appearance by Guardian or Prochein Ami.** — Infants must appear in suits by guardian or by *prochein ami*. *Nicholson v. Wilborn*, 13 Ga. 467; *Sliver v. Shelback*, 1 Dall. (Pa.) 165; *Stevens v. Cole*, 7 Cush. (Mass.) 467; *Jack v. Davis*, 29 Ga. 219; *Castledine v. Mundy*, 1 N. & M. 635; *Barber v. Graves*, 18 Vt. 290; *McCloskey v. Sweeney*, 66 Cal. 53.

**4.** See *infra*, III. 3. *Guardians Ad Litem*.

A decree is not binding upon a minor whose guardian is a party to the bill individually but not as a guardian for the infant, such infant not being a party. *Salter v. Salter*, 80 Ga. 178.

**Parents Cannot Defend as Such.** — *Serv-*

ice of summons on the mother and stepfather of an infant under fourteen years of age, residing with them in this state, authorizes and requires the appointment of a guardian *ad litem*, but does not authorize the mother and stepfather to appear and answer for such infant. *Irwin v. Irwin*, 57 Ala. 614. As to service of summons on parents, see *infra*, III. 1. *Service of Process*.

**5. Appearance by General Guardian** (See *infra*, III. 3. *Guardians Ad Litem*.) — The statute may prescribe that the infant shall appear by general guardian if he has one, as in *Kentucky*. *McMakin v. Stratton*, 82 Ky. 226. See also *Hughes v. Sellers*, 34 Ind. 337; *Smith v. McDonald*, 42 Cal. 484; *Colt v. Colt*, 19 Blatchf. (U. S.) 402; *Mansur v. Pratt*, 101 Mass. 60; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284; *Morgan v. Morgan*, 45 S. Car. 323; *Bulow v. Witte*, 3 S. Car. 308; *Walker v. Veno*, 6 S. Car. 459; *Rollins v. Brown*, 37 S. Car. 345.

In *California* appearance by general guardian is sufficient to give the court jurisdiction of the persons of infant defendants, and the fact that no guardian *ad litem* was appointed for them is immaterial. *Western Lumber Co. v. Phillips*, 94 Cal. 54; *Richardson v. Loupe*, 80 Cal. 491; *Emeric v. Alvarado*, 64 Cal. 597; *Gronfier v. Puymiro*, 19 Cal. 629, approved in *Smith v. McDonald*, 42 Cal. 484. These last two decisions were cited in *Emeric v. Alvarado*, 64 Cal. 597, and the court said that they had stood so long as correct rulings that the court would hardly undertake to overrule them.

In *Alabama* infants interested in the distribution of a decedent estate may

*b.* REPRESENTATION BY ATTORNEY — Appearance by Attorney. — It follows, as a general rule, that an infant cannot appear<sup>1</sup> and conduct his suit in person or by attorney.<sup>2</sup>

be represented on the final settlement by their general guardian. *Smith v. Smith*, 21 Ala. 761; *Hatcher v. Dillard*, 70 Ala. 343.

In *Michigan* general guardians do not represent their infant wards in foreclosure proceedings for any purpose, and whether they are proper parties at all or not, their solicitors are in no sense authorized to act so as to bind the rights of the infants. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

In *Louisiana* — Representation by Tutor. — A tutor legally appointed cannot represent minors in proceedings to effect a partition at private sale. *James v. Meyer*, 41 La. Ann. 1100.

In a proceeding at the instance of an administrator who is the father but unqualified tutor of a minor, to compel a purchaser to comply with the adjudication to him of succession property, if the minor is a necessary party he is legally represented therein by the under-tutor. *Meyer's Succession*, 42 La. Ann. 634.

*Colorado* — Representation by Next Friend. — An infant over fourteen years served with process may appear by next friend, no guardian *ad litem* being appointed. If a guardian *ad litem* is desired by the infant, he must ask for the appointment of one within ten days after service. *Filmore v. Russell*, 6 Colo. 171.

1. See article APPEARANCES, vol. 2, p. 588.

2. *Alabama*. — *McIntosh v. Atkinson*, 63 Ala. 241.

*Arkansas*. — *Hodges v. Frazier*, 31 Ark. 58; *Bonner v. Little*, 38 Ark. 397.

*California*. — *McCloskey v. Sweeney*, 66 Cal. 53; *Townsend v. Tallant*, 33 Cal. 45.

*Georgia*. — *Nicholson v. Wilbörn*, 13 Ga. 467.

*Illinois*. — *Kesler v. Penninger*, 59 Ill. 134; *Peak v. Shasted*, 21 Ill. 137; *Crocker v. Smith*, 10 Ill. App. 376; *Quigley v. Roberts*, 44 Ill. 503; *Hall v. Davis*, 44 Ill. 494; *Lemon v. Sweeney*, 6 Ill. App. 507.

*Indiana*. — *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Wetherill v. Harris*, 67 Ind. 452; *Timmons v. Timmons*, 6 Ind. 8; *Abdil v. Abdil*, 26 Ind. 287; *Glass v. Doe*, 2 Blackf. (Ind.) 293; *Fetrow v. Wiseman*, 40 Ind. 148.

*Iowa*. — *Cavender v. Smith*, 5 Iowa 192.

*Kentucky*. — *Rowland v. Cock*, 1 J. Marsh. (Ky.) 453; *Chalfant v. Monroe*, 3 Dana (Ky.) 36; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Beeler v. Bullitt*, 4 Bibb (Ky.) 12; *Cook v. Totton*, 6 Dana (Ky.) 108; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562; *Meredith v. Sanders*, 2 Bibb (Ky.) 101; *Shafer v. Gates*, 2 B. Mon. (Ky.) 453.

*Maine*. — *Marshall v. Wing*, 50 Me. 62.  
*Maryland*. — *Wainwright v. Wilkins*, 62 Md. 146.

*Massachusetts*. — *Miles v. Boyden*, 3 Pick. (Mass.) 219; *Winslow v. Anderson*, 4 Mass. 376; *Knapp v. Crosby*, 1 Mass. 479.

*Michigan*. — *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

*Mississippi*. — *Lee v. Jenkins*, 30 Miss. 592.

*Missouri*. — *Gamache v. Prevost*, 71 Mo. 84; *Powell v. Gott*, 13 Mo. 458; *Thornton v. Thornton*, 27 Mo. 302; *Randalls v. Wilson*, 24 Mo. 76 (where a judgment against an infant plaintiff should appear by attorney was held erroneous. Compare *Holton v. Towner*, 81 Mo. 360, where it was held that a judgment will not be reversed because an attorney appeared for the infant where the decision was in the latter's benefit).

*New Jersey*. — *Lang v. Beloff*, 53 N. J. Eq. 298.

*New York*. — *Ex p. Scott*, 1 Cow. (N. Y.) 33; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Comstock v. Carr*, 6 Wend. (N. Y.) 526; *Shepherd v. Hibbard*, 19 Wend. (N. Y.) 96; *Cruikshank v. Gardner*, 2 Hill (N. Y.) 333; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418.

*Pennsylvania*. — *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455.

*South Carolina*. — *Finley v. Robertson*, 17 S. Car. 439.

*Tennessee*. — *Valentine v. Cooley*, Meigs (Tenn.) 613.

*Texas*. — *Taylor v. Rowland*, 26 Tex. 293; *Wright v. McNatt*, 49 Tex. 425; *Taylor v. Whitfield*, 33 Tex. 181.

*Vermont*. — *Barber v. Graves*, 18 Vt. 290; *Starbird v. Moore*, 21 Vt. 529; *Wrisley v. Kenyon*, 28 Vt. 6; *Somers v. Rogers*, 26 Vt. 585; *Fuller v. Smith*, 49 Vt. 253; *Fall River Foundry Co. v. Doty*, 42 Vt. 412.

**Effect of Appearance by Attorney.** — But if the infant in fact does so appear and conduct his suit, the judgment will not be void, but only erroneous and subject to be set aside; <sup>1</sup> and until reversed or

*Virginia.* — *Parker v. McCoy*, 10 Gratt. (Va.) 594; *Roberts v. Stanton*, 2 Munf. (Va.) 129.

*West Virginia.* — *McDonald v. McDonald*, 3 W. Va. 676; *Piercy v. Piercy*, 5 W. Va. 199; *Myers v. Myers*, 6 W. Va. 369.

*England.* — *Oliver v. Woodroffe*, 4 M. & W. 650; *Jarman v. Lucas*, 15 C. B. N. S. 474, 109 E. C. L. 474; *Hindmarsh v. Chandler*, 1 Moo. 250; *Hindnarch v. Chandler*, 7 Taunt. 488, 2 E. C. L. 487; *Shipman v. Stevens*, 2 Wils. 30; *Dwyer v. O'Brien*, 1 Ridgw. P. C. 18, note.

**Power of Infant to Appoint Attorney.** — An infant cannot appoint an attorney. *Lang v. Belloff*, 53 N. J. Eq. 298; *Crocker v. Smith*, 10 Ill. App. 376; *McIntosh v. Atkinson*, 63 Ala. 241.

An infant who is a party to an action cannot nominate an attorney until he has been served with summons. *McCloskey v. Sweeney*, 66 Cal. 53.

**Appearance by Attorney to Set Aside Proceedings.** — An infant defendant cannot appear by attorney for the purpose of setting aside proceedings upon the ground that no guardian had been appointed for him. *Shepherd v. Hibbard*, 19 Wend. (N. Y.) 96.

**Excuse for Delay in Making Objection.** — The fact that defendants did not inform their counsel that plaintiff was an infant because they did not know the infancy to be material is an excuse for delay in moving to set the declaration aside, on the ground that the infant plaintiff had declared by an attorney. *Ex p. Scott*, 1 Cow. (N. Y.) 33.

**Dismissal by Attorney of Suit Brought by Prochein Ami.** — In *Wainwright v. Wilkinson*, 62 Md. 146, it appeared that an infant had brought suit by her *prochein ami* in a court of law. Afterwards she employed an attorney and requested him to dismiss the suit, which was done accordingly. It was held that the appointment of the attorney being nugatory, the dismissal of the suit was void, and that the case would be reinstated upon the docket for trial on motion of the *prochein ami*.

**Employment of Attorney by Mother.** — The appearance of an attorney for the infant at the instance of his mother is insufficient. *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455.

**Solicitor of General Guardian.** — Moneys belonging to infants in foreclosure proceedings cannot be paid to the solicitors of the general guardian of the infants, because they are strangers to the infants and have neither claim on them nor power to represent them. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

**Personal Answer Allowed.** — An infant may be sued for nonappearance at a military muster, and may answer personally as in case of an indictment. *Winslow v. Anderson*, 4 Mass. 376.

1. *Georgia.* — *Nicholson v. Wilborn*, 13 Ga. 468.

*Illinois.* — *Peak v. Shasted*, 21 Ill. 137.

*Kentucky.* — *Bourne v. Simpson*, 9 B. Mon. (Ky.) 454; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280; *Allison v. Taylor*, 6 Dana (Ky.) 87.

*Maryland.* — *Kemp v. Cook*, 18 Md. 130.

*Massachusetts.* — *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196; *Swan v. Horton*, 14 Gray (Mass.) 179; *Goodridge v. Ross*, 6 Met. (Mass.) 487.

*Missouri.* — *Townsend v. Cox*, 45 Mo. 401; *Bailey v. McGinniss*, 57 Mo. 362; *Crech v. Crech*, 10 Mo. App. 586; *Fulbright v. Cannefox*, 30 Mo. 425; *Powell v. Gott*, 13 Mo. 458.

*New York.* — *Comstock v. Carr*, 6 Wend. (N. Y.) 526; *Wood v. Wood*, 2 Paige (N. Y.) 108; *Bloom v. Burdick*, 1 Hill (N. Y.) 131.

*North Carolina.* — *Turner v. Holden*, 72 N. Car. 134; *Skinner v. Moore*, 2 Dev. & B. L. (N. Car.) 138; *White v. Albertson*, 3 Dev. L. (N. Car.) 241; *Bender v. Askew*, 3 Dev. L. (N. Car.) 149; *Marshall v. Fisher*, 1 Jones L. (N. Car.) 111; *Turner v. Douglass*, 72 N. Car. 127; *England v. Garner*, 90 N. Car. 197.

*Texas.* — *Taylor v. Rowland*, 26 Tex. 293.

*Vermont.* — *Barber v. Graves*, 18 Vt. 292; *Fall River Foundry Co. v. Doty*, 42 Vt. 412; *Somers v. Rogers*, 26 Vt. 585.

*England.* — *Bird v. Pegg*, 5 B. & Ald. 418, 7 E. C. L. 53.

**Appearance by Attorney Is Error in Fact.** — If an infant appears in person or by attorney it is error in fact and may be assigned in the court where rendered.



set aside the judgment is of full force and effect, and cannot be collaterally attacked.<sup>1</sup>

**Imposing Terms.** — Terms may be imposed as a condition precedent to setting aside such a judgment.<sup>2</sup>

**c. APPOINTMENT OF ATTORNEY IN PROBATE PROCEEDINGS IN CALIFORNIA.** — An exception to the general rule that an infant cannot appear by attorney exists in the case of probate proceedings in California, and in such proceedings the court appoints an attorney and not a guardian *ad litem* to represent minors.<sup>3</sup> Such

Peak v. Shasted, 21 Ill. 137. And a judgment entered upon such appearance will be revoked on writ of error *coram nobis*. Nicholson v. Wilborn, 13 Ga. 468.

An infant may assign the fact of his appearance by attorney for error. Bird v. Pegg, 5 B. & Ald. 418, 7 E. C. L. 153.

**Setting Aside Proceedings and Filing New Answer.** — In Wood v. Wood, 2 Paige (N. Y.) 108, an infant defendant answered in divorce proceedings by her solicitor, and on her application the proceedings were set aside for irregularity, and she was permitted to introduce a new answer by her guardian.

**Order Changing Venue.** — In Turner v. Douglass, 72 N. Car. 127, it was held that, in an action by an infant by an attorney, an order changing the venue was not void, but that it was erroneous and might be reversed or vacated upon application of the infant upon his arriving at age.

**Protection of Bona Fide Purchaser.** — In England v. Garner, 90 N. Car. 197, it was held that, the judgment not being absolutely void, but merely erroneous, if set aside, the interest of a *bona fide* purchaser under the judgment without notice will not be affected.

**Reversal Both as to Adults and Infants.** — When several defendants, one being an infant, appear by attorney, it is error, and on error brought all should join, and the whole judgment should be reversed both as to the adults and the infant: Somers v. Rogers, 26 Vt. 585.

**Knowledge of Defendant's Infancy Immaterial.** — An infant has his remedy to vacate or reverse the judgment against him, whether the plaintiff knew of his infancy or not at the time the judgment was rendered. Fall River Foundry Co. v. Doty, 42 Vt. 412.

**Appearance by Attorney Without Service of Process.** — Where the infant was not served with process and no guardian

*ad litem* was appointed the judgment is absolutely void, notwithstanding a general appearance by attorney. Brown v. Downing, 137 Pa. St. 569. See also *infra*, III. 1. *Service of Process*.

1. Marshall v. Fisher, 1 Jones L. (N. Car.) 111; White v. Morris, 107 N. Car. 92; Taylor v. Rowland, 26 Tex. 293.

2. Fulbright v. Cannefox, 30 Mo. 425.

3. Carpenter v. Superior Ct., 75 Cal. 596; Pearson v. Pearson, 46 Cal. 609; Matter of Hill's Estate, 67 Cal. 238; Randolph v. Bayue, 44 Cal. 366; Townsend v. Tallant, 33 Cal. 45; Dougherty v. Bartlett, 100 Cal. 496; *In re Rety*, 75 Cal. 256; Matter of Simmons's Estate, 43 Cal. 543; Robinson v. Fair, 128 U. S. 53.

**Statutory Provisions.** — Code. Civil Proc. Cal., § 372, in the chapter on parties to civil actions, provides that a guardian *ad litem* shall be appointed to represent infants. Section 1718 provides for the appointment of an attorney to represent infants in probate proceedings. Construing these two sections together, it has been held that the provision in relation to guardians *ad litem* in the chapter on parties to civil actions does not apply to probate proceedings, for the reason that if both provisions applied it would be possible to have two representatives of the minor in the same contest, neither of whom would be subordinate to the other. Carpenter v. Superior Ct., 75 Cal. 596.

**Attorney in Effect a Guardian Ad Litem.** — An attorney for minor defendants appointed by the probate judge after service of citation, to represent a minor upon a contest as to the validity of a will, is to all intents and purposes a guardian *ad litem*, although not called by that name. Carpenter v. Superior Ct., 75 Cal. 596.

**Reappointment of Attorney After Amendment.** — Reappointment of an attorney for a minor or of a guardian *ad litem*,

appointment is entirely within the discretion of the Probate Court,<sup>1</sup> as is also the question of his compensation.<sup>2</sup>

**d. EMPLOYMENT OF ATTORNEY TO CONDUCT CASE.** — The rule that an infant cannot appear in person or by an attorney applies only to appearances upon the record, and is not intended to deprive the infant of the benefit of counsel.<sup>3</sup> And after the infant is properly in court by his next friend, or guardian *ad litem*, or other proper representative, an attorney may be employed to conduct the case.<sup>4</sup>

after demurrer to petition and amendment thereto, is not necessary. *Carpenter v. Superior Ct.*, 75 Cal. 596.

**Appointment of Attorney Without Service on Minor.** — The appointment by the probate court of an attorney to represent minor heirs who reside in the county and were not served with citations to appear, and the appearance of such attorney for such minor heirs, are nullities, and do not give the court jurisdiction. *Randolph v. Bayue*, 44 Cal. 366.

**Recital of Appointment in Decree.** — In a proceeding in the probate court for the distribution of an estate, if there are minor heirs named in the will, and a minor heir not named in the will, and an attorney is appointed to represent the minor heirs named in the will, and the decree of distribution recites that he appeared for the minor heirs, but on the settlement of the executor's account he appears for the minor heirs named in the will only, the recital in the decree of distribution will be construed as an appearance for the minor heirs named in the will only. *Pearson v. Pearson*, 46 Cal. 609.

**Presumption in Support of Proceedings.** — If the probate record is full, and shows that an attorney — not a guardian *ad litem* — was appointed to represent minor heirs in proceedings set on foot by the administrator to sell land to pay debts, it will not be presumed that a guardian *ad litem* was appointed. *Townsend v. Tallant*, 33 Cal. 45.

**Effect of Consent of Attorney to Proceedings.** — The consent of an attorney appointed by the court to represent minor heirs, to a sale of real property for the purpose of paying a claim against the estate, does not estop such heirs from afterwards questioning the correctness of the claim upon an accounting by the administrator. *Matter of Hill's Estate*, 67 Cal. 238.

1. *In re Rety*, 75 Cal. 256; *Dougherty v. Bartlett*, 100 Cal. 496.

2. *Dougherty v. Bartlett*, 100 Cal. 496.

**Amount of Allowance.** — In proceedings to obtain an order for sale of real estate belonging to the estate of a deceased person a fee of fifty dollars to an attorney appointed to represent the heirs is not unusual or excessive. *Matter of Simmons's Estate*, 43 Cal. 543.

**Vacating Allowance.** — If the allowance of a fee be improvident and indiscreet the court may vacate it at the suggestion of any one or on its own motion. *In re Rety*, 75 Cal. 256.

3. *Doe v. Brown*, 8 Blackf. (Ind.) 444; *People v. New York C. Pl.*, 11 Wend. (N. Y.) 164.

4. *Alexander v. Frary*, 9 Ind. 481; *Doe v. Brown*, 8 Blackf. (Ind.) 444; *People v. New York C. Pl.*, 11 Wend. (N. Y.) 164.

Under a statute providing that every pleading shall be subscribed by the party or his attorney, where the party is an infant and appears by guardian the pleading may be signed by the attorney. *Hill v. Thacter*, 3 How. Pr. (N. Y. Supreme Ct.) 407.

**Duty to Employ Attorney.** — It is the duty of the guardian *ad litem* or next friend to employ an attorney to conduct the case. "As he is not supposed to be a person learned in the law, his intervention is by no means designed to dispense with the services of an attorney to carry on the proceedings and try the case if necessary." *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619. See also *Carter v. Montgomery*, 2 Tenn. Ch. 455.

**Application for Leave to Employ Attorney.** — The guardian *ad litem* should apply to the court for leave to employ counsel. *Smith v. Smith*, 69 Ill. 308.

**Employment of Counsel Directed by Court.** — The court may direct the guardian *ad litem* to employ counsel to be approved by the court. *Colgate v. Colgate*, 23 N. J. Eq. 372.

**Compensation of Attorney.** — Such attorney is entitled to reasonable compensation out of the infant's estate.<sup>1</sup>

**Power of Attorney to Bind Infant.** — An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age.<sup>2</sup>

**II. ACTIONS BY INFANTS.** — See article NEXT FRIEND.

**III. ACTIONS AGAINST INFANTS** — 1. **Service of Process** — *a*. **STRICT COMPLIANCE WITH STATUTE.** — The matter of service of process on infants is one regulated almost exclusively by statute, and the provisions of the statute must be strictly followed or no jurisdiction will be acquired.<sup>3</sup>

**Presumption as to Attorney's Authority.** — After a guardian *ad litem* has been appointed for infant defendants they will be regarded as properly in court, and if an attorney appears and pleads in their name it will be presumed that he is properly authorized so to do. *Doe v. Brown*, 8 Blackf. (Ind.) 443.

**Separate Counsel When Guardian's Interest Is Hostile.** — Where the interests of a guardian and the interests of his ward are hostile to each other the ward must be represented by counsel other than those who represent the guardian. *Roodhouse v. Roodhouse*, 132 Ill. 360.

**Death of Next Friend—Power of Attorney.** — Where the next friend dies pending the suit, the infant's attorney should at once move for the appointment of a new one. *Bracey v. Sandiford*, 3 Madd. 468.

1. *Colgate v. Colgate*, 23 N. J. Eq. 372.

**Compensation Fixed by Court.** — In *Smith v. Smith*, 69 Ill. 308, it is said that the court should, in granting leave to employ counsel, fix the amount that he may, if required, expend for the purpose of defense, and that if such amount should prove insufficient through protracted litigation or otherwise, the court, on being satisfied of the fact might increase the allowance.

**Action for Attorney's Fees.** — The Superior Court of the state of New York has no authority to direct payment to an attorney for his services out of the estate of an infant in whose behalf the services were rendered; the court can only acquire jurisdiction by the service of process and the appointment of a guardian. *Matter of Greenhalgh*, 64 Hun (N. Y.) 26.

In an action by attorneys against a guardian to reach the estate of his ward and recover for services rendered, the petition must allege that the employ-

ment of the plaintiff was a reasonable and proper expense incurred by the guardian. *Caldwell v. Young*, 21 Tex. 800.

**Liability for Attorney's Fees on Contract of Guardian or Next Friend.** — In *Houck v. Bridwell*, 28 Mo. App. 644, it is held that the next friend cannot bind the infant for attorney's fees.

In *Phelps v. Worcester*, 11 N. H. 51, it is held that where suit was brought by direction of the guardian of an infant to protect the infant's title to his estate the counsel could not recover for services and expenditures in such suit against the infant, but that suit must be brought against the guardian. Such services and expenditures are not regarded as necessities, and may be avoided by the infant even under an expressed promise.

2. *Walsh v. Walsh*, 116 Mass. 382; *Tillotson v. Hargrave*, 3 Madd. 494; *Levy v. Levy*, 3 Madd. 245.

After the appointment of a guardian *ad litem* an attorney bears the same relation to an infant client as to adult clients. *Doe v. Brown*, 8 Blackf. (Ind.) 443.

**Stipulations by Attorney.** — The attorney of the guardian *ad litem* cannot by stipulation injuriously affect the rights of the infant. *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 350; *Burt v. McBain*, 29 Mich. 260; *Chandler v. McKinney*, 6 Mich. 217.

**Signature of Pleadings, etc.** — Though the appointment of guardian should appear on the record, yet the signing of the process and pleadings should be done by the attorney who conducts the suit. *Hill v. Thaxter*, 3 How. Pr. (N. Y. Supreme Ct.) 407.

3. *Alabama.* — *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Coster v. Georgia Bank*, 24 Ala. 37; *Bruce v. Strickland*, 47 Ala. 195.

b. SERVICE ON INFANT PERSONALLY. — In nearly every state the statute requires process to be served upon the infant personally,<sup>1</sup> and although this may seem a useless formality where the

*California.* — *Townsend v. Tallant*, 33 Cal. 46.

*Florida.* — *Price v. Winter*, 15 Fla. 66.

*Illinois.* — *Clark v. Thompson*, 47 Ill. 25.

*Mississippi.* — *Price v. Crone*, 44 Miss. 571.

*Missouri.* — *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

*New York.* — *Ingersoll v. Mangam*, 84 N. Y. 622; *Smith v. Reid*, 134 N. Y. 568; *Potter v. Ogden*, 136 N. Y. 384.

*South Carolina.* — *Riker v. Vaughan*, 23 S. Car. 187; *Carrigan v. Drake*, 36 S. Car. 354; *Harvey v. Harvey*, 25 S. Car. 283; *Finley v. Robertson*, 17 S. Car. 440; *Genobles v. West*, 23 S. Car. 154; *Whitesides v. Barber*, 24 S. Car. 373; *Tederall v. Bouknight*, 25 S. Car. 275; *Frost v. Frost*, 21 S. Car. 501.

*Tennessee.* — *Brown v. Severson*, 12 Heisk. (Tenn.) 381.

*Wisconsin.* — *Helms v. Chadbourne*, 45 Wis. 60.

**Setting Aside Decree for Noncompliance.** — Where the formalities are not all complied with the decree may be set aside. *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129; *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455; *Girty v. Logan*, 6 Bush (Ky.) 8; *O'Hara v. MacConnell*, 93 U. S. 150; *Stinson v. Pickering*, 70 Me. 273; *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Crockett v. Drew*, 5 Gray (Mass.) 399.

**Irregularities Cured by Amendment.** — Irregularity in bringing in an infant in partition may be cured by subsequent amendment. *Rogers v. McLean*, 34 N. Y. 536.

**1. Personal Service on Infant Necessary.** — See the statutes of the various states and the following decisions.

*Alabama.* — *Preston v. Dunn*, 25 Ala. 507; *Walker v. Hallett*, 1 Ala. 379.

*Arkansas.* — *Boyd v. Roane*, 49 Ark. 397; *Freeman v. Russell*, 40 Ark. 56; *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235.

*California.* — *Johnston v. San Francisco Sav. Union*, 63 Cal. 554; *Brown v. Lawson*, 51 Cal. 615; *Fanning v. Foley*, 99 Cal. 336; *Gronfier v. Puymirrol*, 19 Cal. 629.

*Florida.* — *Thompson v. McDermott*, 19 Fla. 852; *McDermott v. Thompson*,

29 Fla. 299; *Terrell v. Weymouth*, 32 Fla. 255; *State v. Mitchell*, 29 Fla. 302; *Brock v. Doyle*, 18 Fla. 172.

*Georgia.* — *Kilpatrick v. Strozier*, 67 Ga. 247; *Boardman v. Taylor*, 66 Ga. 638; *Wallace v. Jones*, 93 Ga. 419.

*Illinois.* — *Crocker v. Smith*, 10 Ill. App. 376; *Campbell v. Campbell*, 63 Ill. 502; *Greenman v. Harvey*, 53 Ill. 386; *Sconce v. Whitney*, 12 Ill. 150; *Hickenbotham v. Blackledge*, 54 Ill. 316; *McDermaid v. Russell*, 41 Ill. 489; *Clark v. Thompson*, 47 Ill. 25; *Marshall v. Rose*, 86 Ill. 374; *Fischer v. Fischer*, 54 Ill. 231; *Benefield v. Albert*, 132 Ill. 665; *Dickison v. Dickison*, 124 Ill. 483; *Nichols v. Mitchell*, 70 Ill. 258; *Whitney v. Porter*, 23 Ill. 445.

*Indiana.* — *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Abdil v. Abdil*, 26 Ind. 287; *Wells v. Wells*, 6 Ind. 447; *Martin v. Starr*, 7 Ind. 225; *Pugh v. Pugh*, 9 Ind. 132; *Alexander v. Frary*, 9 Ind. 481; *Hawkins v. Hawkins*, 28 Ind. 67; *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Harvey*, 5 Blackf. (Ind.) 487; *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Doe v. Anderson*, 5 Ind. 33; *Timmons v. Timmons*, 6 Ind. 8.

*Iowa.* — *Dahms v. Alston*, 72 Iowa 411; *Dohms v. Mann*, 76 Iowa 723; *Good v. Norley*, 28 Iowa 188; *Hunter's Estate*, 84 Iowa 388.

*Kansas.* — *Armstrong v. Wyandotte Bridge Co.*, *McCahon* (Kan.) 166.

*Kentucky.* — *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 45; *Cox v. Story*, 80 Ky. 64.

*Missouri.* — *Fischer v. Siekmann*, 125 Mo. 165; *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585; *Gibson v. Chouteau*, 39 Mo. 536; *Baumgartner v. Guessfeld*, 38 Mo. 36.

*New Jersey.* — *Pierson v. Hitchner*, 25 N. J. Eq. 130.

*New York.* — *Ingersoll v. Mangam*, 84 N. Y. 627; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Overton v. Barclay*, (Supreme Ct.) 35 N. Y. Supp. 326, 89 Hun (N. Y.) 611; *Potter v. Ogden*, 136 N. Y. 393; *Coughlin v. Fay*, 68 Hun (N. Y.) 521; *Rogers v. McLean*, 34 N. Y. 539.

*North Carolina.* — *Young v. Young*, 91 N. Car. 359; *Sumner v. Sessoms*, 94 N. Car. 371; *Bass v. Bass*, 78 N. Car. 376; *Gardner v. Ellis*, Tayl. (N.

infant is very young, it is a necessary one,<sup>1</sup> and a failure to serve the infant will render the judgment against him, if not void, at least

Car.) 106; *Alien v. Shields*, 72 N. Car. 504; *Turner v. Douglass*, 72 N. Car. 127; *Moore v. Gidney*, 75 N. Car. 34; *Hare v. Hollomon*, 94 N. Car. 14; *Stancill v. Gay*, 92 N. Car. 462; *Larkins v. Bullard*, 88 N. Car. 35; *Coffin v. Cook*, 106 N. Car. 376; *Ward v. Lowndes*, 96 N. Car. 367.

*Ohio*. — *Robb v. Irwin*, 15 Ohio 689.

*Pennsylvania*. — See *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455.

*South Carolina*. — *Tobin v. Addison*, 2 Strobb. L. (S. Car.) 3; *Tederall v. Bouknight*, 25 S. Car. 275; *Harvey v. Harvey*, 25 S. Car. 283; *Genobles v. West*, 23 S. Car. 155; *Carrigan v. Drake*, 36 S. Car. 354.

*Tennessee*. — *Robertson v. Robertson*, 2 Swan (Tenn.) 197; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 379.

*Texas*. — *Wheeler v. Ahrenbeak*, 54 Tex. 536; *Kremer v. Haynie*, 67 Tex. 450.

*United States*. — *New York L. Ins. Co. v. Bangs*, 103 U. S. 435; *Nelson v. Moon*, 3 McLean (U. S.) 319; *Carrington v. Brents*, 1 McLean (U. S.) 167.

**Service on Minor Over Fourteen Years of Age.** — Under the *California Practice Act of 1851*, if the minor was over fourteen years of age, the summons was served by delivering to him personally a copy together with a certified copy of the complaint. *Brown v. Lawson*, 51 Cal. 615.

**Chancery Rule in Absence of Statute.** — In *Thompson v. McDermott*, 19 Fla. 853, the court said: "There is no statutory provision regulating service of process upon minor defendants. It is controlled by the general rule in chancery, which is that 'in a suit against an infant process should be served upon him and a guardian *ad litem* appointed by the court.'"  
*Citing Brock v. Doyle*, 18 Fla. 172; *Carrington v. Brents*, 1 McLean (U. S.) 167; *Walker v. Hallett*, 1 Ala. 379; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 45; 1 Barb. Ch. Pr. 51; 1 Dan. Ch. Pr. 153; Fla. Equity Rules, Rule 36.

**Partition Proceedings.** — In *Florida* partition proceedings are void as to interested minors, unless they have been made parties thereto by service upon them personally. *Thompson v. McDermott*, 19 Fla. 852, 29 Fla. 299; *Terrill v. Weymouth*, 32 Fla. 260.

In *Illinois*, if a proceeding for parti-

tion is by bill in chancery, it is indispensable to the jurisdiction of the court that the summons should be served upon the minor defendants in interest, service on their guardian being insufficient. But if it is under the statute, service upon their guardian, by reading, is sufficient to give the court jurisdiction. *Nichols v. Mitchell*, 70 Ill. 258.

In *Tennessee* the notice required by the Act of 1799, c. 11, or the publication required by the Act of 1831, c. 37, was necessary in all applications for the partition of lands in which infants were interested, and they could not otherwise be properly before the court. *Robertson v. Robertson*, 2 Swan (Tenn.) 197.

**Infants Made Plaintiffs by Amendment.**

— Where infants are made plaintiffs by amendment and appear by next friend, they need not be served with a copy of the bill. *Wallace v. Jones*, 93 Ga. 419.

**Personal Service Outside of State.** — Personal service upon an infant outside the jurisdiction is void. *Potter v. Ogden*, 136 N. Y. 393.

**Intervention by Infants Without Process.** — The court does not acquire jurisdiction of infants where, after the trial, they petition for leave to intervene and to have a guardian *ad litem* appointed, and thereafter file an amended answer by a guardian appointed upon such petition. *Johnston v. San Francisco Sav. Union*, 63 Cal. 554.

**1. Personal Service a Necessary Formality.** — Personal service of little children with an application for leave to sell trust property of which they are beneficiaries, though required by the Act of 1876, is a formality. *Boardman v. Taylor*, 66 Ga. 638.

"It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service if made, or that it would have been competent for the legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observance." *Ingersoll v. Mangam*, 84 N. Y. 626.

voidable.<sup>1</sup> Service upon the general guardian without service upon the minor is insufficient.<sup>2</sup> The principal object of requiring personal service upon minors, especially where they are of tender years, is to draw the attention of friends of the infant to the suit so that he may have the benefit of their care and protection.<sup>3</sup> Accordingly it has been held that process should be served upon a minor in the presence of his guardian or the person having the care and custody of him.<sup>4</sup> In a few states process must be

**1. Effect on Judgment of Failure to Serve Infant.** — A judgment rendered against a minor 'not actually brought into the court by service of process is voidable only and not void. *McAnear v. Epperson*, 54 Tex. 220; *Alston v. Emmerson*, 83 Tex. 231; *Thomas v. Jones*, 10 Tex. 52; *Kegans v. Allcorn*, 9 Tex. 34; *Wheeler v. Ahrenbeak*, 54 Tex. 536. And it will not be set aside to the prejudice of a *bona fide* purchaser without notice. *Hare v. Hollomon*, 94 N. Car. 14; *England v. Garner*, 90 N. Car. 197.

But a judgment against an infant who has never been served with process, or who has no general or testamentary guardian or guardian *ad litem*, is void. *Stancill v. Gay*, 92 N. Car. 462.

If there has been no personal service on the infant, any judgment rendered against him in the suit is voidable at his election, even though a guardian *ad litem* may have been appointed and an answer filed and defense set up. *Robb v. Irwin*, 15 Ohio 689; *Preston v. Dunn*, 25 Ala. 507; *Nelson v. Moon*, 3 McLean (U. S.) 319; *Larkins v. Bullard*, 88 N. Car. 35; *Gronfier v. Puymirol*, 19 Cal. 629; *Cox v. Story*, 80 Ky. 64; *Gibson v. Chouteau*, 39 Mo. 536.

An infant defendant not personally served as required by statute is not bound by the answer filed by her guardian *ad litem*. *Tederall v. Bouknight*, 25 S. Car. 275.

**North Carolina.** — According to the former practice in North Carolina, jurisdiction of an infant was acquired by the appointment of a guardian *ad litem* without service of process on the infant, but this practice has been changed by the Code of Civil Procedure. See *infra*, III. 3. f. (2), (e) *North Carolina Curative Act*.

Clarke's North Carolina Code of Civil Procedure, § 387, validates judgments against infants in proceedings pending on March 14, 1879, notwithstanding there had been no personal service of the summons. For cases as to the con-

struction of this statute, see *infra*, III. 3. f. (2), (e) *North Carolina Curative Act*.

**2. Service on Guardian Without Service on Minor.** — A service of summons upon a guardian without also serving it upon the minor is insufficient, and a default entered against the guardian does not bind either the guardian or the minor, and a decree rendered thereon is absolutely void and should be vacated on motion. *Fanning v. Foley*, 99 Cal. 336.

Service upon the general guardian alone and not upon the minor is error, but not available collaterally. *Doe v. Harvey*, 5 Blackf. (Ind.) 487.

But as to the practice in a few states of serving process against infant on his general guardian only, see *infra*, III. 1. d. *Service on Parent or Guardian Alone*.

**3.** "Service on them would be very absurd if it were not intended by that means to apprise their relations of the institution of a suit, and thus to put it in the power of those most deeply interested in their welfare to protect their interests." *Massie v. Donaldson*, 8 Ohio 377. See also *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 379.

**4. Service on Minor in Presence of Guardian or Protector.** — Where minors are to be made parties defendant in a suit in equity, subpoena should be issued to such minors and regularly served upon them in the presence of their legal guardian, or in the presence of the person who has the present care and custody of them. Then a guardian *ad litem* for such minors should be appointed by an order of the court; and such guardian *ad litem* should also be served with subpoena in the cause. *McDermott v. Thompson*, 29 Fla. 299. To the effect that service should be in the presence of the infant's guardian or protector, see also *Thompson v. McDermott*, 19 Fla. 853; *State v. Mitchell*, 29 Fla. 302; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102.

Citation to a ward to attend the accounting of an executor may be made

served upon infants in precisely the same manner as if they were adults.<sup>1</sup>

**c. SERVICE ON BOTH INFANT AND PARENT, GUARDIAN, OR OTHER PERSON IN CHARGE.** — In order to insure notice of the proceedings to persons interested in the welfare of the minor, some statutes require process to be served in all cases both upon the minor and upon his parent, guardian, or other person having the care or control of the infant.<sup>2</sup> And in the majority of the states process is required to be served both upon the minor and upon his parent, guardian, or other person having the care of him, in cases where the infant is under fourteen years of age.<sup>3</sup>

by delivering the citation to the ward personally in the presence of his guardian. *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

**1. Infants Served in Same Manner as Adults.** — *Hough v. Canby*, 8 Blackf. (Ind.) 301, *Pugh v. Pugh*, 9 Ind. 132; *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Anderson*, 5 Ind. 33; *Martin v. Starr*, 7 Ind. 224; *Hawkins v. Hawkins*, 28 Ind. 67; *Abdil v. Abdil*, 26 Ind. 287; *Fischer v. Siekmann*, 125 Mo. 165; *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585; *Ward v. Lowndes*, 96 N. Car. 367 (provided the infant is over fourteen years old).

"Nor is there any change effected in the ordinary manner of service of process on an infant in consequence of the statute in relation to appropriation of lands, providing that where 'the proceedings seek to affect the lands of persons under guardianship, the guardians must be made parties defendant.' The only object of the provision was, doubtless, to obviate the necessity of appointing a guardian *ad litem*, the legislature probably regarding the interests of the minor safer in the hands of the general guardian, conversant as such person must be with the rights and interests of the infant, than in the hands of one appointed only for the occasion." *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 589.

**2. Mississippi** Annotated Code, 1892, § 3430, provides that "if the defendant be an unmarried infant the process shall be served on him personally, and upon his father or mother or guardian if he have any in this state; but if he be married, process may be served as on an adult." This statute relates only to process on infant defendants in courts proper, when property rights are involved. *Moore v. Allen*, 72 Miss. 273.

**Scire Facias.** — In *Tennessee a sci. fa.* to subject an infant's lands to payment of debts of his ancestor must be served on both the infant and his guardian. *Britain v. Cowen*, 5 Humph. (Tenn.) 319; *Valentine v. Cooley*, Meigs (Tenn.) 613.

In *Gardner v. Ellis*, Tayl. (N. Car.) 106, the court said: "The practice of appointing a guardian upon the return of a *sci. fa.*, after service upon the infant, is liable to objection, for, as such guardian gives no security, the infant may lose a remedy against him if he mismanages the defense. We will, however, appoint a guardian for this defense, but it is proper to take notice that hereafter applications should be made to the proper court for the appointment of guardians before the *sci. fa.* issues." Though a *sci. fa.* is void as to infants for want of personal service, it will on that account only be irregular as to adults joined therein with them; and a judgment and sale under it will stand till reversed as to the adults and pass the title to their interest in the land. *Valentine v. Cooley*, Meigs (Tenn.) 613.

**3. California.** — Code Civ. Pro. 1886, § 411, subs. 3.

**Colorado.** — Mills's Annot. Code, § 30.

**Georgia.** — Code of 1895, § 4987.

**Idaho.** — Rev. Stat. 1887, § 144.

**Kansas.** — Gen. Stat. 1889, c. 80, § 71.

**Kentucky.** — Civil Code, 1851, § 81.

**Minnesota.** — Gen. Stat. 1894, § 5199.

**Mississippi.** — Code 1880, § 1531.

**Montana.** — Comp. Stat. 1887, c. 72.

**Nebraska.** — Comp. Stat. 1897 (5668), § 76.

**Nevada.** — Gen. Stat. 1885 (3051), § 29.

**New York.** — Code Civ. Pro., §§ 226-427.

**North Carolina.** — Code Civ. Pro., § 217.

**Strict Compliance.** — These provisions, designed for the protection of minors, must be strictly complied with or the proceedings will be void as against the infant for want of jurisdiction.<sup>1</sup>

*North Dakota.* — Rev. Code 1895, § 2552.

*Ohio.* — Bates' Annot. Stat. 1897, § 5047.

*Oklahoma.* — Stat. 1893 (3949), § 71.

*Oregon.* — Hill's Annot. Laws 1892, § 55.

*South Carolina.* — Code of Civil Procedure, § 155.

*Utah.* — Comp. Laws 1888, § 3208.

*Wisconsin.* — Sanborn & Berryman's Annot. Stat., § 2636.

*Wyoming.* — Rev. Stat. 1887, § 2434.

**Typical Statute.** — The *California* statute (Code Civ. Pro. 1886, § 411, subs. 3) may be taken as type of these statutes. It provides for the delivery of the copy of the summons "if against a minor under the age of fourteen years residing within this state, to such minor personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed." A number of the statutes make no special provision for cases where the minor is above fourteen years of age, in which case the general statute as to service of summons governs and the minor must be served as other persons. A few statutes, however, expressly provide that if the minor be more than fourteen years of age service upon him alone will be sufficient, and that the manner of service may be the same as in the case of adults. See, for example, General Statutes of Kansas, c. 80, § 71; McClain's Anno. Code of Iowa 1888, § 3918.

1. See *supra*, III. 1. *u. Strict Compliance with Statute.*

*California.* — Gray v. Palmer, 9 Cal. 628.

Personal service both upon minor defendants and upon their guardian is sufficient. Richardson v. Loupe, 80 Cal. 491.

*Illinois.* — In Whitney v. Porter, 23 Ill. 445.

*Colorado.* — Service upon an infant over fourteen years of age, but not upon the guardian, is sufficient. Filmore v. Russell, 6 Colo. 171.

*Iowa.* — Dohms v. Mann, 76 Iowa 723.

*Kentucky.* — Cox v. Story, 80 Ky. 64; Cheatham v. Whitman, 86 Ky. 614;

Rodgers v. Rodgers, (Ky. 1895) 31 S. W. Rep. 139.

*Mississippi.* — Johnson v. McCabe, 42 Miss. 255; Rigby v. Lefevre, 58 Miss. 639; Ingersoll v. Ingersoll, 42 Miss. 155; Winston v. McLendon, 43 Miss. 254; Mullins v. Sparks, 43 Miss. 129.

A decree in chancery against any infant on service of process on him alone, without any service as to his father or guardian, is erroneous under the Code of 1871, where the record fails to show that the infant had no father or guardian in the state. Moody v. McDuff, 58 Miss. 751. See also Jones v. Mathews, (Miss. 1888) 4 So. Rep. 547; Erwin v. Carson, 54 Miss. 282; Cocks v. Simmons, 57 Miss. 183, holding that whenever the nonexistence of the father, mother, or guardian in the state is shown anywhere in the record the service is regular if made on the infant alone.

*Missouri.* — Campbell v. Laclede Gas Light Co., 84 Mo. 352, following Kansas City, etc., R. Co. v. Campbell, 62 Mo. 585.

*New York.* — Bellamy v. Guhl, 62 How. Pr. (N. Y. Supreme Ct.) 460. See also Potter v. Ogden, 136 N. Y. 384.

*Nebraska.* — Hughes v. Housel, 33 Neb. 707, holding the statute to be mandatory.

*North Carolina.* — Coffin v. Cook, 106 N. Car. 376; Ward v. Lowndes, 96 N. Car. 367.

*Pennsylvania.* — Swain v. Fidelity Ins., etc., Co., 54 Pa. St. 459, holding that where the infant is over fourteen years of age service must be made both upon the minor and on his guardian, but if there is no guardian, then on the minor alone.

*South Carolina.* — In an action against one or more minor children, where the record shows proof by affidavit that a copy of the summons and complaint was served on the minors, and a written acknowledgment by the father of the minors of service of copies on him, and a petition by him for the appointment of a guardian *ad litem* for such minors, with proof that notice of this application had been served on the infants over the age of fourteen, and on the parents of the minor, and an order of the court appointing a guard-



**Parent or Guardian Codefendant.** — But where the parent, guardian, or other person upon whom service is required, is a codefendant with the infant, it seems that the delivery of a copy of the summons in addition to the one already delivered to him on his own account is unnecessary.<sup>1</sup>

**d. SERVICE ON PARENT OR GUARDIAN ALONE.** — In a few states personal service upon the minor is not required in all cases, but the process may be served upon the guardian alone or other person designated by the statute.<sup>2</sup> The typical statute of this class provides that where the defendant is an infant under the age of fourteen, the service must be upon his father or

ian *ad litem* reciting service on the minor and an answer by such guardian, jurisdiction of the minors is sufficiently shown. *Allen v. Allen*, (S. Car. 1897) 26 S. E. Rep. 786.

*Washington.* — *Hatch v. Ferguson*, 57 Fed. Rep. 966. See also *Kromer v. Friday*, 10 Wash. 621.

*Wisconsin.* — *Helms v. Chadbourne*, 45 Wis. 60.

1. *McIlvoy v. Alsop*, 45 Miss. 374; *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139. But see *Cook v. Rogers*, 64 Ala. 406; *Hodges v. Wise*, 16 Ala. 509; *Estes v. Bridgforth*, (Ala. 1897) 21 So. Rep. 512.

Service of one summons upon the infant and one summons upon the father, where both are parties defendant, is a sufficient compliance with Civil Code *Kentucky*, 1851, § 18, providing that where defendant is an infant under fourteen years of age, service must be had upon him and his father or guardian, etc. *Cheatham v. Whitman*, 86 Ky. 614. Compare *Helms v. Chadbourne*, 45 Wis. 60, where it was held that a strict construction of a similar statute required a delivery of a copy to the minor in person and another to the father, mother, or guardian for the minor, and that delivery of a copy to such father, mother, or guardian for himself or herself as a party to the suit was not a substitute for the second part of the requirement.

#### **Presumptions in Support of Jurisdiction.**

— Where the fact that one of the defendants was the father of an infant codefendant does not appear of record, the court cannot assume such fact from the similarity of names so as to show compliance with the statute requiring service on father, mother, etc. *Jones v. Mathews*, (Miss. 1888) 4 So. Rep. 547.

#### **If a Father Sues His Infant Son Resid-**

**ing With Him** and the statute requires the summons to be served personally on the infant and also upon the father, a service upon the infant alone is sufficient, for the father has notice of the suit without service; and if the judgment against the infant is offered in evidence, and the record shows service on the infant, but does not show with whom he was residing, it will be presumed for the purpose of sustaining the jurisdiction that he was residing with his father. *Brown v. Lawson*, 51 Cal. 615.

2. See the statutes of the various states.

*In Alabama* it is held that when the complainant in a bill for partition is the father of an infant defendant whose mother is dead, process should be served on the infant's general guardian; and if process is served on the person who is averred to be such guardian, but the bill is not sworn to, and there is no affidavit of the fact that he is such guardian, and no proof of the fact, the infant is not properly before the court. *Gayle v. Johnston*, 80 Ala. 395. See also *Cook v. Rogers*, 64 Ala. 406.

*Georgia.* — In *Dampier v. McCall*, 78 Ga. 607, it was held that where a statutory guardian has been served with process in partition the judgment is conclusive on the minor, and a court of equity in the absence of any suggestion of fraud will not afterwards inquire into it.

*Kentucky.* — Civil Code, § 52, provides that if the defendant be under fourteen years of age, summons must be served on his father; if he have no father, on his guardian; or if he have no guardian, on his mother; or if he have no mother, on the person having charge of him. The amendment of January 16, 1882, provides that if any of the parties upon whom sum-

guardian, or if any of these cannot be found, then upon his mother, or upon any other person having the care or control of

mons is directed to be served is a plaintiff, then it shall be served on the person who stands first in the order named in said section, who is not a plaintiff, and if all such persons are plaintiffs it shall be the duty of the clerk, upon the affidavit of one or more of them showing that fact, to appoint a guardian *ad litem* for the infant, and the summons shall be served upon such guardian *ad litem*.

A certified petition showing that the infants reside with their mother, or that she is their guardian, and a party plaintiff, is a substantial compliance with this statute as amended without stating that she is the person in charge of them, and the appointment of a guardian *ad litem* by the clerk is authorized thereon. *Robinson v. Clark*, (Ky. 1896) 34 S. W. Rep. 1083.

Under this statute service of summons upon the guardian of an infant whose father was plaintiff in an action for the sale of land was held to be void as to the infant. *Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294.

Summons is properly served on infants by service on their mother, who is likewise their guardian. *Cohen v. Ripy*, (Ky. 1896) 33 S. W. Rep. 625.

*Michigan*.—Where an infant defendant three years of age has no general guardian, a subpoena is properly served on his mother, who is also his trustee. *Peck v. Adsit*, 98 Mich. 639.

*Mississippi*.—Under the Miss. Code of 1857, in proceedings affecting the rights or interests of an infant in the probate court, it was necessary to summon the guardian of the infant, if he had one, and if his guardian was adversely interested or failed to appear, then to appoint a guardian *ad litem* for him, but while it was not required in any case that the infant should be cited or summoned, it was necessary that he should be represented in the court by a guardian. *Burrus v. Burrus*, 56 Miss. 92. See also *Mundy v. Calvert*, 40 Miss. 181.

*North Carolina*.—To the effect that service on legal guardian is sufficient to bring the ward into court, see *White v. Albertson*, 3 Dev. L. (N. Car.) 242; *Turner v. Douglass*, 72 N. Car. 132. But see cases cited *supra*.

*Pennsylvania*.—Act of June 13, 1836 (Pamphlet Laws 587, § 83), provides that

"if any defendant in any real action as aforesaid shall be a minor, service of the writ shall be as follows: (1) If any such defendant have a guardian of his estate, service thereof shall be made upon such guardian in the manner directed by law; (2) if any such defendant be above the age of fourteen years, service thereof shall also be made upon him in the same manner as is directed by law in the case of adults; (3) if any such defendant be under the age of fourteen years and have no guardian as aforesaid, service thereof shall be made upon the next of kin of such defendant residing in the county wherein such defendant shall reside, in the manner aforesaid."

In *Girard L. Ins., etc., Co. v. Farmers', etc., Nat. Bank*, 57 Pa. St. 388, it was held that the service contemplated in this statute is personal and does not refer to cases when the defendant cannot be found in the county.

*Tennessee*.—In this state *Britain v. Cowen*, 5 Humph. (Tenn.) 315, is a controlling authority to the effect that where there is an infant defendant service of process may be made upon his regularly appointed guardian, except in cases where the statute expressly requires that such infant shall be served personally.

This case was followed in *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284, where the court said that the earlier case "probably goes to the verge of the law, but we do not feel at liberty to disturb it now;" but the court further said that the practice of serving process upon the guardian only is one not to be encouraged, and in cases where fraud is charged or suspected in proceedings against the infant the fact that the infant was not personally served with process might, under some circumstances, be an important consideration.

In *Taylor v. Walker*, 1 Heisk. (Tenn.) 738, the court said: "It is a settled law of this state that a sale without service of process on an infant who has no regular guardian is void, and that the want of such service cannot be waived by the appearance of a guardian *ad litem*. See *Robertson v. Robertson*, 2 Swan (Tenn.) 197; *Frazier v. Pankey*, 1 Swan (Tenn.) 75; *Wheatley v. Harvey*, 1 Swan (Tenn.) 484; *Crippen v. Crippen*, 1 Head (Tenn.) 128. The

the infant or with whom he lives, and where the infant is over fourteen years of age service upon him shall be sufficient,<sup>1</sup> though some statutes make no distinction between infants of tender age and those of maturer years as to the manner of service.<sup>2</sup>

**Service on Infant Alone.** — In cases where service upon the parent or guardian is required, service upon the infant alone will be insufficient.<sup>3</sup>

**Person Served Also a Party.** — And it has been held that where the person required to be served is also a party defendant, he must be specially served for the infant in order to bring the latter before the court.<sup>4</sup>

application of the principle to a case in which the validity of the sale is directly attacked by or in behalf of the infants whose land was sold, is not affected by the case of *Hopper v. Fisher*, 2 Head (Tenn.) 256, which was an action of ejectment, in which an effort was made to impeach the decree collaterally. In that case the recital in the decree that the infants answered, by their guardian *ad litem*, was deemed sufficient as against a naked trespasser who had no interest in the land in dispute; but it was expressly said by the court that 'we do not mean to question the rule that requires service or notice upon the parties, and that a decree contrary to the course of the court is void.'" See also *Mason v. Swan*, 6 Heisk. (Tenn.) 450; *Scott v. Porter*, 2 Lea (Tenn.) 224.

**England.** — Service upon a mother who had secreted her infants so that they could not be served has been held sufficient. *Smith v. Marshall*, 2 Atk. 70. See also *Thompson v. Jones*, 8 Ves. Jr. 141; *Kirwan v. Kirwan*, 1 Hog. 264; *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301.

1. Ark. Dig. 1894, § 5673; W. Va. Code 50, § 39. See also statutes cited in preceding note.

**2. Age of Infant as Affecting Manner of Service.** — The service of a subpoena on the surviving parent of infant defendants, for them, is sufficient, whether they are over or under fourteen years of age. *Sanders v. Godley*, 23 Ala. 473; *Cook v. Rogers*, 64 Ala. 406.

The mode for the service of summons to answer bills in equity issuing against infants, prescribed by the 23d rule of chancery practice in *Alabama*, is exclusive of all other modes; and hence service on infant defendants per-

sonally, whose parents are living, and not interested adversely to them, whether the infants are of tender years or have nearly attained their majority, is irregular; and the appointment of a guardian *ad litem* on such service is premature and erroneous. *Hibbler v. Sprowl*, 71 Ala. 50.

3. A judgment cannot be sustained upon a service upon an infant alone. *Wells v. American Mortg. Co.*, 109 Ala. 430; *Herring v. Ricketts*, 101 Ala. 340; *Bruce v. Strickland*, 47 Ala. 195.

Personal service on an infant under fourteen years of age is irregular, and will not authorize the appointment of a guardian *ad litem*. *Bondurant v. Sibley*, 37 Ala. 565.

The service should be upon the parent, general guardian, or person having charge of the infant. *Carter v. Ingraham*, 43 Ala. 78; *Herring v. Ricketts*, 101 Ala. 340; *McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 408; *Gayle v. Johnston*, 80 Ala. 395; *Irwin v. Irwin*, 57 Ala. 614; *Estes v. Bridgforth*, (Ala. 1897) 21 So. Rep. 512; *Walker v. Hallett*, 1 Ala. 379; *Hodges v. Wise*, 16 Ala. 509.

**4. Parent and Child Both Parties.** — Where parent and child are both parties defendant to a bill, the mere service of subpoena upon the parent is not sufficient to bring the infant before the court. The subpoena should be served upon the parent for the infant. *Hodges v. Wise*, 16 Ala. 509.

But in *Rodgers v. Rodgers*, (Ky. 1895) 31 S. W. Rep. 139, the court said: "Here the petition showed that the father was dead, and while it did not show that they had no guardian, yet it showed that Annie Rodgers, who was also made a defendant by the same pleading, and summoned with them, was

*e.* **NECESSITY OF ACTUAL OR CONSTRUCTIVE SERVICE.** — Notice in some form to an infant is essential to confer jurisdiction upon a court to bind his property, and while the legislature may prescribe that the notice may be constructive instead of actual, proceedings must be in conformity with the statute in order to be valid and binding upon the infant.<sup>1</sup>

their mother. It is true that a return shows that a copy of this summons was unnecessarily delivered to each of the infants, and that it fails to show that the copy delivered to Annie Rodgers was delivered to her as their mother. Still we are of the opinion that within the reason and spirit of previous adjudications of this court the service of the summons as shown by this return was good against these infants." See also *Cheatham v. Whitman*, 86 Ky. 618; *Bailey v. Fanning Orphan School*, (Ky. 1890) 14 S. W. Rep. 908.

Compare cases cited *supra*, III. 1. *c.* *Services on Both Infant and Parent, etc.*

**Return of Service.** — The return of the officer executing the summons must show, if the parent is also a party defendant, that service was made upon him or her for the infant, and in all cases it is better that this fact should distinctly appear in the return. *Cook v. Rogers*, 64 Ala. 406.

**Service on Parent of Several Infant Defendants.** — In *Huggins v. Dabbs*, 57 Ark. 628, it is held to be a sufficient compliance with the statute to serve each of the infant defendants with a copy of the summons and to leave one copy with their mother, without leaving one copy for each of the infants.

1. *Smith v. Reid*, 134 N. Y. 568. See also *supra*, III. 1. *a.* *Strict Compliance with Statute*; and *infra*, III. 3. *f.* (2) *Before Service of Process*. And see, in general, article PUBLICATION.

**Judgment Without Service Void.** — Judgments in adversary suits either in law or equity rendered without notice actual or constructive, whether against infants or adults, are absolutely void. *Boyd v. Roane*, 49 Ark. 397.

**Personal Service on Infant Unnecessary.** — Under 2 Rev. Stat. New York 317, § 2, personal service of the summons upon the infant defendant in an action for partition was not essential to give the court jurisdiction. *Gotendorf v. Goldschmidt*, 83 N. Y. 110; *Croghan v. Livingston*, 17 N. Y. 218; *Ingersoll v. Mangam*, 84 N. Y. 626.

**Constructive Service Sufficient.** — In-

ants constructively served are properly before the court. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468.

**Constitutionality of Statute Dispensing With Service — Power of Legislature.** — In *Campbell v. Campbell*, 63 Ill. 462, it was held that a statute authorizing a decree against an infant upon the appointment of a guardian *ad litem* without service of process upon the infant was unconstitutional, and the court said: "Probably no person would contend that a court could acquire jurisdiction over an adult defendant without notice by ordering an attorney of the court to enter his appearance, and we can see no difference in principle between such a case and one where the court seeks to acquire jurisdiction by appointing a guardian *ad litem* for an infant and requiring him to file an answer."

In *Burrus v. Burrus*, 56 Miss. 92, the court, in construing the provisions of the Code of 1857, respecting the power of the probate court to deal with the estate of infants, said: "The state assumes the guardianship of those classes of society deemed incapable of caring for themselves, and has established a tribunal to extend the care which the state has considered necessary for their interests. It is entirely free from doubt that the state had the right to confer on the probate court power to deal with the estates of infants in such way as the state chose to determine. It could by statute require process to issue and be served on the infant or not; it could require a guardian *ad litem* for the infant, or dispense with it, as legislative discretion might conclude."

"There is no invariable rule defining what legal proceedings constitute due process of law conferring jurisdiction upon a court to deal with and bind the property of infants. Notice in some form, actual or constructive, is essential, but the legislature may prescribe that such notice shall be given to the parent or guardian or other person as representing the infant, and proceed.

*f. SERVICE ON NONRESIDENT INFANTS*—(1) *Service by Publication*. — It is a general rule that where a minor defendant is a nonresident of the state in which the action is brought, he may be served by publication in the same manner as adults are served under similar circumstances,<sup>1</sup> even though the statute authorizing

ings in conformity with the statute in such cases will be valid and the infant will be bound." *Ingersoll v. Mangam*, 84 N. Y. 622. Compare *Campbell v. Campbell*, 63 Ill. 462.

**Jurisdiction Without Service.**— "Infants are peculiarly under the care of the chancellor as his wards. For this reason, prior to the adoption of our Code, it was held that an actual notification to an infant of the pendency of a suit was not necessary to the jurisdiction of the court. A decree without such service was, therefore, not void as to the infant if a guardian *ad litem* was appointed and defended for him. It was, in such a case, merely erroneous. The rights of the infant were regarded as under the ægis of the court. *U. S. Bank v. Cockran*, 9 Dana (Ky.) 397; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102. The law-making power, however, with the view, doubtless, of affording greater security to the rights of the infant, provided in the Code of 1851 that the infant should be summoned; and, if under fourteen, that service should also be had upon either his father or guardian, if any." *Cheatham v. Whitman*, 86 Ky. 614.

In *Bulow v. Witte*, 3 S. Car. 308, the court said that under the former equity procedure there was no prescribed mode of making an infant a party defendant except his appearance by a guardian *ad litem* appointed by the court for that purpose—neither service of a subpoena *ad respondendum* on the infant nor an answer put in by him was essential, though both were usual. See also *Finley v. Robertson*, 17 S. Car. 440. And see *infra*, III. 3. *f. (2) Appointment of Guardian Ad Litem Before Service of Process.*

1. See, in general, article PUBLICATION.

**Alabama.**—*Walker v. Hallett*, 1 Ala. 379; *Hodges v. Wise*, 16 Ala. 509; *Irwin v. Irwin*, 57 Ala. 614.

**What Record Should Show.**—Where there are nonresident infant defendants, it is indispensable that the record should disclose publication made pursuant to the rules of practice. *Coster v. Georgia Bank*, 24 Ala. 37; *Clark v.*

*Gilmer*, 28 Ala. 265; *Walker v. Hallett*, 1 Ala. 379; *Erwin v. Ferguson*, 5 Ala. 158; *Walker v. Mobile Bank*, 6 Ala. 452.

**Reversal for Error Not Assigned.**—When nonresident infant defendants are not properly brought in as parties, the decree will be reversed by the appellate court, and the cause remanded, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error. *Clark v. Gilmer*, 28 Ala. 265.

**California.**—*Emeric v. Alvarado*, 64 Cal. 529.

**Affidavit for Publication.**—Where the minor is fourteen years of age, and resides outside of the state, if his residence is known to plaintiff, such residence should be stated in the affidavit for publication in order that a copy of the summons may be mailed to him, and a failure to deposit in the post-office a copy of the complaint and summons directed to such minor is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 Cal. 616.

**Georgia.**—*Gefken v. Graef*, 77 Ga. 342.

**Illinois.**—*McDermaid v. Russell*, 41 Ill. 489; *Hickenbotham v. Blackledge*, 54 Ill. 316.

**Indiana.**—*Martin v. Starr*, 7 Ind. 225.

**Kansas.**—*Armstrong v. Wyandotte Bridge Co.*, *McCahon* (Kan.) 166; *Walkenhorst v. Lewis*, 24 Kan. 420.

**Missouri.**—See *Bryan v. Kennett*, 113 U. S. 179.

**Nebraska.**—**Affidavit for Publication.**—An infant residing with its mother, who is a widow and a resident of another state, will not be presumed to have a guardian residing in this state, and in a suit against such infant for the purpose of foreclosing a mortgage on real estate situated in this state, it will be sufficient to state in the affidavit for service of notice by publication: "That said — are nonresidents of the state of Nebraska, and that service of a summons cannot be made upon them in this state." *Davis v. Huston*, 15 Neb. 28.

service by publication does not expressly include nonresident minors,<sup>1</sup> but there is at least one decision to the contrary.<sup>2</sup>

(2) *Appointment of Guardian Ad Litem by Commissioners.*— It has been held that nonresident infant defendants may be brought before a court of equity and subjected to its jurisdiction by the appointment of guardians *ad litem* by commissioners appointed by the court for that purpose and the taking of answers by such guardians.<sup>3</sup>

**New York** — *Resident Minor Temporarily Absent.* — In *Potter v. Ogden*, 136 N. Y. 393, it was held that service by publication upon a resident minor temporarily absent in Canada was void, as was also personal service upon such minor, while outside of the jurisdiction.

**North Carolina.** — *Ward v. Lowndes*, 96 N. Car. 367.

**South Carolina.** — Code, § 156, providing for service by publication upon nonresidents, provides that where publication is ordered, personal service of the summons out of the state is equivalent to publication and deposit in the post-office. It is also expressly declared that "in case of minors in like cases, a similar order shall be made and like proceedings had as in the case of adults." Under this statute it has been held that an acknowledgment of service out of the state by a nonresident is equivalent to personal service, and is sufficient in the case of adults, but that a nonresident minor cannot accept service, and thus dispense with the necessity of publication, and also that an order of publication is essential even when personal service is made. *Riker v. Vaughan*, 23 S. Car. 187. See also *Bailey v. Whaley*, 14 Rich. Eq. (S. Car.) 81.

**1. Publication Under Statute Not Mentioning Minors.** — In *Bryan v. Kennett*, 113 U. S. 179 (in error to the Circuit Court for the Eastern District of Missouri), it was held that nonresident infants could be proceeded against by publication under a statute authorizing service by publication upon adults, but which was silent upon the subject of minors.

In *Gefken v. Graef*, 77 Ga. 342, the court said: "The Code, section 4185, enacts that if the defendant does not reside in this state, service of the bill or any order of the court may be made by publication. The language of the statute is, 'a defendant who resides out of the state,' and it can make no differ-

ence that the defendant may be a minor; he may be served by publication as therein provided. The mode of service provided by section 3263 (a) of the Code applies only to minors resident within this state, and not to nonresident minors, who fall within the provision of section 4185 of the Code. To hold otherwise would be to deprive a court of equity of the power to make proper parties and bring all persons interested in the subject-matter of the suit before the court, so that full and complete justice may be done between all the parties interested."

**2.** See *Bailey v. Whaley*, 14 Rich. Eq. (S. Car.) 81, where it was held that an infant defendant who is absent from the state cannot be made a party by publication of notice under a statute providing for service by publication upon nonresidents, but not expressly mentioning infants. This was upon the ground that decrees *pro confesso* cannot be taken against infants, and the service would therefore be wholly nugatory if the infant failed to appear.

**3.** *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260. In this case the court said: "It is true there was no service of subpoena upon either the appellee or his sister, but there was what the law recognizes as a substitute for such service, and that is the appointment of a guardian *ad litem* by commissioners appointed by the court, and the taking of an answer by such guardian. And in the case of a nonresident infant defendant that would appear to be the most feasible method in practice, both in England and in this country, of bringing the infant defendant before the court and rendering him subject to its jurisdiction. This is fully shown by Chancellor Bland in the case of *Snowden v. Snowden*, 1 Bland (Md.) 552, and the precedents cited by him. The decree sought by the creditor's bill was not a personal decree against the infant defendants, but was a decree to affect and charge real property in which they

g. RETURN OF SERVICE. — The return is the means by which the court is to be informed of the legality of service. It should therefore show the exact manner of service, and must affirmatively show everything necessary to constitute a valid service.<sup>1</sup> Thus it must show, when defendants are within the age fixed by statute, that service was made upon the person who stands next to

were supposed to have an interest; and that being the case, it would seem to be fully covered and concluded by the decision in the case of *New York L. Ins. Co. v. Bangs*, 103 U. S. 440, and cases there cited." But see *infra*, III. 3. g. (11) *Appointment by Commission*.

1. See, in general, article RETURNS.

*Alabama*. — If a bill makes infants parties defendant, it should state whether they are believed to be over or under fourteen years of age, and the return of the process should show how it was executed, whether on parent or parents, or general guardian, or the person or persons having the maintenance or charge of the infants. *Carter v. Ingraham*, 43 Ala. 78.

The return of the officer executing the summons must show, if the parent is also a defendant, that service was made upon him for the infant, and it is the better practice that this should appear in all cases. *Cook v. Rogers*, 64 Ala. 406. See also *Hodges v. Wise*, 16 Ala. 509; *Estes v. Bridgforth*, (Ala. 1897) 21 So. Rep. 512.

*California*. — *Richardson v. Loupe*, 80 Cal. 491.

*Iowa*. — Where the service is not upon the father, mother, or guardian, it should appear from the return that neither father, mother, nor guardian is within the state (as to this, see Mississippi cases cited *infra*), and that there is no guardian on whom service could be made. *Allen v. Saylor*, 14 Iowa 435.

But where the minor children had no guardian except their mother, who was their natural guardian, and they lived with her, and she had the care and control of them, and both she and they were personally served, the judgment will not be held void collaterally for the omission of the return to say that the person served was the mother of the other infant defendants. *Moomey v. Maas*, 22 Iowa 380.

As to the sufficiency of return where the service upon the minor was by leaving a copy of the summons at his residence, see *Dohms v. Mann*, 76 Iowa 723.

*Kentucky*. — In *Donaldson v. Stone*,

(Ky. 1889) 11 S. W. Rep. 462, the summons required E. L. S. and ——— S., an unchristened infant, to appear and answer, and the return of the officer that the service was made on E. L. S. by delivering a true copy thereof to the father, and saying nothing of the manner of execution of the summons on the infant unnamed, was held a sufficient service on the latter, under a statute requiring service of the summons on an infant to be made on the father.

*Mississippi*. — If the mother be a co-defendant and she and her infant child are summoned in one process, her relationship appearing on the face of it, a return thereof showing that a copy was delivered to each will be sufficient. *McIlvoy v. Alsop*, 45 Miss. 365.

It was at one time held in this state that a return showing personal service on an unmarried infant is insufficient, unless it also showed that the infant had no father, mother, or guardian in the state. *Ingersoll v. Ingersoll*, 42 Miss. 155; *Mullins v. Sparks*, 43 Miss. 129; *Price v. Crone*, 44 Miss. 571. But these decisions were disapproved in *Erwin v. Carson*, 54 Miss. 282, and it was held that in such case the return need only show that the infant had no father, mother, or guardian in the county; the sheriff not being supposed to have any information on the subject outside of his county, and the fact that there is no father, mother, or guardian in the state must be shown otherwise than by the return in order to confer jurisdiction to appoint a guardian *ad litem*, and should be recited in the decree. *Erwin v. Carson*, 54 Miss. 282; *Moody v. McDuff*, 58 Miss. 751.

*Nebraska*. — See *Parker v. Starr*, 21 Neb. 680; *Davis v. Huston*, 15 Neb. 28.

*Ohio*. — Where a minor is found within the jurisdiction the presumption is that one of the persons upon whom service is required to be made is also to be found therein, and unless the return shows the contrary, service on the minor will not be sustained. *Keys v. McDonald*, 1 Handy (Ohio) 287. See *Davis v. Huston*, 15 Neb. 28.

the minors. If it merely recites that the process was served by delivering a copy to each of the persons named in it, the presumption that service is made on any other person than the infant defendants is negated.<sup>1</sup> So a return merely stating that the process was "executed in full,"<sup>2</sup> or "served," or "executed," is at least irregular.<sup>3</sup>

*h. WAIVER OF PROCESS AGAINST INFANTS—(1) By Infant Himself.* — In cases where an infant is entitled to be served with process he can neither waive nor accept service.<sup>4</sup>

*(2) By General Guardian.* — Nor, in most states, can service be waived or accepted for him by his general guardian,<sup>5</sup> although

1. *Beverly v. Perkins*, 1 Duv. (Ky.) 251.

2. *Carter v. Ingraham*, 43 Ala. 78.

3. In *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485, the return of "served" was held sufficient to uphold the decree. In *Rigby v. Lefevre*, 58 Miss. 639, the return of "executed" was held irregular, but sufficient to sustain a decree upon collateral attack.

4. *Winston v. McLendon*, 43 Miss. 254; *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585; *Marshall v. Rose*, 86 Ill. 374; *Armstrong v. Wyandotte Bridge Co., McCahon (Kan.)* 166; *Riker v. Vaughan*, 23 S. Car. 187; *Whitesides v. Barber*, 24 S. Car. 373; *Finley v. Robertson*, 17 S. Car. 439; *Genobles v. West*, 23 S. Car. 154; *Bass v. Bass*, 78 N. Car. 374; *Johnson v. Futrell*, 86 N. Car. 123; *Nicholson v. Cox*, 83 N. Car. 44; *Taylor v. Walker*, 1 Heisk. (Tenn.) 734.

**Reason for Rule.** — "An infant cannot accept service, for the reason that when without a general guardian no proceedings can be had without a guardian appointed *ad litem*, and no such guardian can be appointed by a court except in conformity to our statute, which, as construed by this court, is mandatory, that such appointment can only be made after personal service." *Nicholson v. Cox*, 83 N. Car. 46.

**Irregularity Waived by Answer.** — In *Turner v. Douglass*, 72 N. Car. 127, it was held that any irregularity on the part of the sheriff in serving a summons is waived by the defendant's answer, although such defendant be an infant.

**Presumption in Support of Jurisdiction.** — "The practice of proceeding with a cause when a written acknowledgment of service signed by the defendant is indorsed upon the process, in like manner as when service is returned by the

officer to whom the process is directed, has been uniform and universal in this state, and its regularity and sufficiency are not open to question. It is true, the genuineness of the entry as the act of the defendant must be made to appear to the court in which the action is depending, and, to have legal force, must proceed from one possessing capacity to do the act, in order to the validity and binding effect of subsequent proceedings upon the defendants. But when the court proceeds with a cause in which the defendants are thus made parties, it must be assumed that the genuineness of the entry was satisfactorily shown, without any express adjudication of the fact appearing in the record." *Johnson v. Futrell*, 86 N. Car. 123; *Nicholson v. Cox*, 83 N. Car. 44.

5. *Alabama.* — *Irwin v. Irwin*, 57 Ala. 614. But see *Smith v. Smith*, 21 Ala. 761.

*Arkansas.* — *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235.

*Missouri.* — *Gibson v. Chouteau*, 39 Mo. 536; *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585.

*Illinois.* — *Greenman v. Harvey*, 53 Ill. 386; *Clark v. Thompson*, 47 Ill. 25; *Crocker v. Smith*, 10 Ill. App. 376. A statute providing that a guardian shall appear for and represent his ward in all legal suits and proceedings does not authorize the guardian to enter and appear for a ward who has not been served with process. *Dickison v. Dickison*, 124 Ill. 483.

*New York.* — In *Coughlin v. Fay*, 68 Hun (N. Y.) 521, the court, in holding that a general guardian had no power under the statute to submit an agreed controversy to the court for a decision, said that they were aware of no way in which the court could acquire jurisdiction of infants except by action brought



in a few states the rule is settled otherwise.<sup>1</sup>

(3) *By Guardian Ad Litem*. — So a guardian *ad litem* appointed in the suit cannot waive service of process on the minor.<sup>2</sup>

(4) *By Attorney*. — Neither can a minor be brought into court by stipulation of attorneys,<sup>3</sup> and an appearance by attorney without service of process will not confer jurisdiction.<sup>4</sup>

on behalf of the infant or by the service of a summons upon the infant. But see *Rogers v. McLean*, 34 N. Y. 536, where a nonresident infant lunatic was allowed to appear by his committee without service either personally or by publication.

*North Carolina*. — *White v. Albertson*, 3 Dev. L. (N. Car.) 242, holding that the admission of service of process by the guardian for his ward renders the judgment erroneous, but not void and collateral assailable.

1. *California*. — The appearance of an infant defendant by his general guardian, who defends on his behalf, will confer jurisdiction over the person of the infant, although he was not personally served with process. *Smith v. McDonald*, 42 Cal. 484; *Richardson v. Loupe*, 80 Cal. 491; *Gronfier v. Puy-mirol*, 19 Cal. 629; *Western Lumber Co. v. Phillips*, 94 Cal. 54.

*Stare Decisis*. — In *Emeric v. Alvarado*, 64 Cal. 597, the court said that the decisions in that state, holding that an appearance by a general guardian was sufficient to confer jurisdiction over the minor, had stood so long as correct rulings that it would hardly undertake to overrule them.

*Kentucky*. — In *Banta v. Calhoun*, 2 A. K. Marsh. (Ky.) 166, it is held that if the guardian appears it is not necessary that process should have been served upon the infant.

*Ohio*. — A general guardian may waive process and enter his appearance for his wards in a proceeding by an administrator to sell land. *Sprague v. Litherberry*, 4 McLean (U. S.) 442.

*South Carolina*. — *Where Guardian Is Hostile*. — Acceptance of service by the general guardian, who is also the plaintiff, is insufficient. *Morgan v. Morgan*, 45 S. Car. 323. See also *Bulow v. Witte*, 3 S. Car. 308; *Walker v. Veno*, 6 S. Car. 459; *Rollins v. Brown*, 37 S. Car. 345.

*Tennessee*. — In this state a regular guardian may appear for infants, and may waive service of process even where their realty is involved. *Scott v. Porter*, 2 Lea (Tenn.) 224; *Cowan v.*

*Anderson*, 7 Coldw. (Tenn.) 284; *Mason v. Swan*, 6 Heisk. (Tenn.) 450; *Britain v. Cowen*, 5 Humph. (Tenn.) 315.

In *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284, it was said that if personal service upon the ward was essential to the jurisdiction of the court the regular guardian could not waive it for him, but that, it being well settled in Tennessee that notice to the guardian alone was sufficient, he could waive the service of notice upon himself. See also *supra*, III. 1. *d. Service on Parent or Guardian Alone*.

2. *Illinois*. — *Chambers v. Jones*, 72 Ill. 275; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Clark v. Thompson*, 47 Ill. 25.

*Indiana*. — *Abdil v. Abdil*, 26 Ind. 288; *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Robbins v. Robbins*, 2 Ind. 74; *Pugh v. Pugh*, 9 Ind. 132; *Peoples v. Stanley*, 6 Ind. 410; *Hawkins v. Hawkins*, 28 Ind. 66.

*Iowa*. — *Good v. Norley*, 28 Iowa 188.

*Tennessee*. — *Rucker v. Moore*, 1 Heisk. (Tenn.) 726; *Frazier v. Pankey*, 1 Swan (Tenn.) 75; *Taylor v. Walker*, 1 Heisk. (Tenn.) 738; *Robertson v. Robertson*, 2 Swan (Tenn.) 197; *Wheatley v. Harvey*, 1 Swan (Tenn.) 484; *Crippen v. Crippen*, 1 Head (Tenn.) 128. But see *Hopper v. Fisher*, 2 Head (Tenn.) 256.

*Appearance and Answer of Guardian Ad Litem Not a Waiver*. — "Although if a party who is *sui juris* voluntarily appear and file his answer to a bill, it will be a waiver of the service of process, and he will be held to be a party, yet such a result does not follow where the answer of infants is filed by a guardian *ad litem*." *Frazier v. Pankey*, 1 Swan (Tenn.) 75. To the same effect, see *Crippen v. Crippen*, 1 Head (Tenn.) 128.

3. *McDermaid v. Russell*, 41 Ill. 489; *Russell v. Texas*, etc., R. Co., 68 Tex. 646.

4. *Evans v. Davies*, 39 Ark. 235; *Brown v. Downing*, 137 Pa. St. 569.

The infant cannot be bound by an at-

i. SERVICE ON CROSS-COMPLAINT. — After an infant is properly brought into court it is not necessary that he should be served upon a cross-complaint filed by another party to the action.<sup>1</sup> But it has been held that this rule does not apply in favor of an unsued intervener.<sup>2</sup>

j. REVIVOR OF ACTIONS AGAINST INFANTS. — Actions against infants are revived substantially in the same manner as actions against adults. Thus it has been held that they may be brought into court and the case continued against them by motion and order of court without issuance of a summons.<sup>3</sup> But the

torney; hence, when an infant defendant to a bill has not been properly brought in, his pleading, signed by an attorney, though purporting to act as solicitor for all the defendants, does not bring the infant into court nor amount to an appearance by him. *McIntosh v. Atkinson*, 63 Ala. 241. See also *supra*, I. 10. b. *Representation by Attorney*.

1. *Peak v. Percifull*, 3 Bush (Ky.) 218; *Pillow v. Sentelle*, 49 Ark. 430; *Deering v. Hurt*, (Tex. 1886) 2 S. W. Rep. 42; *Treiber v. Shafer*, 18 Iowa 29. See, as to process generally on cross bills and complaints, articles CROSS-BILLS, vol. 5, p. 658; CROSS-COMPLAINTS, vol. 5, p. 683.

2. Rendering a decree against infants without legal notice or defense, and rendering a judgment in favor of an unsued intervener without service of process on, or appearance to, his cross-petition, without any order making him a party, are reviewable errors and good cause for revision and relief by the circuit court without first appealing to the court of appeals. *Peak v. Percifull*, 3 Bush (Ky.) 218.

But see *Deering v. Hurt*, (Tex. 1886) 2 S. W. Rep. 42, where it is held that after the appearance and answer of a guardian *ad litem*, the infant is in court for all the purposes of the suit, and is charged with notice of all new pleadings that may be filed, either by the original parties or others who may come into the case.

3. *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235; *Lyles v. Haskell*, 35 S. Car. 391; *Emeric v. Alvarado*, 64 Cal. 596.

"It is unnecessary to issue a summons to bring in the infant parties. It might be done on motion under section 385, Code of Civil Procedure (Prac. Act, § 16). This section, as it stood in the Practice Act, was somewhat modified by the Code of Civil Procedure,

section 385, from what it was as originally framed, and was further modified in 1874, but these changes do not affect the question here. Under the section, as it stood in the Practice Act, or under any of its subsequent modifications, the infants might have been made parties, and the suit continued against them on motion. The motion and order were sufficient. See *Allen v. Walter*, 10 Abb. Pr. (N. Y. C. Pl.) 379; *Coon v. Knapp*, 13 How. Pr. (N. Y. Supreme Ct.) 175; *Gordon v. Sterling*, 13 How. Pr. (N. Y. Supreme Ct.) 405; *Greene v. Bates*, 7 How. Pr. (N. Y. Supreme Ct.) 206. In *Gordon v. Sterling*, above cited, infant defendants were thus brought in in an action for partition, and it was held regular under section 121 of the New York Code of Practice, which as to this question is the same as ours. This section 121 provides that if the motion is not made within a year after the death a supplementary complaint was necessary. In *Gordon v. Sterling*, the motion was within the year. It is therefore on all fours with this case as regards the question presented. The order continuing the case as against the infant defendants should have been served, and no doubt was. They appeared in the case and answered regularly. This is sufficient. *McCreery v. Everding*, 44 Cal. 286. The only objection to the proceeding appearing in the bill of exceptions in the case before us is that no summons was served on the infants. The above, in our opinion, disposes of this point." *Emeric v. Alvarado*, 64 Cal. 596.

*Contra*. — In *Tennessee*, in case of the death of a party defendant before answer filed, leaving an infant representative, a subpoena accompanied with a copy of the bill should issue to bring in the infant. *Lewis v. Outlaw*, 1 Overt. (Tenn.) 140.

A revivor on motion, at the term

order of revivor must be served upon them.<sup>1</sup> And it has been held that until such service their guardian has no power to enter their appearance.<sup>2</sup> And no guardian *ad litem* can be appointed.<sup>3</sup>

*b. COLLATERAL ATTACK.* — In the absence of anything in the record to show that infant defendants were not properly served, the judgment cannot be collaterally attacked upon that ground,<sup>4</sup> but it will be presumed that service was properly made.<sup>5</sup> A

when the death of the ancestor is proved, against his widow and heirs at law is void, and a scire facias issued afterwards to warn them is a nullity. As to infants, such a proceeding will not authorize the appointment of a guardian *ad litem*, and his appointment and answer will confer no jurisdiction. *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

In *Alabama*, where suit is revived against infant heirs, a summons must issue and must be served as required by the 23d rule of Chancery Practice upon the parent or guardian. *Wells v. American Mortg. Co.*, 109 Ala. 430.

1. *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235; *Lyles v. Haskell*, 35 S. Car. 391; *Emeric v. Alvarado*, 64 Cal. 529.

2. *Haley v. Taylor*, 39 Ark. 104.

3. *Evans v. Davies*, 39 Ark. 235.

4. *Sumner v. Sessoms*, 94 N. Car. 371; *Hare v. Hollomon*, 94 N. Car. 14. Generally, as to collateral attack on judgments for want of service or defects in service of process, see articles JURISDICTION; SERVICE OF PROCESS.

**Effect of Finding or Recital.** — The judgment of a court as to the sufficiency of notice can only be questioned on appeal, and cannot be attacked collaterally. *Tharp v. Brennehan*, 41 Iowa 251.

The judgment of a court of general jurisdiction recited an appearance by minor defendants, an adjudication that they were minors, the appointment of a guardian *ad litem*, and his appearance and defense for them. It was held that the fact that the minors were not really cited personally, even if sufficient to cause a reversal of the judgment on direct proceedings, furnished no ground for attacking the judgment in a collateral proceeding. *McAnear v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *Kremer v. Haynie*, 67 Tex. 450.

A recital of due service in a decree is conclusive collaterally. *Cocks v. Simmons*, 57 Miss. 183.

**Recital Not Conclusive, but Merely Prima Facie.** — "The judgment contained a recital that said infants had been served with the supplementary summons in the action on March 11, 1878, and such recital was *prima facie* evidence of the truth of that fact. But it was not conclusive, and the defendant was at liberty to show that service of the summons was not in fact made." *Smith v. Reid*, 134 N. Y. 568 [citing *Potter v. Merchants' Bank*, 28 N. Y. 641; *Bosworth v. Vandewalker*, 53 N. Y. 597; *Ferguson v. Crawford*, 70 N. Y. 253].

**Necessity of Affirmative Showing of Jurisdiction in Record.** — But to the effect that the record must affirmatively show due service, in order to protect the judgment from collateral attack, see *Herdman v. Short*, 18 Ill. 59; *Whitney v. Porter*, 23 Ill. 445; *Fischer v. Siekmann*, 125 Mo. 165.

In a direct proceeding a recital of due service is insufficient to show affirmatively the nonexistence of father, mother, or guardian, where such nonexistence is essential to the validity of service upon the infant alone. *Cocks v. Simmons*, 57 Miss. 183; *Crawford v. Redus*, 54 Miss. 700; *Billups v. Brander*, 56 Miss. 495.

**5. Presumption on Collateral Attack.** — Where the record of a petition for partition and the decree failed to show service of process upon the minor defendants, it was held that service on the minors, in the absence of record evidence to the contrary, would be presumed. *Benefield v. Albert*, 132 Ill. 665.

The judgment of a probate court, regular on its face and showing proper service on the parties to it, cannot be contradicted by parol testimony in collateral proceedings; or, from the judgment itself, it may be that the court would presume that the summons had been properly issued and served. *Tedgerall v. Bouknight*, 25 S. Car. 275.

In *Nichols v. Mitchell*, 70 Ill. 258, it was held that where the proceedings

court will not presume that an officer in the service of process failed to discharge a plain duty imposed upon him by law, or infer facts inconsistent with his return, in order to divest rights acquired under it, or defeat the judgment of a court of competent jurisdiction.<sup>1</sup> Where, however, the record itself shows failure to duly serve the infant, the judgment is void, and may be collaterally attacked.<sup>2</sup>

2. **Appearance.** — See article APPEARANCE, vol. 2, p. 588.

3. **Guardians Ad Litem** — *a.* **DEFINITION AND NATURE OF OFFICE.** — A guardian *ad litem* has been defined to be a person appointed by a court of justice to prosecute or defend for an infant, in any suit to which he may be a party.<sup>3</sup> He is most commonly appointed for infant defendants; infant plaintiffs generally suing by next friend;<sup>4</sup> though it would seem from the authorities that there is but little substantial difference between the office of a next friend, or a *prochein ami*, and that of a guardian *ad litem*.<sup>5</sup>

for partition are in chancery service must be on the minor, and where the proceedings are under the statute service on the guardian *ad litem* is sufficient, and that where a decree of partition and sale thereunder are questioned collaterally the case will be considered as in chancery or under statute, whichever will sustain the decision of the court.

In *Harvey v. Harvey*, 25 S. Car. 283, it was held that it might be presumed that a summons was issued and served, although the record failed to show that the petition prayed for any process to bring infants into court, or that any summons was issued at all, or that notice was given of the appointment of a guardian *ad litem*; but it was further held that it sufficiently appeared from the record in that case that summons had not been properly served.

1. *Pursley v. Hayes*, 22 Iowa 11; *Parker v. Starr*, 21 Neb. 682.

2. *Tederall v. Bouknight*, 25 S. Car. 275; *New York L. Ins. Co. v. Bangs*, 103 U. S. 435; *Whitney v. Porter*, 23 Ill. 445; *Moore v. Starks*, 1 Ohio St. 369.

3. 2 Stephen's Com. 342; *Black's Law Dict.*, title *Guardian Ad Litem*.

**Other Definitions.** — A guardian *ad litem* is a person appointed by a court to look after the interests of an infant when his property is involved in litigation. *Anderson's Law Dict.*, title *Guardian Ad Litem*. See also *New York L. Ins. Co. v. Bangs*, 103 U. S. 438; *Colt v. Colt*, 111 U. S. 578.

A guardian *ad litem* is a guardian

appointed to represent the ward in legal proceedings in which he is a party defendant. *Bouvier's Law Dict.*, title *Guardian Ad Litem*.

A guardian *ad litem* is a person appointed by a court to prosecute or defend an action or other proceeding, on behalf of an infant, or lunatic, or idiot, who is plaintiff, defendant, or respondent to a proceeding in the court. *Rapalje & Lawrence's Law Dict.*, title *Guardian Ad Litem*.

4. See article NEXT FRIEND. See also *Sharp v. Findley*, 59 Ga. 729.

5. *Sharp v. Findley*, 59 Ga. 729.

**Distinction between Next Friend and Guardian Ad Litem.** — "At common law infants could neither sue nor defend, except by guardian; by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. *Fitz N. B.* 27 H. & L. But by analogy to Stat. West. 2d (13 Edw. I.), c. 15, the court in all cases appoints a *prochein ami*, as its officer, to conduct the suit for the infant, and to look after his interests. No appointment or subsequent confirmation by the infant is necessary, and he cannot disavow the action. *Morgan v. Thorne*, 7 M. & W. 400. But he may apply to the court, who may remove him at their discretion. *Goodwin v. Moore*, Cro. Car. 161. The power of appointing a guardian *ad litem* is said to be incident to all courts. *Co. Litt.* 89 a, n.

**General Duties of Guardian** — In a general way, this guardian is to do what, with riper judgment, the infant would do for himself. He is to appear for him in his proper person; employ competent attorneys and counsel to prepare and plead his cause; he is to collect testimony, summon witnesses, and at the trial to afford such aid to his counsel as may be necessary in unexpected difficulties.<sup>1</sup> He is also the person on whom the complainant may serve the various notices and rules that may be made in the progress of the suit, so that no exception may be afterwards taken for the want of legal service.<sup>2</sup>

**b. GUARDIAN AD LITEM AS A PARTY AND AS AN OFFICER OF COURT.** — A guardian *ad litem* is not in the general sense a legal party to the action, although his name appears upon the record;<sup>3</sup>

70; 3 Bl. Com. 427; 2 Kent's Com. 229. But a distinction has always been made between the office of a guardian and that of a *prochein ami*. In the case of *Simpson v. Jackson*, Cro. Jac. 640, in error, the defendant in the suit appeared by *prochein ami* and pleaded, and the error assigned was that he ought to have been permitted to plead by his guardian and not by *prochein ami*. The court held that a guardian and *prochein ami* were distinct; that either might be admitted for the plaintiff; but that when an infant is to defend a suit in an action, real or personal, it ought to be always by guardian, and the guardian ought to be admitted by the court, who may answer his misleading, if there should be cause; and the defendant ought always to appear by guardian, and not by *prochein ami*; and for this cause the judgment was reversed. In Co. Litt. 135, *b*, it is said that an infant shall sue by *prochein ami*, and defend by guardian." *Clarke v. Gilmanton*, 12 N. H. 515.

"Whenever the rights of others are sought to be enforced against an infant, by a judicial proceeding the court first attempts to secure him full means of defense by the appointment of a guardian *ad litem*, who occupies the same relation, if not a more immediate and direct one, to the infant as the *prochein ami* does, who is appointed to protect the interests of a minor seeking redress against others for a violation of his rights." *Bulow v. Witte*, 3 S. Car. 322.

For a general discussion as to the origin of guardians *ad litem*, see *Mercer v. Watson*, 1 Watts (Pa.) 348.

1. *Mercer v. Watson*, 1 Watts (Pa.) 349.

An infant defendant is made amena-

ble to the jurisdiction by the appointment of a special guardian, who for all purposes represents the infant in the suit. *Burrus v. Burrus*, 56 Miss. 92; *Bailey v. Fitz-Gerald*, 56 Miss. 578; *Saxon v. Ames*, 47 Miss. 566; *Mullins v. Sparks*, 43 Miss. 129; *Winston v. McLondon*, 43 Miss. 257.

2. *Clarke v. Gilmanton*, 12 N. H. 515.

3. *Tate v. Mott*, 96 N. Car. 19; *Brown v. Hull*, 16 Vt. 673; *Anonymous*, 2 Hill (N. Y.) 417; *Bartlett v. Batts*, 14 Ga. 539; *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619; *Morgan v. Thorne*, 7 M. & W. 400; *Sinclair v. Sinclair*, 13 M. & W. 640.

**General Guardian Appearing for Ward.**

— Where a general guardian appears to manage and take care of the interests of his ward, as in some states he is permitted to do, he does not thereby become a party to the action; and, indeed, he cannot be joined with his ward as a party defendant where the cause of action affects only the interest of the ward, and he may demur in such case on the ground that the complaint states no cause of action against him. *O'Shea v. Wilkinson*, 95 Cal. 454.

**Appointment Not a Change of Parties.**

— In *Emeric v. Alvarado*, 64 Cal. 513, it was held that a statute providing that an order relating to a change of parties should form part of the judgment roll did not require an order appointing a guardian *ad litem* to form part of the judgment roll.

**The Relationship of the Judge to the Guardian Ad Litem** will not disqualify the former from sitting in the case, the statute referring only to relationship to "a party." *Bryant v. Livermore*, 20 Minn. 313; *McDonald v. McDonald*, 24 Ind. 68.

but he is a party within the meaning of a statute requiring writs to be indorsed by the party, his agent or attorney.<sup>1</sup>

**Officer of Court.** — A guardian *ad litem* is properly regarded as an officer of the court appointing him.<sup>2</sup>

**c. NECESSITY AND PROPRIETY OF APPOINTMENT** — (1) *Statement of Rule.* — It is an almost universal rule that where an infant is a defendant a guardian *ad litem* must be appointed for him to conduct the defense.<sup>3</sup> The reason of this rule is plain,

1. Crossen *v.* Dryer, 17 Mass. 222. See also Harrison *v.* Meredith, 3 J. J. Marsh. (Ky.) 220, where the court said that a guardian *ad litem* was virtually a party.

2. In Sinclair *v.* Sinclair, 13 M. & W. 640, Pollock, C. B., said: "It appears to me that the view taken by this court in Morgan *v.* Thorne, 7 M. & W. 400, is perfectly correct, that he is not a party, but is merely to be considered as an officer of the court, specially appointed by them to look after the interests of the infant." See also Bulow *v.* Witte, 3 S. Car. 322; Sharp *v.* Findley, 59 Ga. 729. See also cases cited, note 1, *supra*.

3. *Alabama.* — Revised Code, § 2526; Rhett *v.* Mastin, 43 Ala. 86; McIntosh *v.* Atkinson, 63 Ala. 241; Griffith *v.* Ventress, 91 Ala. 366; Irwin *v.* Irwin, 57 Ala. 614.

*Arkansas.* — Hodges *v.* Frazier, 31 Ark. 58; Bonner *v.* Little, 38 Ark. 397.

*Florida.* — Thompson *v.* McDermott, 19 Fla. 852; Brock *v.* Doyle, 18 Fla. 172; State *v.* Mitchell, 29 Fla. 302.

*Georgia.* — Nicholson *v.* Wilborn, 13 Ga. 467.

*Illinois.* — Enos *v.* Capps, 12 Ill. 255; McDaniel *v.* Correll, 19 Ill. 226; Peak *v.* Shasted, 21 Ill. 137; Quigley *v.* Roberts, 44 Ill. 503; Kesler *v.* Penninger, 59 Ill. 134; Bursen *v.* Goodspeed, 60 Ill. 277; Tibbs *v.* Allen, 27 Ill. 119; Lemon *v.* Sweeney, 6 Ill. App. 507; Hall *v.* Davis, 44 Ill. 494; Crocker *v.* Smith, 10 Ill. App. 376.

*Indiana.* — Hough *v.* Canby, 8 Blackf. (Ind.) 301; De La Hunt *v.* Holderbaugh, 58 Ind. 285; Wetherill *v.* Harris, 67 Ind. 452; Timmons *v.* Timmons, 6 Ind. 8.

*Kansas.* — Patton *v.* Furthmeyer, 16 Kan. 29.

*Kentucky.* — Rowland *v.* Cock, 1 J. J. Marsh. (Ky.) 453; Chalfant *v.* Monroe, 3 Dana (Ky.) 36; Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; Meredith *v.* Sanders, 2 Bibb (Ky.) 101; Beeler *v.* Bullitt, 4 Bibb (Ky.) 12; Shaefer *v.* Gates, 2 B.

Mon. (Ky.) 453; Cook *v.* Totton, 6 Dana (Ky.) 108; Graham *v.* Sublett, 6 J. J. Marsh. (Ky.) 45; Shields *v.* Bryant, 3 Bibb (Ky.) 525; Ewing *v.* Armstrong, 4 J. J. Marsh. (Ky.) 69; Letcher *v.* Letcher, 2 A. K. Marsh. (Ky.) 158; Searcey *v.* Morgan, 4 Bibb (Ky.) 96; Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468; Bustard *v.* Gates, 4 Dana (Ky.) 429; Newman *v.* Kendall, 2 A. K. Marsh. (Ky.) 235; Greenup *v.* Bacon, 1 T. B. Mon. (Ky.) 109.

*Maryland.* — Bush *v.* Linthicum, 59 Md. 344.

*Maine.* — Tucker *v.* Bean, 65 Me. 353; Wakefield *v.* Marr, 65 Me. 341.

*Massachusetts.* — Crockett *v.* Drew, 5 Gray (Mass.) 399; Swan *v.* Horton, 14 Gray (Mass.) 179.

*Michigan.* — Bearinger *v.* Pelton, 78 Mich. 109; Prince *v.* Clark, 81 Mich. 167.

*Mississippi.* — Lee *v.* Jenkins, 30 Miss. 592.

*Missouri.* — Lehew *v.* Brummell, 103 Mo. 546; Gamache *v.* Prevost, 71 Mo. 84.

*New Jersey.* — Foulkes *v.* Young, 21 N. J. L. 438; Lang *v.* Belloff, 53 N. J. Eq. 298.

*New York.* — Alderman *v.* Tirrell, 8 Johns. (N. Y.) 418; Frost *v.* Frost, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167.

*North Carolina.* — Harrison *v.* Harrison, 106 N. Car. 282.

*South Carolina.* — Finley *v.* Robertson, 17 S. Car. 435; Carrigan *v.* Drake, 36 S. Car. 354.

*Tennessee.* — Kelley *v.* Kelley, 15 Lea (Tenn.) 194. But see *infra*, p. 622, as to appearance by general guardian.

*Texas.* — Buchanan *v.* Thompson, 4 Tex. Civ. App. 236; Taylor *v.* Rowland, 26 Tex. 293; Taylor *v.* Whitfield, 33 Tex. 181.

*Vermont.* — Barber *v.* Graves, 18 Vt. 290; Somers *v.* Rogers, 26 Vt. 585; Starbird *v.* Moore, 21 Vt. 529; Fall River Foundry Co. *v.* Doty, 42 Vt. 412.

*Virginia.* — Parker *v.* McCoy, 10

for it is evident that the privileges of an infant with regard to contracts and other transactions would be of slight utility if he were liable to be dragged into court and exposed there, unprotected in his ignorance, to contend with learning and experience. It is to protect him against such danger that the law assigns him a guardian in the suit.<sup>1</sup>

**Suits in Chancery.** — There is no distinction in this regard between actions at law and suits in chancery; a guardian *ad litem* is equally required in both.<sup>2</sup>

Gratt. (Va.) 594; Roberts *v.* Stanton, 2 Munf. (Va.) 129.

*West Virginia.* — McDonald *v.* McDonald, 3 W. Va. 676; Piercy *v.* Piercy, 5 W. Va. 199; Myers *v.* Myers, 6 W. Va. 369.

*Wisconsin.* — McKinney *v.* Jones, 55 Wis. 39.

*United States.* — Carrington *v.* Brents, 1 McLean (U. S.) 167.

*England.* — Simpson *v.* Jackson, Cro. Jac. 640; Frescobaldi *v.* Kinaston, 2 Stra. 783; Colman *v.* Northcote, 7 Jur. 528; *In re* Cleveland, 29 L. J. Ch. 530; *In re* Ward, 2 Giff. 122; *In re* Cooper, 9 W. R. 531, 1 Ridgway, § 38; Jarman *v.* Lucas, 15 C. B. N. S. 474, 109 E. C. L. 474; N— *v.* N—, 31 L. T. N. S. 79.

**Appointment Not a Formality.** — In Rhoads *v.* Rhoads, 43 Ill. 239, the court said that the appointment of a guardian *ad litem* is something more than mere form, although such guardian cannot bind an infant by anything he may do or admit in his answer. See also Mercer *v.* Watson, 1 Watts (Pa.) 348.

**Females Over Eighteen.** — Under a statute providing that when it shall appear that any of the persons required to be made parties defendant are minors under the age of twenty-one years without a guardian, etc., the court shall appoint a guardian *ad litem*, it was held that where by another statute females become of age at eighteen years, a guardian *ad litem* need not be appointed for a female defendant who had attained the age of eighteen, but who was not twenty-one years of age. Bursen *v.* Goodspeed, 60 Ill. 277.

**Answer by Guardian Ad Litem.** — An infant can answer only by a guardian *ad litem*. Tucker *v.* Bean, 65 Me. 353. Although an infant may sue by his next friend, he cannot answer except by guardian *ad litem*. Bush *v.* Linthicum, 59 Md. 344.

**Substitution of Guardian for Attorney by Amendment.** — If a defendant appear by attorney the court will compel an

amendment of the appearance by substituting a guardian. Hindmarsh *v.* Chändler, 7 Taunt. 488, 2 E. C. L. 487.

**North Carolina Curative Act.** — In North Carolina it was held that Code, § 387, curing informalities in proceedings to which infants were parties, was inoperative unless the infant had been represented by a guardian *ad litem*. Harrison *v.* Harrison, 106 N. Car. 282.

1. Mercer *v.* Watson, 1 Watts (Pa.) 348.

2. *Alabama.* — Roach *v.* Hix, 57 Ala. 576; Stammers *v.* McNaughten, 57 Ala. 277; Irwin *v.* Irwin, 57 Ala. 614; Ashford *v.* Patton, 70 Ala. 479; Woods *v.* Montevallo Coal, etc., Co., 107 Ala. 364.

*Florida.* — Thompson *v.* McDermott, 19 Fla. 854; McDermott *v.* Thompson, 29 Fla. 299.

*Georgia.* — Kilpatrick *v.* Strozier, 67 Ga. 247.

*Illinois.* — Hall *v.* Davis, 44 Ill. 494.

*Indiana.* — Hough *v.* Canby, 8 Blackf. (Ind.) 301; Abdil *v.* Abdil, 26 Ind. 287.

*Kentucky.* — Ewing *v.* Armstrong, 4 J. J. Marsh. (Ky.) 69.

*Maine.* — Stinson *v.* Pickering, 70 Me. 273; Wakefield *v.* Marr, 65 Me. 341.

*Massachusetts.* — Crockett *v.* Drew, 5 Gray (Mass.) 399; Swan *v.* Horton, 14 Gray (Mass.) 179; Parker *v.* Lincoln, 12 Mass. 19. But see *infra*, p. 622, to the effect that a guardian *ad litem* is necessary only when the general guardian does not appear or is adversely interested.

*New Jersey.* — Lang *v.* Belloff, 53 N. J. Eq. 298.

*New York.* — Larkin *v.* Mann, 2 Paige (N. Y.) 27.

*North Carolina.* — James *v.* Withers, 114 N. Car. 474.

*Tennessee.* — Rucker *v.* Moore, 1 Heisk. (Tenn.) 726.

*Virginia.* — Roberts *v.* Stanton, 2 Munf. (Va.) 129; Talley *v.* Starke, 6 Gratt. (Va.) 339.

**No Proceeding Without Guardian.** — In either case, no judgment or decree can be rendered until a guardian *ad litem* has been appointed,<sup>1</sup> and it will be erroneous to take any steps in the case, after service of process, until such appointment is made.<sup>2</sup>

**The Statutory Requirements** relative to the appointment of guardians *ad litem* must be strictly followed to bring infants properly before the court.<sup>3</sup>

(2) **Instances Where Necessary.** — In accordance with these principles it has been held that a guardian *ad litem* should be appointed in condemnation proceedings under the right of eminent domain;<sup>4</sup> in proceedings before a justice of the peace;<sup>5</sup> in proceedings to lay out a highway;<sup>6</sup> in criminal proceedings;<sup>7</sup> in

*West Virginia.* — *Hull v. Hull*, 26 W. Va. 1.

*United States.* — *O'Hara v. MacConnell*, 93 U. S. 150.

Infants must sue by *prochein ami*, and defend by guardian. Courts of chancery should always appoint special guardians to defend for infants. *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 69.

**In Foreclosure Suits** against an infant a guardian *ad litem* is always necessary. *Stinson v. Pickering*, 70 Me. 273.

**Cancellation of Deed of Trust.** — In an action to cancel a deed of trust, minors interested should be made parties and guardians *ad litem* appointed to represent them. *James v. Withers*, 114 N. Car. 474.

1. *Rhett v. Mastin*, 43 Ala. 86; *Jarman v. Lucas*, 15 C. B. N. S. 474, 109 E. C. L. 474.

An action at law or a suit in equity for the enforcement of a contract cannot be duly constituted against an infant, without the appointment of a guardian *ad litem*. *Crockett v. Drew*, 5 Gray (Mass.) 399; *Swan v. Horton*, 14 Gray (Mass.) 179.

2. *Alabama.* — *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Irwin v. Irwin*, 57 Ala. 614.

*Illinois.* — *McDaniel v. Correll*, 19 Ill. 226; *Quigley v. Roberts*, 44 Ill. 503; *Kessler v. Penninger*, 59 Ill. 134; *Hall v. Davis*, 44 Ill. 494.

*Indiana.* — *Abdil v. Abdil*, 26 Ind. 287.

*Kentucky.* — *Newman v. Kendall*, 2 A. K. Marsh. (Ky.) 235.

*New York.* — *Arnold v. Sandford*, 14 Johns. (N. Y.) 417; *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167.

*Tennessee.* — *Kelley v. Kelley*, 15 Lea (Tenn.) 194.

*United States.* — *O'Hara v. MacConnell*, 93 U. S. 150; *Nelson v. Moon*, 3 McLean (U. S.) 321; *Carrington v. Brents*, 1 McLean (U. S.) 175.

After infant defendants have been served with process, the suit cannot be further prosecuted until a guardian *ad litem* has been appointed for them. *Lehew v. Brummell*, 103 Mo. 546; *Larkin v. Mann*, 2 Paige (N. Y.) 27.

As to the effect of a failure to appoint a guardian *ad litem*, or of irregularities in the appointment, see *infra*, III. 3. d. *Effect of Failure to Appoint or of Irregular Appointment.*

3. *Carrigan v. Drake*, 36 S. Car. 354. See *infra*, III. 3. d. *Effect of Failure to Appoint or of Irregular Appointment.*

4. **Condemnation Proceedings.** — *Charleston, etc., Bridge Co. v. Comstock*, 36 W. Va. 263, holding such appointment necessary if the infant's general guardian does not make a defense.

5. **Proceedings Before Justices.** — *Starbird v. Moore*, 21 Vt. 529.

On Appeal from a Justice's Court, or courts of like character, a guardian *ad litem* will be appointed for an infant party. *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567, following *Moody v. Gleason*, 7 Cow. (N. Y.) 482.

6. **Highway Proceedings.** — *Clarke v. Gilmanton*, 12 N. H. 515.

7. **Criminal Proceedings.** — In *Fahay v. State*, 25 Conn. 205, it was held that on a criminal prosecution against a minor, it is the duty of the court before whom the prosecution is carried on to see that a guardian is appointed to assist the minor in his defense.

**Contra.** — In criminal cases no guardian is appointed; the court acts as guardian. See *Reeve's Domestic Relations*, 318; *Bouvier's Law Dict.*, title *Guardian Ad Litem*.



trustee process;<sup>1</sup> on bill for divorce;<sup>2</sup> in application by petition;<sup>3</sup> and in bills of revivor.<sup>4</sup> So, where infants are brought into a suit as interveners they should have a *guardian ad litem* appointed for them,<sup>5</sup> and in the case of a counterclaim against an infant plaintiff a *guardian ad litem* is likewise necessary.<sup>6</sup>

In Louisiana, in partition proceedings, minors should be represented by a curator *ad hoc*.<sup>7</sup>

(3) *Instances Where Unnecessary.* — There are certain cases, however, in which a *guardian ad litem* need not be appointed. Thus, a *guardian ad litem* is not necessary where the infants appear as parties plaintiff.<sup>8</sup> So, where an infant's disabilities have been removed, a *guardian ad litem* is unnecessary;<sup>9</sup> and it has been held that in an action to annul a marriage both parties, though minors, can stand in judgment without the intervention of tutors;<sup>10</sup> so it has also been held that a *guardian ad litem* is unnecessary in a proceeding for the appointment of a trustee for a minor.<sup>11</sup>

**1. Trustee Process.** — A minor must defend by a guardian in a trustee process, and the plaintiff must at his peril apply to the court to have a *guardian ad litem* appointed. *Wilder v. Eldridge*, 17 Vt. 226.

A guardian should be appointed for an infant claimant in trustee process. *Keeler v. Fassett*, 21 Vt. 539.

**2. Divorce Proceedings.** — *Wood v. Wood*, 2 Paige (N. Y.) 108, holding that on a bill for a divorce, if the wife is an infant she must prosecute or defend by her next friend or guardian. See, in general, article DIVORCE, vol. 7, p. 61.

**3. Proceedings by Petition.** — *In re Barrington*, 27 Beav. 272.

**4. Bills of Revivor.** — *St. Clair v. Smith*, 3 Ohio 355. See also *Allen v. Shanks*, 90 Tenn. 362.

**5. Infant Intervenors.** — *Schonfield v. Turner*, 75 Tex. 324.

**6. Counterclaim.** — *Morris v. Edmonds*, 43 Ark. 427; *Smith v. Ferguson*, 3 Metc. (Ky.) 424.

*Contra.* — *Watkins v. Lawton*, 69 Ga. 672, approved in *Freeman v. Prendergast*, 94 Ga. 385.

**7. Curator Ad Hoc.** — In proceedings to partition real estate in which non-resident minors have an interest, they should be represented by a curator *ad hoc*. *Crawford v. Binion*, 46 La. Ann. 1261.

**Tutor Ad Hoc.** — In partition, minors may be represented by a tutor *ad hoc*, instead of curator *ad hoc*. *Covas v. Bertoulain*, 44 La. Ann. 683.

**Appointment of Curator Ad Hoc Jurisdictional.** — Where an absentee is sought to be reached and to be affected

by a decree pertaining to real estate situated within the state, the appointment of a curator *ad hoc* to represent him is jurisdictional, and the mode of appointment must conform strictly to the constitutional provisions. *Gates v. Gaither*, 46 La. Ann. 286.

**8. Infant Plaintiffs.** — *Clark v. Platt*, 30 Conn. 282. And see article NEXT FRIEND.

**9. Removal of Disabilities.** — *Sand. & H. Dig.*, § 1119, which empowers a minor to transact business with the same force and effect as if he were an adult, will authorize him to defend without a *guardian ad litem*, so as to bind him by a judgment by default where no such guardian is appointed. *Merriman v. Sarlo*, 63 Ark. 151.

*Must Be Shown by Record.* — An answer of an infant without a guardian should not be allowed to be filed upon a mere statement in the answer that the disabilities of the defendant were removed by the probate court, but the removal of the disabilities should be shown by the record of that court. *Pinchback v. Graves*, 42 Ark. 222.

**Marriage of Female Ward.** — Under the New York Code of Procedure, the marriage of a female ward terminates the guardianship, and in a proceeding before the surrogate she may appear without a guardian. *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

**10. Annulment of Marriage.** — *Lacoste v. Guidroz*, 47 La. Ann. 295.

**11. Proceedings for Appointment of Trustee.** — In appointment of trustee for a minor, in the absence of any ex-

Where the suit is against the general guardian, and not against the infant, a guardian *ad litem* is, of course, unnecessary.<sup>1</sup> So, where a husband is authorized by statute to appear for his infant wife, no guardian for her is necessary.<sup>2</sup>

**Appearance by Next Friend.** — In Colorado and Georgia a minor has been permitted to appear and defend by next friend, instead of guardian *ad litem*.<sup>3</sup>

**Existing Appointment.** — The appointment of a guardian *ad litem*, while there is an existing appointment, is improper.<sup>4</sup>

(4) *Where There Is a General Guardian.* — It is sometimes held that an infant cannot appear and defend by his general guardian,<sup>5</sup> but must do so by guardian *ad litem*, and this notwithstanding the general guardian is also a party.<sup>6</sup> But in a number of states it is held that an infant must defend by his regular guardian if he has one,<sup>7</sup> and that there is no necessity or

press provision of law to the contrary, it does not seem necessary to appoint a guardian *ad litem*. *Brandon v. Carter*, 119 Mo. 572; *Freeman v. Prendergast*, 94 Ga. 369.

1. **Action Against General Guardian.** — *Tuttle v. Garrett*, 74 Ill. 444.

2. **Appearance by Husband.** — *Frisby v. Harrison*, 30 Miss. 452, which was a proceeding for the final settlement of the account of an administrator upon an estate of which the wife was a distributee.

**When Wife Appears by Guardian.** — Where a suit is instituted against baron and feme, the wife being an infant, she must appear by guardian in all cases where she has a separate estate, or where, on any other account, her defense may be distinct from that of her husband. *Nicholson v. Wilborn*, 13 Ga. 467.

3. *Filmore v. Russell*, 6 Colo. 171, holding that an infant over fourteen years of age served with process may appear by next friend, no guardian *ad litem* being appointed; if a guardian *ad litem* is desired by the infant, he must ask for the appointment of one within ten days after service. *Cuyler v. Wayne*, 64 Ga. 78, holding that the decree is binding upon the infant, in the absence of fraud.

4. *Bondurant v. Sibley*, 37 Ala. 565.

5. *Michigan.* — *Bearinger v. Pelton*, 78 Mich. 110.

*Missouri.* — *Gibson v. Chouteau*, 39 Mo. 536.

*New York.* — *Matter of Stratton*, 1 Johns. (N. Y.) 509.

*Tennessee.* — *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

*Wisconsin.* — *McKinney v. Jones*, 55 Wis. 39.

"In the chancery courts of England and in many of the states of the Union a regular guardian cannot, in that capacity, appear and make defense in court for his wards; but a guardian *ad litem* must be appointed for that purpose, the authority of the regular guardian not permitting him to represent the infant in court." *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284. But in *Tennessee* the rule is otherwise. See *infra*, note 9. See also cases cited *supra*, III. 3. c. (4) *Where There Is a General Guardian*, as to necessity of appointing guardian *ad litem*.

6. *Florida.* — *Thompson v. McDermott*, 19 Fla. 852 [citing *Brock v. Doyle*, 18 Fla. 172; *Equity Rule* 36].

*New York.* — *Sharp v. Pell*, 10 Johns. (N. Y.) 486.

7. *Alabama.* — *Rhett v. Mastin*, 43 Ala. 86; *Morgan v. Morgan*, 35 Ala. 303.

*Arkansas.* — *Moore v. Woodall*, 40 Ark. 42; *Pinchback v. Graves*, 42 Ark. 222.

*California.* — *Smith v. McDonald*, 42 Cal. 484; *Gronfier v. Puymiroi*, 19 Cal. 629; *Justice v. Ott*, 87 Cal. 530; *Fox v. Minor*, 32 Cal. 117; *Western Lumber Co. v. Phillips*, 94 Cal. 54.

*Connecticut.* — *Colt v. Colt*, 19 Blatchf. (U. S.) 402.

*Indiana.* — *Hughes v. Sellers*, 34 Ind. 337.

*Kentucky.* — *Miller v. Cabell*, 81 Ky. 182; *Walker v. Dunyser*, 80 Ky. 620; *Cohen v. Ripy*, (Ky. 1896) 33 S. W. Rep. 625. *Contra*, *Shields v. Bryant*, 3 Bibb (Ky.) 525.

*Massachusetts.* — *Swan v. Horton*, 14

propriety in appointing a guardian *ad litem* when his regular guardian is before the court.<sup>1</sup> But where there is no regular

Gray (Mass.) 179; *Mansur v. Pratt*, 101 Mass. 60; *Johnson v. Waterhouse*, 152 Mass. 585; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Farris v. Richardson*, 6 Allen (Mass.) 118; *Cassier's Case*, 139 Mass. 458; *Knapp v. Crosby*, 1 Mass. 479; *Parker v. Lincoln*, 12 Mass. 16; *Talbot v. Curtis*, (Norfolk 1851), cited in *Mansur v. Pratt*, 101 Mass. 61.

*Mississippi*. — *Johnson v. Cooper*, 56 Miss. 608.

*North Carolina*. — *Ward v. Lowndes*, 96 N. Car. 367.

*Ohio*. — *Ewing v. Hollister*, 7 Ohio, pt. 2, 138.

*Pennsylvania*. — *Mercer v. Watson*, 1 Watts (Pa.) 350 (by express statutory provision).

*Tennessee*. — *Gowan v. Anderson*, 7 Coldw. (Tenn.) 284; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 620.

#### 1. Duty of General Guardian to Defend.

— Where the court does not specially appoint a guardian *ad litem*, it is the duty as well as the right of the general guardian to appear for his ward. *Gronfier v. Puymiro*, 19 Cal. 629; *Moore v. Woodall*, 40 Ark. 42. As to the imperfect obligation of this duty, see *Whitney v. Porter*, 23 Ill. 445.

In California the general practice is to have a guardian *ad litem* appointed in pursuance of the Practice Act, even where there is a general guardian, the general guardian being usually appointed where there is no objection to his acting. This seems to have been done through abundance of caution, but has been held to be unnecessary where there was a general guardian who had been duly appointed and against whom there was no objection. *Fox v. Minor*, 32 Cal. 117.

The provisions of the Cal. Civ. Pr. Act, relating to the appointment of guardians *ad litem*, where infants were parties, only applied where there was no general guardian, or he did not act. *Gronfier v. Puymiro*, 19 Cal. 629.

Appearance of the general guardian is sufficient to give the court jurisdiction of the persons of infant defendants, and the fact that no guardian *ad litem* was appointed for them is immaterial. *Western Lumber Co. v. Phillips*, 94 Cal. 54. See also *supra*, III. 1. *h. Waiver of Process Against Infants*.

**Appointment Notwithstanding General Guardian.** — Where the interests of minors will be subserved the court will appoint a guardian *ad litem*, even though the minor have a general guardian. *Gronfier v. Puymiro*, 19 Cal. 629; *Justice v. Ott*, 87 Cal. 530; *Alexander v. Frary*, 9 Ind. 481.

In *Kentucky*, under Ky. Civ. Code, § 38, a guardian *ad litem* to defend cannot be appointed until there is an affidavit filed that there is no statutory guardian. *Miller v. Cabell*, 81 Ky. 182.

In *Massachusetts* the rule is well established that a judgment cannot be properly rendered against an infant defendant in a civil suit, unless he has a guardian who may defend the suit in his behalf; and if a judgment is so rendered, the infant is entitled to maintain a writ of error to avoid it. Defense may be made either by the general guardian or by a guardian *ad litem*, but appearance and defense by the parent without appointment as guardian is not sufficient. *Johnson v. Waterhouse*, 152 Mass. 585; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Swan v. Horton*, 14 Gray (Mass.) 179; *Farris v. Richardson*, 6 Allen (Mass.) 118; *Mansur v. Pratt*, 101 Mass. 60; *Cassier's Case*, 139 Mass. 458.

In *Vermont*, although an infant is not legally capable of appearing and defending in person or by attorney, an appearance and defense by his father and natural guardian is sufficient, and even this need not appear of record, but may be shown by parol. *Fuller v. Smith*, 49 Vt. 253. In this case it appeared that in a suit against an infant his father became bail, was present during the entire trial, testified on material points at the suggestion of his son's counsel, assisted in impaneling the jury, and would have appealed if he had not known of his son's minority. It was held upon *audita querela* to set it aside that the judgment was valid and binding upon the infant. See also *Priest v. Hamilton*, 2 Tyler (Vt.) 44; *Wrisley v. Kenyon*, 28 Vt. 5.

**New York Code of Civil Procedure**, § 2531, which recognizes the authority of the surrogate to appoint a special guardian for an infant at the instance of the latter, must be construed when read in connection with section 2530, as

guardian, or where he is unfit or unwilling to conduct the defense, or where he fails to appear, then a guardian *ad litem* must be appointed as in other cases.<sup>1</sup>

**General Guardian Adversely Interested.** — So, also, a guardian *ad litem*

authorizing such an appointment only where there is no appearance of a general guardian, or where it is shown to the satisfaction of the surrogate that the general guardian is for some reason disqualified from affording to the interests of his wards adequate protection. *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.

**Notice of Application for Special Guardian.** — Where, therefore, an infant having a general guardian applies to a surrogate's court for the appointment of a special guardian to represent him in a proceeding therein, he must give notice to the former of the application. *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.

1. *Alabama.* — *King v. Collins*, 21 Ala. 363, *overruling Parks v. Stonum*, 8 Ala. 755; *Morgan v. Morgan*, 35 Ala. 303.

*Arkansas.* — *Woodall v. Delatour*, 43 Ark. 521.

*California.* — *Gronfier v. Puymiroul*, 19 Cal. 629; *Townsend v. Tallant*, 33 Cal. 45.

*Illinois.* — *Lloyd v. Kirkwood*, 112 Ill. 329.

*Iowa.* — *Treiber v. Shafer*, 18 Iowa 29.

*Maine.* — *Stinson v. Pickering*, 70 Me. 273.

*Massachusetts.* — *Swan v. Horton*, 14 Gray (Mass.) 179; *Mansur v. Pratt*, 101 Mass. 60.

*Mississippi.* — *Gregory v. Orr*, 61 Miss. 307; *Wells v. Smith*, 44 Miss. 296. Compare *Jack v. Thompson*, 41 Miss. 49.

*New York.* — *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

*North Carolina.* — *Ward v. Lowndes*, 96 N. Car. 367.

*Tennessee.* — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 620; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

*Texas.* — *Bond v. Dillard*, 50 Tex. 302; *Pucket v. Johnson*, 45 Tex. 550; *Hawkins v. Forrest*, 1 Tex. Unrep. Cas. 167; *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511; *Smith v. Redden*, 1 Tex. Unrep. Cas. 360.

*Vermont.* — *Brown v. Hull*, 16 Vt. 673; *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

*West Virginia.* — *Charleston, etc.,*

*Bridge Co. v. Comstock*, 36 W. Va. 263.

**Facts Justifying Appointment of Special Guardian.** — The mere fact that the attorneys for the general guardian acted as attorneys for plaintiffs, in an action of partition brought against the infants and against their issues, is insufficient to authorize the appointment of a special guardian for an infant having a general guardian, where it does not appear that the commencement or prosecution of the action for partition was detrimental to the interests of the infant, or that his general guardian was unable, unwilling, or unlikely to protect his interests. *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.

**Appointment of Guardian or Attorney.** — Under the California probate court act of 1851, where there was a petition for leave to sell real estate and there were minor heirs with no general guardian, it was necessary that a guardian — not an attorney — should be appointed to represent them before the petition could be acted upon. *Townsend v. Tallant*, 33 Cal. 45.

**Making General Guardian a Party.** — Under the Texas statutes of 1870 and 1876, which make it the duty of the court to appoint a special guardian in a suit or proceeding which is pending, or is about to be commenced, it is irregular to proceed in an action against minors without making their guardians parties, if they have any, and where they have no regularly appointed guardian the court should appoint special guardians for them. This rule will apply to minor plaintiffs as well as to minor defendants. *Bond v. Dillard*, 50 Tex. 302; *Pucket v. Johnson*, 45 Tex. 550.

In a proceeding affecting the interests of infants in land, if the minors have lawful guardians they must be made parties; if not, or if the guardians are interested adversely to the minors, special guardians should be appointed. *Hawkins v. Forrest*, 1 Tex. Unrep. Cas. 167. And see *Pucket v. Johnson*, 45 Tex. 550; *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511; *Bond v. Dillard*, 50 Tex. 302; *Smith v. Redden*, 1 Tex. Unrep. Cas. 360.

must be appointed where the general guardian is interested in the suit adversely to his ward.<sup>1</sup>

(5) *Probate Proceedings* — (a) *In General*. — Although the prac-

1. *California*. — *Gronfier v. Puymiol*, 19 Cal. 629; *Townsend v. Tallant*, 33 Cal. 45.

*Georgia*. — *Poullain v. Poullain*, 79 Ga. 11.

*Illinois*. — *Roodhouse v. Roodhouse*, 132 Ill. 360.

*Kentucky*. — *Robinson v. Fidelity Trust, etc., Co.*, (Ky. 1889) 11 S. W. Rep. 806.

*Louisiana*. — *James v. Meyer*, 41 La. Ann. 1100.

*Maine*. — *Stinson v. Pickering*, 70 Me. 273.

*Massachusetts*. — *Mansur v. Pratt*, 101 Mass. 60; *Parker v. Lincoln*, 12 Mass. 19; *Talbot v. Curtis*, (Norfolk 1851), cited in *Mansur v. Pratt*, 101 Mass. 61.

*Mississippi*. — *Wells v. Smith*, 44 Miss. 296; *Burrus v. Burrus*, 56 Miss. 92; *Gregory v. Orr*, 61 Miss. 307; *Jack v. Thompson*, 41 Miss. 49.

*New York*. — *Havens v. Sherman*, 42 Barb. (N. Y.) 636, distinguished in *Jenkins v. Young*, 43 Hun (N. Y.) 197; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

*Tennessee*. — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 620; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

**Arbitration Proceedings**. — Where a guardian and his ward are both interested in arbitration proceedings, and their interests are adverse, the ward should be represented by a guardian *ad litem*. *Poullain v. Poullain*, 79 Ga. 11.

**Partition**. — Where a suit in a partition is brought in the name of the guardian and his ward by such guardian, if their interests are hostile the ward should be made a defendant and a guardian *ad litem* appointed for him. *Roodhouse v. Roodhouse*, 132 Ill. 360.

Where a tutor owns real estate in common with his wards, if he seeks to partition the same, a special tutor should be appointed to represent the wards. *James v. Meyer*, 41 La. Ann. 1100.

**Distinction Drawn Between Law and Equity**. — "In *Massachusetts* it was lately held that a guardian *ad litem* need not be appointed if the infant has a probate or general guardian, unless the interests of the infant and the guardian are in conflict. *Mansur v. Pratt*, 101

Mass. 60. The authorities cited for this rule are principally cases at law in the courts of that state. The rule in equity is thus stated in *Parker v. Lincoln*, 12 Mass. 19: 'The course in chancery, where an infant defendant does not appear voluntarily, is to send an officer to bring him into court, and then a guardian is appointed to defend his interests in the suit. \* \* \* It is still necessary to appoint a guardian, notwithstanding *Lincoln*, his legal guardian, is made a defendant.' And this is one of the cases cited by *Hoar, J.*, in *Mansur v. Pratt*, 101 Mass. 60." *Thompson v. McDermott*, 19 Fla. 854.

**Duties of Administrator and Guardian Incompatible in Proceedings to Sell Land**. — Where an administrator, who was at the same time the general guardian of the infant heirs of his intestate, applied, in his character as administrator, to the surrogate for leave to sell the real estate of the deceased to pay debts, and thereupon the surrogate proceeded, without appointing any guardian for the infants, to make an order for all persons interested in the estate to show cause, within four weeks, why the application should not be granted, and subsequently, without any appearance of the infants, made an order of sale, and confirmed the sale made by the administrator, it was held that the surrogate did not obtain jurisdiction of the subject-matter and of the persons of the infants, and that the proceedings and sale were void. *Havens v. Sherman*, 42 Barb. (N. Y.) 636, distinguished in *Jenkins v. Young*, 43 Hun (N. Y.) 197.

**Control of Court Over Guardian**. — In *Tennessee* an infant is allowed to sue and defend by his guardian; still he is, in all respects, the next friend of the infant. He is charged with all the duties and liabilities, subject to the same restraints, and bears the same relation to the infant and the suit, as if he had been described as the next friend. He is subject to the control of the court. If he fails to perform his duty, or has an interest in the litigation antagonistic to that of the infant, the court has the power to remove him, and it is its duty to do so, and appoint another. *Simpson v. Alexander*, 6 Coldw. (Tenn.) 620.

tice of chancery courts makes it necessary to have a guardian *ad litem* appointed for infant defendants, such guardian need not be appointed in a probate court, if the statutes instituting and regulating the practice in such courts do not require such appointment.<sup>1</sup> Probate proceedings are not civil actions or proceedings within the statutory provisions requiring the appointment of guardians *ad litem* in civil actions and proceedings.<sup>2</sup>

(b) **Settlement of Decedent's Estate.** — It has been held that it is not necessary, before the administration account of an executor or administrator is allowed, to appoint guardians *ad litem* for minor heirs or legatees interested in the estate.<sup>3</sup> But the contrary has also been held.<sup>4</sup>

(c) **Administration Sales.** — The authorities are not harmonious as to whether or not a guardian *ad litem* may be appointed for infant heirs in proceedings by an executor or administrator to sell lands of a decedent for the payment of debts. In a number of the states the proceeding is regarded as an adversary one, and a guardian *ad litem* is required,<sup>5</sup> except, of course, in states

1. *Johnson v. Cooper*, 56 Miss. 608.

**Application by Guardian for Leave to Invest.** — Where an application is made by a guardian for leave to invest money in land, it is not necessary that a guardian *ad litem* should be appointed for the ward. *Callaway v. Bridges*, 79 Ga. 753.

**Probate of Will.** — In the absence of any statutory requirement to that effect, the appointment of a guardian *ad litem* for infants interested in the probate of a will is unnecessary. *Mousseau's Will*, 30 Minn. 202.

But in *Massachusetts* and *Rhode Island* it has been held that a guardian *ad litem* should be appointed in proceedings to probate a will. *Peters v. Peters*, 8 Cush. (Mass.) 529; *Mathewson v. Sprague*, 1 Curt. (U. S.) 457.

Where the heirs at law were under the age of thirteen years when a will was proved, and the executor named in the will was also made residuary legatee and testamentary guardian of the heirs, it was held that a probate of the will, made before any other guardian of the heirs was appointed, could not have the effect of a probate in solemn form. *Noyes v. Barber*, 4 N. H. 406.

In *Mississippi*, under Code of 1857, it was necessary in all proceedings in the probate court affecting the rights of infants that their general guardian be summoned for them, and if such guardian was adversely interested or failed to appear, that a guardian *ad*

*litem* be appointed for the infants. It was not required in any case that the infant should be summoned, but it was required in every case that he should have a guardian in court to represent him. *Burrus v. Burrus*, 56 Miss. 92.

2. *Carpenter v. Superior Ct.*, 75 Cal. 596.

3. *Balch v. Hooper*, 32 Minn. 158.

4. *Eatman v. Eatman*, 82 Ala. 223, holding that the court has no jurisdiction in the absence of such appointment; *Willis v. Willis*, 16 Ala. 652; *King v. Collins*, 21 Ala. 363 [*overruling Parks v. Stonum*, 8 Ala. 755]; *Morgan v. Morgan*, 35 Ala. 303; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12, holding that on an accounting by an executor a special guardian may be appointed for an infant if his general guardian has any interest adverse to him. See also *Taylor v. Reese*, 4 Ala. 121.

5. *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 781, holding that it is necessary for infants to have a statutory guardian who shall answer and also execute such a covenant as the statute requires, and that otherwise a sale will be void; *Bloom v. Burdick*, 1 Hill (N. Y.) 131; *Ackley v. Dygert*, 33 Barb. (N. Y.) 176, holding that if there is an infant heir or devisee a guardian must be appointed for such infant by the surrogate, even though it does not appear from the petition that such infant is an heir or devisee, and that otherwise the surrogate will not obtain

where the general guardian is authorized to appear for the infant.<sup>1</sup> In other states the proceeding is regarded as a proceeding *in rem*, and no guardian *ad litem* is required.<sup>2</sup> In a few states the statute expressly requires guardians *ad litem* to be appointed for minor heirs, at least where they have no general guardian appearing for them.<sup>3</sup>

(d) **Guardians' Sales.** — There is the same conflict of authority as to the necessity of appointing a guardian in proceedings by a general guardian to sell his ward's lands as exists in the case of administrators' sales. This subject is considered hereafter in connection with the discussion of the "Sale of Infants' Real Estate."<sup>4</sup>

**d. EFFECT OF FAILURE TO APPOINT, OR OF IRREGULAR APPOINTMENT — (1) In General — Reversible Error.** — It is error<sup>5</sup>

jurisdiction of the person of the infant. *Fowler v. Poor*, 93 N. Car. 466. See also article PROBATE AND ADMINISTRATION.

1. See *supra*, III. 3. c. (4) *Where There Is a General Guardian*.

2. *Overton v. Johnson*, 17 Mo. 442; *McClay v. Foxworthy*, 18 Neb. 295. In the latter case the court said: "The failure to appoint a guardian *ad litem* for the minor heirs of said estate is not available as an objection. A proceeding under the statute to sell real estate of the deceased for the payment of debts against the estate is not, strictly speaking, an action. It is purely a proceeding *in rem*, where the principal questions involved are, the amount of debts outstanding against the estate, the amount of personal property available for the payment of the debts, and the necessity to sell the land for which license is sought for the payment of the same. The proceeding is not adversary in its character in the sense in which the term is used in an action, as only so much of the estate descends to the heirs as exists after the payment of the debts. The notice is to be given to the heirs and to all persons interested in the estate. If the reasons assigned by the petitioner to obtain a license are unfounded, or insufficient, or untrue, it is presumed that some one interested in the estate will make these facts appear, or that the judge will refuse to grant the necessary authority. No guardian *ad litem*, however, is necessary."

In *Holmes v. Beal*, 9 Cush. (Mass.) 223, the court said: "The proceedings \* \* \* are not like those required in ordinary suits at law against a minor

himself, where the plaintiff must at his peril see that the party has a guardian *ad litem*, or other proper legal representative."

In *Boody v. Emerson*, 17 N. H. 577, it was held that it was not necessary that minors entitled by the terms of the statute to notice of the petition should have guardians appointed. See also *French v. Hoyt*, 6 N. H. 370. And see article PROBATE AND ADMINISTRATION.

3. *Price v. Winter*, 15 Fla. 66; *Herdman v. Short*, 18 Ill. 59; *Whitney v. Porter*, 23 Ill. 445; *Johnson v. Johnson*, 30 Ill. 223; *Morris v. Hogle*, 37 Ill. 150; *Goudy v. Hall*, 30 Ill. 109, 36 Ill. 313; *Gibson v. Roll*, 27 Ill. 88, 30 Ill. 172; *Cromine v. Tharp*, 42 Ill. 120; *Miller v. Handy*, 40 Ill. 448; *Campbell v. McCahan*, 41 Ill. 45; *Pardon v. Dwire*, 23 Ill. 572; *Loyd v. Malone*, 23 Ill. 43 [cited *Johnson v. Johnson*, 30 Ill. 215; explained and approved *Moore v. Neil*, 39 Ill. 256; cited *Mulford v. Stalzenback*, 46 Ill. 303; *Hess v. Voss*, 52 Ill. 472; *Wilson v. Kellogg*, 77 Ill. 47]; *Timmons v. Timmons*, 6 Ind. 8; *Secrist v. Green*, 3 Wall. (U. S.) 751.

4. See *infra*, VI. *Sale of Infants' Real Estate*.

5. *Alabama*. — *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Clack v. Clack*, 20 Ala. 461; *Clark v. Gilmer*, 28 Ala. 265; *Bondurant v. Sibley*, 37 Ala. 565; *Irwin v. Irwin*, 57 Ala. 614; *Rowland v. Jones*, 62 Ala. 322; *Griffith v. Ventress*, 91 Ala. 366.

*Arkansas*. — *Morris v. Edmonds*, 43 Ark. 427.

*Georgia*. — *Nicholson v. Wilborn*, 13 Ga. 467; *Groce v. Field*, 13 Ga. 24.

*Illinois*. — *McDaniel v. Correll*, 19

to render judgment against an infant without the appointment of a guardian *ad litem* where such appointment is necessary, and for such error the judgment may be reversed,<sup>1</sup> by writ of

Ill. 226; *Peak v. Shasted*, 21 Ill. 137; *Hall v. Davis*, 44 Ill. 494; *Quigley v. Roberts*, 44 Ill. 503; *Kesler v. Penninger*, 59 Ill. 134.

*Indiana*. — *Timmons v. Timmons*, 6 Ind. 8; *Abdil v. Abdil*, 26 Ind. 288; *Rawles v. State*, 56 Ind. 433; *De Priest v. State*, 68 Ind. 569.

*Kansas*. — *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47.

*Kentucky*. — *Smith v. Ferguson*, 3 Metc. (Ky.) 424; *Irons v. Crist*, 3 A. K. Marsh. (Ky.) 143; *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 781; *Newman v. Kendall*, 2 A. K. Marsh. (Ky.) 235; *Hocker v. Montague*, (Ky. 1895) 29 S. W. Rep. 874; *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398; *Carneal v. Sthresley*, 1 A. K. Marsh. (Ky.) 471; *Searcey v. Morgan*, 4 Bibb (Ky.) 96; *Meredith v. Sanders*, 2 Bibb (Ky.) 101; *Rowland v. Cock*, 1 J. J. Marsh. (Ky.) 453; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 458.

*Maryland*. — *Kemp v. Cook*, 18 Md. 137.

*Massachusetts*. — *Knapp v. Crosby*, 1 Mass. 479; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Swan v. Horton*, 14 Gray (Mass.) 179; *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196.

*Missouri*. — *Powell v. Gott*, 13 Mo. 458; *Neenan v. St. Joseph*, 126 Mo. 89.

*New Hampshire*. — *Beckley v. Newcomb*, 24 N. H. 359.

*New York*. — *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417; *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167; *Mason v. Denison*, 15 Wend. (N. Y.) 68; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

*Pennsylvania*. — *Moore v. McEwen*, 5 S. & R. (Pa.) 373; *Knox v. Flack*, 22 Pa. St. 337; *Sliver v. Shelback*, 1 Dall. (Pa.) 165.

*South Carolina*. — *Haigler v. Way*, 2 Rich. L. (S. Car.) 324.

*Tennessee*. — *Kelley v. Kelley*, 15 Lea (Tenn.) 194; *McKnight v. Hughes*, 4 Lea (Tenn.) 526.

*Texas*. — *Taylor v. Rowland*, 26 Tex. 293; *Taylor v. Whitfield*, 33 Tex. 181.

*Vermont*. — *Chase v. Scott*, 14 Vt. 77; *Starbird v. Moore*, 21 Vt. 529; *Somers v. Rogers*, 26 Vt. 585.

*Virginia*. — *Roberts v. Stanton*, 2 Munf. (Va.) 129; *Cole v. Pennell*, 2 Rand. (Va.) 174.

*West Virginia*. — *Piercy v. Piercy*, 5 W. Va. 199.

*United States*. — *Carrington v. Brents*, 1 McLean (U. S.) 175; *Nelson v. Moon*, 3 McLean (U. S.) 319; *O'Hara v. MacConnell*, 93 U. S. 150.

*England*. — *Gregor v. Molesworth*, 2 Ves. 109; *Jaques v. Cesar*, 2 Saund. 101a, note (1).

**Presumption on Appeal.** — No presumption will be indulged that a guardian *ad litem* appeared for infant defendants where the record expressly affirms that he did not appear and that the judgment rendered against them was by default. *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453.

1. *Alabama*. — *Bondurant v. Sibley*, 37 Ala. 565; *Clack v. Clack*, 20 Ala. 461; *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Griffith v. Ventress*, 91 Ala. 366.

*Georgia*. — *Nicholson v. Whilborn*, 13 Ga. 467.

*Illinois*. — *Hall v. Davis*, 44 Ill. 494; *McDaniel v. Correll*, 19 Ill. 226; *Herdman v. Short*, 18 Ill. 59; *Peak v. Shasted*, 21 Ill. 138.

*Indiana*. — *Timmons v. Timmons*, 6 Ind. 8; *Abdil v. Abdil*, 26 Ind. 288.

*Kentucky*. — *Meredith v. Sanders*, 2 Bibb (Ky.) 101; *Hocker v. Montague*, (Ky. 1895) 29 S. W. Rep. 874.

*Maryland*. — *Kemp v. Cook*, 18 Md. 137.

*Massachusetts*. — *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196; *Swan v. Horton*, 14 Gray (Mass.) 179; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Knapp v. Crosby*, 1 Mass. 479.

*Missouri*. — *Powell v. Gott*, 13 Mo. 458.

*New York*. — *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167; *Mason v. Denison*, 15 Wend. (N. Y.) 68.

*Pennsylvania*. — *Knox v. Flack*, 22 Pa. St. 337; *Sliver v. Shelback*, 1 Dall. (Pa.) 165; *Moore v. McEwen*, 5 S. & R. (Pa.) 373.

*South Carolina*. — *Haigler v. Way*, 2 Rich. L. (S. Car.) 324.

*Texas*. — *Taylor v. Whitfield*, 33 Tex. 181; *Taylor v. Rowland*, 26 Tex. 293.

*Vermont*. — *Somers v. Rogers*, 26 Vt. 585; *Chase v. Scott*, 14 Vt. 77; *Starbird v. Moore*, 21 Vt. 533.

*Virginia*. — *Cole v. Pennell*, 2 Rand. (Va.) 174.



error,<sup>1</sup> writ of error *coram nobis* or *coram vobis*,<sup>2</sup> or other proper proceeding according to the practice of the state where the case arises.<sup>3</sup>

*West Virginia.* — *Piercy v. Piercy*, 5 W. Va. 199.

*United States.* — *O'Hara v. MacConnell*, 93 U. S. 150.

**What Record Must Show on Appeal.** — Decree against an infant defendant cannot be supported unless the record shows that a guardian *ad litem* has been appointed to represent him and defend on his behalf. *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364.

**Failure to Except or Assign for Error.** — Failure to appoint a guardian *ad litem* for an infant defendant is a ground for reversal of a judgment against him, although no exception on that ground was taken below nor assigned for error. *Taylor v. Whitfield*, 33 Tex. 181; *Clark v. Gilmer*, 28 Ala. 265.

**Appearance by Next Friend.** — In *Hocker v. Montague*, (Ky. 1895) 29 S. W. Rep. 874, the infants had answered by next friend, and the judgment was reversed.

**A Judgment Against Joint Defendants** will be reversed where it appears that one of the defendants was an infant for whom no guardian was appointed. *Beckley v. Newcomb*, 24 N. H. 359. See, however, *Mason v. Denison*, 15 Wend. (N. Y.) 64, where it is held that the infancy of one of two defendants, as joint debtors, against whom judgment is rendered in form (though it is not personal as to the infant, and can only affect the joint property, and not the sole property of the infant), cannot be assigned as error in fact upon a writ of error *coram nobis* to revoke the judgment, where, upon the *capias ad respondendum*, the infant is returned not found; and the other defendant not taken, and judgment is rendered against both defendants, pursuant to the statute authorizing proceedings against joint debtors. See also *Van Bramer v. Cooper*, 2 Johns. (N. Y.) 279.

**Harmless Error.** — In *Illinois* it is held that a decree against infants will not be reversed for want of an appointment of a guardian *ad litem*, where it appears that their guardian was sued with them, answered for them in that capacity, and did by way of defense all that a guardian *ad litem* could have done. *Tuttle v. Garrett*, 74 Ill. 444.

Although the appointment of a guardian *ad litem* for an infant defendant

may be irregular and unauthorized, yet if the infant is not prejudiced the appellate court will not reverse the decree for that reason, though otherwise if the decree had been against the infant. *Bondurant v. Sibley*, 37 Ala. 565.

**New York — Curative Act.** — A decree of a surrogate's court, admitting or rejecting a will presented for probate, is "a judgment," within the meaning of the Code of Civil Procedure, § 721, which is made applicable to such a court by section 2538, and protects a "judgment of a court of record" from impairment, by reason of the appearance, by attorney, of an infant party, if the judgment be in his favor. But where the will is admitted, the decree cannot be said to be in favor of an infant contestant. *Matter of Bowne*, 6 Dem. (N. Y.) 51.

1. *Swan v. Horton*, 14 Gray (Mass.) 179.  
**Scire Facias on Judgment.** — A judgment against an infant for whom no guardian *ad litem* has been appointed, on a *scire facias* on a judgment charging him as a trustee in foreign attachment, is erroneous, and may be reversed by a writ of error without first obtaining a reversal of the original judgment. *Crockett v. Drew*, 5 Gray (Mass.) 399.

**Infancy Assigned as Error in Fact.** — Before the New York Court of Civil Procedure, in actions at common law, where an infant appeared by an attorney and suffered a default, and judgment was rendered against him, his remedy was by writ of error to reverse the judgment, and infancy was assigned as error in fact. *Arnold v. Sandford*, 14 Johns. (N. Y.) 417.

2. *Nicholson v. Wilborn*, 13 Ga. 467.  
By the former practice in England it could only be done by this writ sued out of the court in which the supposed error existed; and this writ is still in use in some of the states of the Union while in many of them it has gone into disuse, and has been superseded by motion to amend. *Peak v. Shasted*, 21 Ill. 138. See generally article *CORAM NOBIS AND CORAM VOBIS*, vol. 5, p. 26.

3. **Arrest of Judgment.** — In the case of *Rawles v. State*, 56 Ind. 433, it was decided that the fact that a guardian *ad litem* had not been appointed for an infant defendant in a bastardy suit

**Error in Fact.** — Failure to appoint a guardian *ad litem* is error in fact.<sup>1</sup>

**Judgment Vacated on Motion.** — Such error may be assigned in the court in which judgment was rendered, and the judgment vacated on motion, and the party allowed to make any defense to which he is entitled.<sup>2</sup>

**Vacation at Subsequent Term.** — This may be done at a term subsequent to the one at which judgment was rendered.<sup>3</sup>

**Ignorance of Infancy Immaterial.** — It is immaterial whether the adverse party knew of the infancy or not.<sup>4</sup>

**Judgment Voidable but Not Void.** — But the judgment is merely erroneous; it is voidable, but not void, and until set aside in a proper proceeding for that purpose it is valid and binding.<sup>5</sup>

was not sufficient ground for arresting the judgment therein. See also *De Priest v. State*, 68 Ind. 569.

**Review After Coming of Age.** — If a decree be entered in a suit, ordering a sale of the lands of infants, before a guardian *ad litem* is appointed for them, and before he files an answer for them, and under such decree the lands are sold, any of the infants may, within six months after he attains the age of twenty-one, appear in the suit, whether it be ended or not, and have the decree reviewed and reversed, and on such a reversal of such decree for this error the title of the purchaser of the land falls, and the parties must by proper proceedings by the court be put *in statu quo*. *Hull v. Hull*, 26 W. Va. 1.

1. *Neeman v. St. Joseph*, 126 Mo. 89; *Peak v. Shasted*, 21 Ill. 137; *Sloo v. State Bank*, 2 Ill. 428; *Beaubien v. Hamilton*, 4 Ill. 213.

2. **Vacation on Motion.** — *Castledine v. Mundy*, 4 B. & Ad. 90, 24 E. C. L. 30; *Meredith v. Sanders*, 2 Bibb (Ky.) 101; *Hall v. Davis*, 44 Ill. 494; *Peak v. Shasted*, 21 Ill. 137; *Sloo v. State Bank*, 2 Ill. 428; *Beaubien v. Hamilton*, 4 Ill. 213; *Barwick v. Rackley*, 45 Ala. 215; *Petty v. Britt*, 46 Ala. 491; *Keyes v. Ellensohn*, 72 Hun (N. Y.) 392; *Story v. Dayton*, 22 Hun (N. Y.) 450; *Kellogg v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 28; *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47.

**Writ of Error Coram Vobis and Motion Concurrent Remedies.** — "But it is urged that the only mode by which a judgment can be reversed for error in fact is by writ of error *coram vobis*. That it may be done by this writ is true, but this court has repeatedly held that it may likewise be done by motion." *Peak v. Shasted*, 21 Ill. 137.

**Vacated Without Terms.** — The judgment will be set aside on motion and without terms. *Kellogg v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 28.

**Discretion of Court.** — An irregular appointment of a special guardian is not of itself ground for setting aside a decree after the expiration of the time in which to appeal, but the application is addressed to the discretion of the court. *Story v. Dayton*, 22 Hun (N. Y.) 450. See also *Keyes v. Ellensohn*, 72 Hun (N. Y.) 392.

3. **Direct Attack After Lapse of Term.** — For such an error in fact, which can only be shown by evidence outside the record, a judgment can be attacked by direct proceeding after the lapse of the term at which it was rendered. *Neehan v. St. Joseph*, 126 Mo. 89.

**Motion at Next Following Term.** — A judgment against an infant for whom no guardian *ad litem* has been appointed may be set aside on motion of the minor at the next term of the court after which the judgment was rendered. *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47.

**The Probate Court Has the Power** at a subsequent term to set aside the final settlement of the administrator on the application of an infant distributee, if the settlement was made without the appointment of a guardian *ad litem*, or if the guardian *ad litem* appointed did not accept his appointment and did not in fact represent the infant on the settlement. *Barwick v. Rackley*, 45 Ala. 215; *Petty v. Britt*, 46 Ala. 491.

4. In such a case the plaintiff proceeds at his peril. *Fall River Foundry Co. v. Doty*, 42 Vt. 412.

5. *Alabama.* — *Smith v. Redus*, 9 Ala. 99; *Tabor v. Lorange*, 53 Ala. 543; *Cook v. Rogers*, 64 Ala. 406.

**Vacated Only in Direct Proceeding.** — Such a judgment cannot be merely disregarded, but it fixes the rights of the parties until

*Arkansas.* — Trapnall *v.* State Bank, 18 Ark. 63; Boyd *v.* Roane, 49 Ark. 397.  
*California.* — Cahill's Estate, 74 Cal. 52; Emeric *v.* Alvarado, 64 Cal. 529; Childs *v.* Lanterman, 103 Cal. 387.

*Connecticut.* — Fahay *v.* State, 25 Conn. 205; State *v.* James, 37 Conn. 361.

*Georgia.* — Ross *v.* Southwestern R. Co., 53 Ga. 514.

*Illinois.* — Lemon *v.* Sweeney, 6 Ill. App. 507; Peak *v.* Shasted, 21 Ill. 137; Whitney *v.* Porter, 23 Ill. 445; Quigley *v.* Roberts, 44 Ill. 503; Kestler *v.* Penninger, 59 Ill. 134; Gage *v.* Schroder, 73 Ill. 44; Bonnell *v.* Holt, 89 Ill. 71; Millard *v.* Marmon, 116 Ill. 649.

*Indiana.* — Blake *v.* Douglass, 27 Ind. 416; McBride *v.* State, 130 Ind. 525; Clark *v.* Hillis, 134 Ind. 422; Carver *v.* Carver, 64 Ind. 195.

*Iowa.* — Good *v.* Norley, 28 Iowa 188; Bickel *v.* Erskine, 43 Iowa 213; Drake *v.* Hanshaw, 47 Iowa 291; Myers *v.* Davis, 47 Iowa 325; Hoover *v.* Kinsey Plow Co., 55 Iowa 668; Webster *v.* Page, 54 Iowa 461.

*Kansas.* — Walkenhors *v.* Lewis, 24 Kan. 420.

*Kentucky.* — Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 253; Schaefer *v.* Gates, 2 B. Mon. (Ky.) 453; Allison *v.* Taylor, 6 Dana (Ky.) 87; Keller *v.* Wilson, 90 Ky. 350; Bourne *v.* Simpson, 9 B. Mon. (Ky.) 455; Pond *v.* Doneghy, 18 B. Mon. (Ky.) 558; Porter *v.* Robinson, 3 A. K. Marsh. (Ky.) 253; Simmons *v.* McKay, 5 Bush (Ky.) 25; Smith *v.* Ferguson, 3 Metc. (Ky.) 424.

*Maine.* — Tucker *v.* Bean, 65 Me. 352.

*Maryland.* — Kemp *v.* Cook, 18 Md. 130.

*Massachusetts.* — Doe *v.* Bradley, 6 Smed. & M. (Miss.) 485; Austin *v.* Charlestown Female Seminary, 8 Met. (Mass.) 196.

*Michigan.* — Westbrook *v.* Comstock, Walk. (Mich.) 314; Sheahan *v.* Wayne Circuit Judge, 42 Mich. 69; Cooper *v.* Mayhew, 40 Mich. 528; Burt *v.* McBain, 29 Mich. 261.

*Minnesota.* — Eisenmenger *v.* Murphy, 42 Minn. 84.

*Missouri.* — Townsend *v.* Cox, 45 Mo. 401; Fulbright *v.* Cannefox, 30 Mo. 428; Bailey *v.* McGinniss, 57 Mo. 362; Charley *v.* Kelley, 120 Mo. 135; Cochran *v.* Thomas, 131 Mo. 258; Colvin *v.* Hauenstein, 110 Mo. 583.

*Nebraska.* — Parker *v.* Starr, 21 Neb. 680; McAlister *v.* Lancaster County Bank, 15 Neb. 295; McCormick *v.* Paddock, 20 Neb. 486; Parker *v.* Starr, 21 Neb. 680.

*New York.* — Bloom *v.* Burdich, 1 Hill (N. Y.) 130; Sims *v.* New York Dentistry College, 35 Hun (N. Y.) 344; McMurray *v.* McMurray, 66 N. Y. 175; Wilkimming *v.* Schmale, 1 Hilt. (N. Y.) 263; Croghan *v.* Livingston, 17 N. Y. 218; Rogers *v.* McLean, 34 N. Y. 539; Keyes *v.* Ellensohn, 72 Hun (N. Y.) 392; Crouter *v.* Crouter, 133 N. Y. 55; Drischler *v.* Van Den Henden, 49 N. Y. Super. Ct. 508; Mills *v.* Dennis, 3 Johns. Ch. (N. Y.) 367; Jenkins *v.* Young, 43 Hun (N. Y.) 197.

*North Carolina.* — White *v.* Albertson, 3 Dev. L. (N. Car.) 241; Larkins *v.* Bullard, 88 N. Car. 35.

*Ohio.* — St. Clair *v.* Smith, 3 Ohio 363.

*Pennsylvania.* — Moore *v.* McEwen, 5 S. & R. (Pa.) 373.

*South Carolina.* — Finley *v.* Robertson, 17 S. Car. 435; McCrosky *v.* Parks, 13 S. Car. 90; Bulow *v.* Witte, 3 S. Car. 308.

*Tennessee.* — Miles *v.* Kaigler, 10 Yerg. (Tenn.) 10.

*Texas.* — McAnear *v.* Epperson, 54 Tex. 224; Montgomery *v.* Carlton, 56 Tex. 365; Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307; Taylor *v.* Rowland, 26 Tex. 293; Martin *v.* Weyman, 26 Tex. 468.

*Virginia.* — Roberts *v.* Stanton, 2 Munf. (Va.) 129.

*United States.* — O'Hara *v.* MacConnell, 93 U. S. 150.

In *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307, no guardian *ad litem* had been appointed, but the court declined to decide whether the judgment was void or voidable, there being sufficient equitable grounds for setting the judgment aside. The court, however, inclined to think the judgment voidable, but not void. *Citing* *Montgomery v. Carlton*, 56 Tex. 365; *McAnear v. Epperson*, 54 Tex. 224.

**Complaint for Drunkenness.** — The failure of a justice to appoint a guardian *ad litem* for a minor on a trial for a complaint for drunkenness, although erroneous and rendering his judgment liable to be set aside on a writ of error, will not afford a ground for dismissing

reversed or vacated by appeal, writ of error, or some other direct proceeding, brought for the purpose of setting it aside.<sup>1</sup>

**Jurisdiction Not Affected.** — The omission to appoint a guardian *ad litem* does not affect the jurisdiction of the court.<sup>2</sup>

the complaint and setting the accused at liberty. *Fahay v. State*, 25 Conn. 205.

**Protection of Persons Acting Under Decree.** — Persons acting under the decree or acquiring rights in good faith thereunder, without notice of irregularity, will be protected. *Ross v. Southwestern R. Co.*, 53 Ga. 514.

**Assessments for the Construction of a Public Ditch**, although erroneous for the failure to appoint a guardian *ad litem* for infant landowners, are not void. *McBride v. State*, 130 Ind. 525.

**Decree Without Knowledge of Infancy.** — Where, as far as the record shows, the court ordered an administrator's sale of real estate without knowledge of the infancy of the decedent's heirs, the judgment is not void, and the failure to appoint a guardian *ad litem* was merely collateral to that error. *Clark v. Hillis*, 134 Ind. 422.

**Tax Sale.** — The fact that the infants were unrepresented by a guardian in an action against them to sell their real estate for taxes renders the judgment merely erroneous and not void. *Keller v. Wilson*, 90 Ky. 350.

**Partition Suits.** — In *Missouri* the failure to appoint a guardian *ad litem* to represent an infant plaintiff in a partition suit does not render the judgment void. The appointment of a guardian *ad litem* by the court may, under the Partition Act, be made before or after any proceeding has been commenced. The proceedings in respect to infants are governed by the Partition Act, and not by the Gen. Pr. Act. *Colvin v. Hauenstein*, 110 Mo. 583. It appears further that a minor, as he may be brought into court as a defendant by service of process, so he may submit himself to the jurisdiction of the court as a plaintiff, after which, in either case, it becomes the duty of the court to appoint a guardian *ad litem* to represent him. In either case, however, the court acquires jurisdiction over him, and the judgment should not be void by reason of a failure of the court to appoint a guardian. *Fulbright v. Cannefox*, 30 Mo. 425. In this case the court held that such judgments are not nullities, but may be set aside on terms.

See also *Cochran v. Thomas*, 131 Mo. 275.

**Mortgage Foreclosure.** — In an action to foreclose a mortgage on real estate the failure of the court to appoint a guardian *ad litem* for minor defendants does not render the decree of foreclosure and sale void; at most, it is erroneous. *Parker v. Starr*, 21 Neb. 680; *McMurray v. McMurray*, 66 N. Y. 175.

**1. Binding Until Set Aside in Direct Proceeding** — *Arkansas*. — *Trapnall v. State Bank*, 18 Ark. 53.

*Illinois*. — *Peak v. Shasted*, 21 Ill. 137; *Whitney v. Porter*, 23 Ill. 445; *Millard v. Marmon*, 116 Ill. 649.

*Indiana*. — *Blake v. Douglass*, 27 Ind. 416.

*Iowa*. — *Myers v. Davis*, 47 Iowa 325; *Drake v. Hanshaw*, 47 Iowa 291; *Bickel v. Erskine*, 43 Iowa 213; *Hoover v. Kinsey Plow Co.*, 55 Iowa 668.

*Kansas*. — *Walkenhorst v. Lewis*, 24 Kan. 420.

*Kentucky*. — *Allison v. Taylor*, 6 Dana (Ky.) 88; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253; *Simmons v. McKay*, 5 Bush (Ky.) 25; *Bourne v. Simpson*, 9 B. Mon. (Ky.) 454; *Smith v. Ferguson*, 3 Metc. (Ky.) 424; *Keller v. Wilson*, 90 Ky. 350.

*Massachusetts*. — *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196.

*Missouri*. — *Charley v. Kelley*, 120 Mo. 134; *Fulbright v. Cannefox*, 30 Mo. 425; *Cochran v. Thomas*, 131 Mo. 258; *Jeffrie v. Robideaux*, 3 Mo. 33; *Townsend v. Cox*, 45 Mo. 402.

*Nebraska*. — *Parker v. Starr*, 21 Neb. 680.

*New York*. — *Croghan v. Livingston*, 17 N. Y. 218; *McMurray v. McMurray*, 66 N. Y. 175; *Bloom v. Burdick*, 1 Hill (N. Y.) 130; *Jenkins v. Young*, 43 Hun (N. Y.) 197.

*North Carolina*. — *White v. Albertson*, 3 Dev. L. (N. Car.) 241.

*South Carolina*. — *Bulow v. Witte*, 3 S. Car. 308; *McCrosky v. Parks*, 13 S. Car. 90.

*Vermont*. — *Patchin v. Ciomach*, 13 Vt. 330; *Barber v. Graves*, 18 Vt. 290.

**2. Sims v. New York Dentistry College**, 35 Hun (N. Y.) 344; *Rogers v. McLean*, 34 N. Y. 539; *Drischler v. Van*

But in Statutory Special Proceedings where a guardian *ad litem* is required, failure to appoint one has been held to deprive the court of jurisdiction over the infant.<sup>1</sup>

**Collateral Attack.** — It follows from what has been said that the judgment or decree cannot in general be collaterally attacked for failure to appoint a guardian *ad litem*.<sup>2</sup>

**Injunction Against Judgment.** — So an injunction will not lie to restrain the enforcement of a judgment rendered against an infant for whom no guardian *ad litem* was appointed.<sup>3</sup>

**Dismissal of Cause.** — A cause should not be dismissed absolutely for failure to have a guardian *ad litem* appointed, but it should

Den Henden, 49 N. Y. Super. Ct. 508; Jenkins v. Young, 43 Hun (N. Y.) 197; McMurray v. McMurray, 66 N. Y. 175; Austin v. Charlestown Female Seminary, 8 Met. (Mass.) 196; Joyce v. McAvoy, 31 Cal. 273; Cahill's Estate, 74 Cal. 52; Gage v. Schroder, 73 Ill. 44.

In Good v. Norley, 28 Iowa 188, the court was evenly divided upon the question of jurisdiction or no jurisdiction.

1. Jenkins v. Young, 43 Hun (N. Y.) 197.

**Final Settlement of a Guardian or Administrator.** — Where a guardian *ad litem* is necessary upon the final settlement of a guardian or administrator in the probate court, failure to appoint one will render the decree void as to the infant. Eatman v. Eatman, 82 Ala. 223; Searcey v. Holmes, 43 Ala. 608; Bailey v. Fitz Gerald, 56 Miss. 578; Cason v. Cason, 31 Miss. 578.

**Administrator's Sale.** — See Hull v. Hull, 26 W. Va. 1. Compare Montgomery v. Carlton, 56 Tex. 365; Laughter v. Seela, 59 Tex. 177.

**Partition.** — The court has no jurisdiction to direct a partition of land where one tenant in common is guardian of another for whom no guardian *ad litem* was appointed. Prince v. Clark, 81 Mich. 167.

2. Alabama. — Levystein v. O'Brien, 106 Ala. 352; Magruder v. Campbell, 40 Ala. 611.

Arkansas. — Trapnall v. State Bank, 18 Ark. 63.

California. — Reed v. Ring, 93 Cal. 93, quoting from the opinion of Joyce v. McAvoy, 31 Cal. 273.

Illinois. — Millard v. Marmon, 116 Ill. 649.

Indiana. — McBride v. State, 130 Ind. 525; Blake v. Douglass, 27 Ind. 416; Cohee v. Baer, 134 Ind. 375.

Iowa. — Milne v. Van Buskirk, 9 Iowa 558; Drake v. Hanshaw, 47 Iowa 292.

Kentucky. — Simmons v. McKay, 5 Bush (Ky.) 25.

Mississippi. — McLemore v. Chicago, etc., R. Co., 58 Miss. 514; Cocks v. Simmons, 57 Miss. 183; Doe v. Bradley, 6 Smed. & M. (Miss.) 485.

North Carolina. — Ward v. Lowndes, 96 N. Car. 367.

Ohio. — Taylor v. Graves, 1 Clev. (Ohio) 178.

South Carolina. — Bulow v. Witte, 3 S. Car. 308.

Texas. — Montgomery v. Carlton, 56 Tex. 365; Laughter v. Seela, 59 Tex. 177.

United States. — Tucker v. Moreland, 10 Pet. (U. S.) 59.

**Probate Sale.** — In Finley v. Robertson, 17 S. Car. 435, which was an action to recover land sold under a probate decree, it was held that infants are not bound by a judgment rendered in a cause in which they were not represented by guardians *ad litem*. Distinguishing Bulow v. Witte, 3 S. Car. 308.

**Insolvency Proceedings.** — In Farris v. Richardson, 6 Allen (Mass.) 119, it was held that insolvency proceedings against an infant who was not represented by a guardian *ad litem* were void, and might be set aside on bill in equity by a creditor who has an attachment on the estate, although the infant might avoid such creditor's claim by a plea of infancy.

3. Drake v. Hanshaw, 47 Iowa 291; Levystein v. O'Brien, 106 Ala. 352.

A court of equity will not interfere to restrain the collection of a judgment rendered against an infant for whom no guardian *ad litem* was appointed except possibly as to so much as the party shows himself equitably not bound to pay. Lemon v. Sweeney, 6 Ill. App. 507.

be either opened so as to permit the parties to fully prepare the case, or it should be dismissed without prejudice.<sup>1</sup>

**Objection Raised on Appeal.** — The objection that a judgment was rendered without the appointment of a guardian *ad litem* may be raised by an appeal by the infant.<sup>2</sup>

(2) *Irregularities Cured or Waived* — **In General.** — If the court has jurisdiction of the parties and the subject-matter, irregularities in the appointment, or even the fact that no appointment of a guardian *ad litem* was made, do not, as has been seen, render the judgment void, and being merely errors or irregularities they may be cured or waived.<sup>3</sup>

**Majority Pending Suit.** — Thus, if the infant reaches majority before final judgment and is aware of the pendency of the suit the error is cured.<sup>4</sup>

**Subsequent Appointment.** — So, also, where irregularity exists because of proceedings conducted before the appointment of a guardian *ad litem*, the irregularity will be cured so as not even to be error on appeal if no binding decree is rendered until the infant is properly represented, and the guardian having the opportunity to object acquiesces in what has been done and the court decrees correctly on the case presented.<sup>5</sup>

1. Covington, etc., R. Co. v. Bowler, 9 Bush (Ky.) 468.

**Dismissal Without Prejudice.** — When a cause is submitted without the appointment and answer of a guardian *ad litem* for infant defendants, the court should vacate the submission and restore the cause to the docket, so that complainant may take proper steps to bring them before the court. The bill should not be dismissed absolutely, unless the neglect of complainant is inexcusable and continuous after his attention has been called to the defect, otherwise the supreme court will reverse the decree and dismiss the bill without prejudice. Roach v. Hix, 57 Ala. 576.

2. Failure to appoint a guardian *ad litem* for an infant may be raised on appeal from the judgment against him. Frost v. Frost, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167.

3. Rutter v. Puckhofer, 9 Bosw. (N. Y.) 638.

**Waiver by Failure to Object.** — The failure to formally appoint a guardian *ad litem* is immaterial, where no objection on that ground is made and a person was permitted to defend for the infants without an appointment. Tanner v. Ames, (Tex. Civ. App. 1896) 37 S. W. Rep. 373.

If there may have been an irregularity in the appointment of the guard-

ian *ad litem*, as for failure to present an affidavit that there was no regular guardian, if the other proceedings were regular, the court would hesitate to set aside a sale where no complaint was made by the minors and no injustice was done them. Martin v. Porter, 4 Heisk. (Tenn.) 407.

**Minor Representing Himself of Age.** — Where a prisoner being about to plead was asked by the judge in the presence of his counsel whether he was of age, and answered that he was supposed to be, and in consequence of such a reply a guardian was not appointed, it was held that the further proceedings, had without the appointment of a guardian *ad litem*, were not even erroneous. State v. James, 37 Conn. 361.

**Failure to Request Appointment.** — The failure to appoint a guardian *ad litem* for an infant defendant in a bastardy proceeding, where such an appointment was not requested before the trial, is not a cause for a new trial. Evans v. State, 58 Ind. 587.

4. Coffey v. Proctor Coal Co., (Ky. 1892) 20 S. W. Rep. 286. See, further, Rutter v. Ruckhofer, 9 Bosw. (N. Y.) 638.

5. Grimstead v. Huggins, 13 Lea (Tenn.) 728; Ridgely v. Bennett, 13 Lea (Tenn.) 210; Livingston v. Noe, 1 Lea (Tenn.) 61.

**Release of Errors After Majority.** — An infant for whom no guardian *ad litem* was appointed may, on arriving at his majority, for the purpose of confirming the judgment, execute a release of errors.<sup>1</sup>

(3) *Who May Take Advantage of Error* — In General. — As a general rule, only the infant or those in privity to him can take advantage of the failure to appoint a guardian *ad litem*.<sup>2</sup>

**Party in Fault.** — And certainly a party who led the court into the error cannot complain.<sup>3</sup>

**Codefendants.** — So, also, the error is not available to an adult codefendant.<sup>4</sup>

**e. POWER TO APPOINT — In General.** — The power to appoint a guardian *ad litem* is one incident to every court wherein an infant's interest can become the subject of judicial investigation.<sup>5</sup>

For the presumption is that the guardian did his duty and could find no substantial ground of complaint, and the decree is warranted by the case as submitted. *Kelley v. Kelley*, 15 Lea (Tenn.) 194.

**Cured by Appointment on Appeal from Probate Court.** — Failure to appoint a guardian *ad litem* for an infant in the probate court on an accounting by an executor may be cured by an appointment on appeal in the circuit court. *In re Sanborn's Estate*, (Mich. 1896) 67 N. W. Rep. 128.

**Cured by Confirmation of Sale After Appointment.** — So, in proceedings to sell homestead property, where the appointment was not complete until after the order of sale was granted, because not accepted until then, the irregularity will be cured by subsequent confirmation of the sale. *Deyton v. Bell*, 81 Ga. 370. See also *infra*, III. 3. *f. Time of Appointment*.

1. *Hill v. Keyes*, 10 Allen (Mass.) 258.

**What Amounts to a Release or Waiver of Error.** — Where a writ of error is brought to reverse a judgment recovered against an infant who appeared by attorney, the promise by him after obtaining his majority to pay the claim sued on is neither a release nor a waiver of the error, nor a bar to a writ of error. *Goodridge v. Ross*, 6 Met. (Mass.) 487.

**2. Infant and Privies in Blood.** — A judgment in partition against an infant for whom no guardian was appointed can be avoided by no one save the infant or his privies in blood. *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196.

**Attachment Creditor.** — Insolvency proceedings instituted against an infant

who was unrepresented by a guardian *ad litem* may be set aside in equity by a creditor who has attached the infant's estate, notwithstanding that the claim of the creditor is one which could be avoided by the infant. *Farris v. Richardson*, 6 Allen (Mass.) 119.

**Purchasers.** — The court will be slow to hold that a purchaser can take advantage of a mere irregularity in the appointment. *Martin v. Porter*, 4 Heisk. (Tenn.) 407. See *Magruder v. Campbell*, 40 Ala. 611.

**3. Error Induced by Appellant.** — Complaint cannot be made of the action of the chancellor in setting aside an order vacating the appointment of a guardian *ad litem*, although improper, if the order was set aside at the instance of the appellant. *Bondurant v. Sibley*, 37 Ala. 565.

4. *Harris v. Rosenberg*, 43 Conn. 231. See also *McCarthy v. McCarthy*, 66 Ind. 128.

Where the purchaser of an administrator's sale, under an order of the probate court, is joined with the decedent's heirs at law as a defendant to a bill which seeks to enforce an outstanding vendor's lien on the land, he cannot complain on error of an irregularity in the appointment of a guardian *ad litem* for an infant heir. *Magruder v. Campbell*, 40 Ala. 611.

5. *Simpson v. Gonzalez*, 15 Fla. 37; *Nicholson v. Wilborn*, 13 Ga. 467; *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Montgomery v. Montgomery*, 3 Barb. Ch. (N. Y.) 132; *Clarke v. Gilmanton*, 12 N. H. 515; *Mace v. Scott*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 100; *Mauro v. Ritchie*, 3 Cranch (C.

Thus, a guardian *ad litem* may be appointed by a chancery court,<sup>1</sup> surrogate's court,<sup>2</sup> and by justices of the peace.<sup>3</sup>

**In Absence of General Guardian.** — The court may always appoint a guardian *ad litem* to defend for a minor where there is no general guardian.<sup>4</sup>

**Notwithstanding General Guardian.** — But the mere fact that there is a general guardian who might defend for the infant will not deprive the court of the power to appoint a guardian *ad litem* if it deems advisable, although it may influence the court's discretion.<sup>5</sup>

C.) 159; Coke's Litt. 89 *a*, n. 70; 3 Blackst. Com. 427; 2 Kent's Com. 229.

**Discretion of Court.** — The power of the court to appoint a guardian *ad litem* for parties to a suit who are minors, and who are unrepresented, is unquestioned. This is a discretionary power vested in the courts from the necessity of the case, and that discretion must rest in the sound judgment of the court; and, under ordinary circumstances, the exercise of that discretion is not subject to revision. *Smith v. Taylor*, 34 Tex. 589. Compare *Gronfier v. Puymiroi*, 19 Cal. 629; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284; *Rhoads v. Rhoads*, 43 Ill. 239; *Burrus v. Burrus*, 56 Miss. 92.

**Oath to Bill.** — In *Tennessee* it was held that a bill filed in the county court, not sworn to, does not authorize the appointment of guardians *ad litem* for infants, nor publication as to nonresidents. *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

This case was distinguished in *Martin v. Porter*, 4 Heisk. (Tenn.) 411, and the court said that it had never been required in Tennessee that in ordinary cases a bill should be sworn to in order to support the appointment of a guardian *ad litem*.

1. *Preston v. Dunn*, 25 Ala. 507.

**Duty of Chancery Court.** — It is the business of the court of chancery to see that no one stands between the infant and the just protection of his rights, and for that purpose a court may appoint a person to prosecute and defend for the infant. *Ames v. Ames*, 151 Ill. 280.

**Appointment by Clerk and Master.** — In *Tennessee*, under Code, § 4420, a guardian *ad litem* may be appointed by the clerk or master in proceedings to sell real estate of infants. And a subsequent order of the chancellor directing

the sale of the infant's property is, it seems, a ratification of the appointment by the master. *Beaumont v. Beaumont*, 7 Heisk. (Tenn.) 226.

In *Hurt v. Long*, 90 Tenn. 445, the irregularity in the appointment assigned was that the guardian *ad litem*, who was himself the clerk and master of the chancery court, was appointed by his deputy, and the objection was held untenable for the reason that, the appointment being afterwards ratified by the chancellor, the irregularity, if there was any, could not be assigned as error.

2. *In re Monell*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377, holding that Code Civ. Pro., § 253, does not prevent a surrogate on his own motion from appointing a guardian *ad litem* to represent an infant on the accounting of an administrator when the general guardian is removed pending proceedings.

**Code Provisions Relating to Actions.** — In *Matter of Watson*, 2 Dem. (N. Y.) 642, it was held that surrogates have no power to appoint special guardians except in those cases provided by statute, and that the provisions of the N. Y. Code of Civ. Pro., §§ 468-477, as to the prosecution and defense of actions by defendants are inapplicable to surrogates' courts. See also *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.

3. *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417; *Starbird v. Moore*, 21 Vt. 529.

4. *Treiber v. Shafer*, 18 Iowa 29; *Wells v. Smith*, 44 Miss. 296; *In re Monell*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377.

5. *Alexander v. Frary*, 9 Ind. 481; *Hyndman v. Stowe*, 9 Utah 23. *Contra* in surrogate court under New York Code Civ. Pro., §§ 2530, 2531. See *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.



**Infant Defendants.** — At common law a guardian *ad litem* could be appointed for an infant only when he was a defendant.<sup>1</sup>

**Infant Plaintiffs.** — But now, in some states, by statute, a guardian *ad litem* may be appointed to prosecute for an infant plaintiff, in which case he is substantially a *prochein ami*.<sup>2</sup>

**By What Court Made.** — Ordinarily, the appointment of a guardian *ad litem* is made by the court wherein the action is pending,<sup>3</sup> but in some states the probate or county judge may appoint a guardian *ad litem* for infant parties to an action pending in another court.<sup>4</sup>

**Nonresident and Unknown Infants.** — Such appointment may also be made for nonresident infants,<sup>5</sup> but not for unknown

1. *Priest v. Hamilton*, 2 Tyler (Vt.) 49. In this case the court said: "The only power the court have to appoint a guardian to an infant party is where he is made defendant, and this from the urgency or necessity of the case. An infant may be sued for a trespass. If he has an official or natural guardian, he may appear in his defense on the record. If he has none, the court will appoint some one to plead for him. But this urgency or necessity does not reach the case where the infant is plaintiff. There the judge of probate may appoint, or preparatory arrangements be made with the natural guardian or next friend to lend his name in aid of the prosecution. The court therefore never appoint a guardian to prosecute, but only to defend an infant party."

2. See article NEXT FRIEND.

**Appointment Where Next Friend Is Hostile.** — Where a bill in partition is prosecuted by an infant by his next friend, and the interest of such infant and his next friend are hostile, a guardian *ad litem* may be appointed to protect the minors. *Ames v. Ames*, 151 Ill. 280.

3. *Tyson v. Tyson*, 94 Wis. 225. See also *Mauro v. Ritchie*, 3 Cranch (C. C.) 159.

4. **Probate Judge.** — Under the express authority conferred upon the probate judge by the South Carolina Code of Procedure, § 138, he may appoint a guardian *ad litem* to appear for infants who are parties to a cause in the court of common pleas. *Trapier v. Waldo*, 16 S. Car. 277.

Under a statutory provision that the guardian *ad litem* may be appointed by the court in which the action is prosecuted, or by a probate judge, the guardian may be appointed by a probate

judge on plaintiff's application, without any further notice, though the order of continuance served on the infants and their father provided that the application might be to "this court," i. e., the Court of Common Pleas, in which the action was pending. *Lyles v. Haskell*, 35 S. Car. 391.

**County Judge.** — In *Towsey v. Harrison*, 25 How. Pr. (N. Y. Supreme Ct.) 266, decided in 1862, it was held that in an action to partition lands, under the Code of Civil Procedure, brought in the Supreme Court, a county judge had power to appoint a guardian *ad litem* of an infant defendant. See further *Lyle v. Smith*, 13 How. Pr. (N. Y. Supreme Ct.) 104; *Varian v. Stevens*, 2 Duer (N. Y.) 635.

**Appearance of Minor in Court.** — The appearance of the minor in court is not essential to the appointment of a guardian *ad litem* for him. *Crabbe v. Moxhay*, 11 Eng. L. & Eq. 156, 21 L. J. Ch. 504; *Benison v. Worsley*, 15 Eng. L. & Eq. 317, 17 Jur. 2. In the latter case *Parker, V. C.*, said that he did not like to do it; that the proper course would be to issue a commission, but that to save expense he would do so in that case. See also *Steed v. Calley*, 7 Sim. 148; *Stillwell v. Blair*, 13 Sim. 399; *Shuttleworth v. Shuttleworth*, 2 Hare 147; — *v. —*; 18 Jur. 770; *Nixon v. Few*, 7 Beav. 349; *Carwardine v. Wishlade*, 16 Jur. 461; *Crabbe v. Moubery*, 5 De G. & Sm. 347; *Foster v. Cantley*, 17 Jur. 370; *Stutely v. Harrison*, 3 De G. & Sm. 390; *Baynton v. Hooper*, 10 Beav. 168; *Benison v. Wortley*, 5 De G. & Sm. 648; *Crabbe v. Moubery*, 5 De G. & Sm. 347.

5. *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260; *Walker v. Hallett*, 1 Ala. 379; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44.

infants.<sup>1</sup>

**After Majority.** — Where an infant reaches majority pending suit, and before appointment of a guardian *ad litem*, such appointment cannot thereafter be made.<sup>2</sup>

**f. TIME OF APPOINTMENT** — (1) *In General.* — A guardian *ad litem* being appointed to conduct the defense for the infant, it is obvious that he should be appointed at the very beginning of the proceedings. It is, therefore, a general rule that a guardian *ad litem* should be appointed after service of process,<sup>3</sup> and before plea or answer.<sup>4</sup> Statutory provisions upon the subject must, of course, be complied with.<sup>5</sup>

**Pending Proceedings.** — It has been held, however, that a guardian *ad litem* may be appointed at any time pending the proceedings,<sup>6</sup>

**Contra — Partition Under Maine Statute.** — Rev. Stat. Maine, c. 88, § 7, providing for the appointment of a guardian *ad litem* in partition suits, confers powers only when the infants reside in the state, and does not apply in the case of infants living out of the state. Coombs v. Persons Unknown, 82 Me. 326.

1. Kountz v. Davis, 34 Ark. 590; State v. McLaughlin, 77 Ind. 335.

2. Patton v. Furthmier, 16 Kan. 29.

3. State v. Mitchell, 29 Fla. 302; Missouri Pac. R. Co. v. McCarty, 97 Mo. 214. See also *infra*, III. 3. f. (2) *Before Service of Process.*

4. Peak v. Shasted, 21 Ill. 137; Nicholson v. Wilborn, 13 Ga. 467; Crocker v. Smith, 10 Ill. App. 376.

5. **Premature Appointment — Illustrations.** — Under a statutory provision that an infant defendant must appear by a guardian appointed on the application of the infant if he is fourteen years old or upward, and applies within twenty days after the personal service of summons, or after service thereof by publication thereof is complete, or, if he neglects so to apply, upon the application of any other party to the action; an appointment of a guardian before the expiration of twenty days after the service of summons was held premature and void. Keyes v. Ellensohn, 72 Hun (N. Y.) 392.

The infants were personally served out of the state under an order of publication, on October 31 and November 1, 1890. The application for appointment of guardian *ad litem*, on behalf of three of the infants, was granted December 8, 1890, and for another March 10, 1891. It was held that, as under the provisions of the Code (§§ 441 and 471) the infant defendants could not

make such an application until forty-two days had elapsed from the time when personal service was made, the court acquired no jurisdiction to make the appointment of guardian for three infants; that they were not competent to waive, by any affirmative act, the restrictive provisions of the statute; and so, that an appearance by the guardian was not an appearance by the infants. Crouter v. Crouter, 133 N. Y. 55.

**Harmless Delay.** — If minors have been duly served with process, delay in appointing a guardian *ad litem* for them which is not prejudicial will not constitute a ground of error. Missouri Pac. R. Co. v. McCarty, 97 Mo. 214.

**Where Statute Is Silent.** — Where, upon petition by the administrator to sell real estate of the deceased to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and on the same day a guardian *ad litem* was appointed for such heirs, who on the same day appeared, and consented to an order of sale, such sale is not void, on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed, and the order to show cause made on the same day, the statute being silent as to the time when a guardian *ad litem* should be appointed. Stuart v. Allen, 16 Cal. 476.

6. **Where a Minor Has Appeared by Attorney,** the plaintiff, at any time, upon ascertaining that the defendant is a minor, may move to strike out the appearance of the attorney and for the appointment of a guardian *ad litem*. Nicholson v. Wilborn, 13 Ga. 467.

Where an infant defendant appears by attorney, proceedings may be amended on motion of the plaintiff by

and before final judgment is entered, and it seems that irregularities in prior proceedings will be thereby cured.<sup>1</sup>

**Before or After Return Day.** — Thus, an application for the appointment of a guardian *ad litem* may be made before or after the return day of the process.<sup>2</sup>

**On Rehearing.** — So a guardian *ad litem* may be appointed, even on a petition for a rehearing.<sup>3</sup>

**After Judgment,** however, the court will not appoint a guardian *ad litem*.<sup>4</sup>

**Nunc Pro Tunc.** — Nor will a guardian be appointed *nunc pro tunc*, so as to forestall the infant's right to avoid the proceedings upon reaching majority.<sup>5</sup>

**On Appeal from Probate Court.** — But a guardian *ad litem* may be appointed pending an appeal from the probate court,<sup>6</sup> and it is error to dismiss the appeal as to the infant because of the failure to appoint a guardian *ad litem*.<sup>7</sup>

(2) *Before Service of Process* — (a) **In General.** — It is a general rule, both in England<sup>8</sup> and in this country,<sup>9</sup> that the appoint-

entering an appearance by guardian, though the application is made after plea, rule of reference, award of referee, or rule *nisi* for judgment. *Smith v. Minor*, 1 N. J. L. 477.

1. See *supra*, III. 3. d. (2) *Irregularities Cured or Waived*.

2. An infant defendant over fourteen, who has been duly served with process, may apply for the appointment of a guardian *ad litem* as well after as before the return day of the process. *McConnell v. Adams*, 3 Sandf. (N. Y.) 728.

**Appointment by Surrogate.** — Under a statutory provision requiring a surrogate to appoint a special guardian for an infant party who does not appear by general guardian, application should not be made until the return day of the citation. *Matter of Leinkauf*, 4 Dem. (N. Y.) 1.

3. **Fact of Infancy Appearing on Rehearing.** — Though the fact that some of the defendants were infants did not appear in the original proceedings, and no guardian *ad litem* was assigned for them, yet if it appear on a petition for rehearing, the decree being interlocutory, a guardian *ad litem* should be appointed. *Roberts v. Stanton*, 2 Munf. (Va.) 129.

4. **Appointment on Motion to Confirm Sale on Execution.** — There is no error in the refusal of a court to appoint a guardian *ad litem* on the hearing of a motion to confirm a sale of real estate made on execution issued on a judgment in an action at law, when for the

first time the insanity of the party is called to the attention of the court. *Kuhn v. Kilmer*, 16 Neb. 699.

5. Where a minor will have a right on attaining his majority to avoid a surrogate's decree, because of the omission to appoint a guardian on a contest of the will, the court will not enter an order appointing a guardian *nunc pro tunc*. *Matter of Bowne*, 6 Dem. (N. Y.) 51.

6. *Clark v. Law*, 2 Root (Conn.) 383.

7. A guardian should be appointed and the case should proceed in the name of the infant as the appellant. *Warnock v. Watson*, 25 Ga. 467.

8. **English Practice.** — The rule in England is that minors must be served with process first, and a guardian *ad litem* appointed afterwards to defend for them. See *Harvey v. Cubbedge*, 75 Ga. 792; *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Banta v. Calhoun*, 2 A. K. Marsh. (Ky.) 166. Formerly in England, after a return of an attachment against an infant for failure to appear or answer, on suggestion of the infancy the court appointed a guardian to appear and answer for him. *Wilson v. Bott*, 1 Price 62; *Eyles v. Le Gros*, 9 Ves. Jr. 12; *Carr v. Aylmer*, Vern. & S. 301. Independent of positive statutory requirement, the more convenient practice is to appoint a guardian in proceedings actually pending and not prior thereto. *In re Hargreaves's Estate*, 5 Jur. N. S. 60.

9. *Alabama.* — *Walker v. Hallett*, 1 Ala. 379; *Hodges v. Wise*, 16 Ala. 509.

ment of a guardian *ad litem* can only be made after service of process, either actual or constructive, has been made upon the minor; though, perhaps, a personal appearance of the infant in court would authorize the appointment of a guardian *ad litem*, notwithstanding the want of service.<sup>1</sup>

(b) **Effect to Render Proceedings Erroneous.** — It is quite universally held that the appointment of a guardian *ad litem* for an infant not properly served with process is fatal error.<sup>2</sup>

*Arkansas.* — *Pinchback v. Graves*, 42 Ark. 222.

*Florida.* — *Thompson v. McDermott*, 19 Fla. 852; *McDermott v. Thompson*, 29 Fla. 299.

*Georgia.* — *Harvey v. Cubbedge*, 75 Ga. 792.

*Illinois.* — *Crocker v. Smith*, 10 Ill. App. 376; *Clark v. Thompson*, 47 Ill. 25.

*Iowa.* — *Allen v. Saylor*, 14 Iowa 435; *Good v. Norley*, 28 Iowa 188.

*Kentucky.* — *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44.

*Mississippi.* — *Stanton v. Pollard*, 24 Miss. 154; *Prewett v. Land*, 36 Miss. 495; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Price v. Crone*, 44 Miss. 571; *Johnson v. Cooper*, 56 Miss. 608.

*Missouri.* — *Nagel v. Schilling*, 14 Mo. App. 576; *Hendricks v. McLean*, 18 Mo. 32.

*New York.* — *Davis v. Crandall*, 101 N. Y. 311; *Ingersoll v. Mangam*, 84 N. Y. 622; *Varian v. Stevens*, 2 Duer (N. Y.) 635; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

*North Carolina.* — *Turner v. Douglass*, 72 N. Car. 127.

*Tennessee.* — *Taylor v. Walker*, 1 Heisk. (Tenn.) 734; *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129.

*Texas.* — *Montgomery v. Carlton* 56 Tex. 361.

*Virginia.* — *Strayer v. Long*, 83 Va. 715.

*United States.* — *New York L. Ins. Co. v. Bangs*, 103 U. S. 435; *Carrington v. Brents*, 1 McLean (U. S.) 167.

**Nonresident Infants.** — A guardian *ad litem* should not be appointed for a non-resident infant until process has been served on him by publication. *Walker v. Hallett*, 1 Ala. 379.

**The Rule in Chancery** is that in suits against an infant, process should be served upon him before the appointment of a guardian *ad litem*. *Thompson v. McDermott*, 19 Fla. 852; *McDermott v. Thompson*, 29 Fla. 299; *Price v. Crone*, 44 Miss. 571; *Stanton v. Pollard*, 24 Miss. 154.

In *Strayer v. Long*, 83 Va. 715, it was held that a guardian *ad litem* should not be appointed until the infant is brought before the court by some of the modes prescribed by law, but that a court of equity had the power to appoint a guardian *ad litem*, whether the infant had been served or not.

In *Mississippi.* — By *Hutchinson's Code*, § 45, p. 761, it was provided that the chancery courts "shall have power to appoint any person they may think fit to be guardian *ad litem* of any infant or insane defendant, whether such infant or insane defendant shall have been served with process or not." And the power of chancery courts to make such appointments was not and could not be taken away by the twenty-second rule of the Superior Court of Chancery, which declared that "no order appointing a guardian *ad litem* to defend infants will be made until after the return day of process executed." *Johnson v. Cooper*, 56 Miss. 608. In *Stanton v. Pollard*, 24 Miss. 154, the statute above referred to was overlooked.

1. See article APPEARANCES, vol. 2, p. 588.

In *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 45, it was said that a guardian *ad litem* should not be appointed for infants except upon their personal appearance, where they have not been served with process.

**Defective Service.** — Appearance of infants served by defective citation will authorize the surrogate to appoint a special guardian. *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

**Petition of Infant for Guardian Ad Litem.** — Where infants over fourteen years of age appear and petition the court for the appointment of a guardian *ad litem*, and an appointment is made upon such petition, the court has jurisdiction, although no summons was served. *Varian v. Stevens*, 2 Duer (N. Y.) 635. See also *Day v. Kerr*, 7 Mo. 426, approved in *Shaw v. Gregoire*, 41 Mo. 407.

2. *Alabama.* — *Walker v. Hallett*, 1

(c) **Effect to Render Proceedings Void.**— But as to whether error in appointing a guardian *ad litem* without service of process renders

Ala. 379; Walker *v.* Mobile Bank, 6 Ala. 452; Hodges *v.* Wise, 16 Ala. 509; Preston *v.* Dunn, 25 Ala. 507; Clark *v.* Gilmer, 28 Ala. 266; Bondurant *v.* Sibley, 37 Ala. 565; Irwin *v.* Irwin, 57 Ala. 614; Cook *v.* Rogers, 64 Ala. 406; Rowland *v.* Jones, 62 Ala. 322; McIntosh *v.* Atkinson, 63 Ala. 241; Hibbler *v.* Sprowl, 71 Ala. 50; Herring *v.* Ricketts, 101 Ala. 340.

*Arkansas.*—Hodges *v.* Frazier, 31 Ark. 58; Evans *v.* Davies, 39 Ark. 235; Pillow *v.* Sentelle, 39 Ark. 61; Freeman *v.* Russell, 40 Ark. 56; Pinchback *v.* Graves, 42 Ark. 222.

*Florida.*—Braswell *v.* Downs, 11 Fla. 62; Brock *v.* Doyle, 18 Fla. 172.

*Indiana.*—Abdil *v.* Abdil, 26 Ind. 287.

*Kentucky.*—Chambers *v.* Warren, 6 B. Mon. (Ky.) 246; Dodge *v.* Foulks, 11 B. Mon. (Ky.) 178; Graham *v.* Sublett, 6 J. J. Marsh. (Ky.) 45; Coleman *v.* Coleman, 3 Dana (Ky.) 398; Collard *v.* Groom, 2 J. J. Marsh. (Ky.) 487; South *v.* Carr, 7 T. B. Mon. (Ky.) 419.

*Mississippi.*—Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155; Erwin *v.* Carson, 54 Miss. 282; Frank *v.* Webb, 67 Miss. 462.

*Missouri.*—Hendricks *v.* McLean, 18 Mo. 32, followed in Campbell *v.* Laclede Gas Light Co., 84 Mo. 366. See Day *v.* Kerr, 7 Mo. 426.

Until the infants are brought before the court in the mode prescribed by the rule of practice, the appointment of a guardian *ad litem* to represent them is irregular, and will not support a decree rendered against them, when assailed on error. McIntosh *v.* Atkinson, 63 Ala. 241; Cook *v.* Rogers, 64 Ala. 406; Irwin *v.* Irwin, 57 Ala. 614; Rowland *v.* Jones, 62 Ala. 322; Clark *v.* Gilmer, 28 Ala. 265.

**There Being No Service upon the Infants,** the appointment of a guardian *ad litem* for them was unauthorized, and, to say the least, irregular; and this, of course, though the appointment, consent to act, and appearance of such guardian had in other respects been formal and regular. Clark *v.* Gilmer, 28 Ala. 266; Bondurant *v.* Sibley, 37 Ala. 565; McIntosh *v.* Atkinson, 63 Ala. 241; Cook *v.* Rogers, 64 Ala. 408; Irwin *v.* Irwin, 57 Ala. 614; Herring *v.* Ricketts, 101 Ala. 340.

**Service on the Father, Mother, or Guardian** of an infant, if he have any in the state, is, under Miss. Code 1871, § 704 (Code 1857, art. 64, p. 489), part of the required service on the infant; and until the process is so executed, or it is made to appear that the infant has no parent or guardian in the state, the court cannot legally appoint a guardian *ad litem*. Erwin *v.* Carson, 54 Miss. 282; Johnson *v.* McCabe, 42 Miss. 258; Ingersoll *v.* Ingersoll, 42 Miss. 155; Frank *v.* Webb, 67 Miss. 462.

In **Mississippi**, where an affidavit showed the place of residence of a non-resident defendant, but the order requiring publication to be made did not direct the clerk to transmit by mail a copy of such order to the nonresident infant, as required by statute, it was held that the service was insufficient to justify the appointment of a guardian *ad litem* for such nonresident infant in the absence of any evidence that a copy of the order of publication had been transmitted to the infant in pursuance of the statute. Ingersoll *v.* Ingersoll, 42 Miss. 155.

In **Missouri**, under the act regulating chancery practice (Rev. St., Code 1845), an order appointing a guardian *ad litem* for minor defendants who had not been served with process was held erroneous. Hendricks *v.* McLean, 18 Mo. 32. See also Campbell *v.* Laclede Gas Light Co., 84 Mo. 366. Compare Day *v.* Kerr, 7 Mo. 426, approved in Shaw *v.* Gregoire, 41 Mo. 407.

**The Answer of a Guardian Ad Litem** appointed by the court before service of process upon infant heirs does not bring such heirs properly before the court. Dodge *v.* Foulks, 11 B. Mon. (Ky.) 178.

**Cross-bill by Guardian Ad Litem.**—Where a defendant in chancery died, and without serving his infant heirs with process a guardian *ad litem* was appointed, who answered and made the answers a cross-bill, on which there was a decree in favor of the infants and others, it was held that the decree was erroneous, as the infants were not properly before the court, although necessary parties. Coleman *v.* Coleman, 3 Dana (Ky.) 398.

**Error Not Cured by Appearance of General Guardian.**—It is a reversible error

the proceedings absolutely void, or merely voidable, the decisions are not in harmony. In a number of jurisdictions it is held that such premature appointment constitutes fatal error, for which the decree may be reversed upon appeal or writ of error, but that until so reversed the judgment is valid and binding, and cannot be collaterally attacked.<sup>1</sup> The argument in support of this view

to appoint a guardian *ad litem* for non-resident infants under fourteen years defendants to a bill, before publication is duly shown to the court; and such error is not cured by the appearance of the general guardian. *Irwin v. Irwin*, 57 Ala. 614.

**Error Not Cured by Appeal of Infant.**—The appointment of a guardian *ad litem* before service of summons upon the infant is not cured by the infant's appeal from the decree. *Freeman v. Russell*, 40 Ark. 56.

1. *Alabama*.—*Hodges v. Wise*, 16 Ala. 509; *Preston v. Dunn*, 25 Ala. 507; *Bondurant v. Sibley*, 37 Ala. 565; *Frierson v. Travis*, 39 Ala. 150.

*Texas*.—*Sprague v. Haines*, 68 Tex. 215; *Kremer v. Haynie*, 67 Tex. 450; *Wheeler v. Ahrenbeak*, 54 Tex. 535; *McAnear v. Epperson*, 54 Tex. 220; *Alston v. Emerson*, 83 Tex. 231.

*United States*.—*Carrington v. Brents*, 1 McLean (U. S.) 174; *Nelson v. Moon*, 3 McLean (U. S.) 319.

**Infants Having Previously Appeared** need not be summoned before a guardian *ad litem* is appointed. *Gashweller v. M'Iroy*, 1 A. K. Marsh. (Ky.) 85; *Ray v. M'Iroy*, 1 A. K. Marsh. (Ky.) 612; *Day v. Kerr*, 7 Mo. 426.

**The Present and Former Rule in Georgia.**—In *Harvey v. Cubbedge*, 75 Ga. 792, the court said: "Since the passage of the Act of 1854, as codified in sections 4221 to 4224 of the Code, which declares that if minors are interested and they have no guardian, guardians *ad litem* must be appointed and notified before the cause proceeds, it has been the constant practice to do as was done in this case, not to notify the infant, but to appoint a guardian *ad litem* to represent him. To hold that the decree was void in cases in which no notice was given to the infants would be to overturn more than thirty years' practice under the act, besides unsettling titles to property honestly acquired and causing endless litigation."

The court, in reaffirming *Boardman v. Taylor*, 66 Ga. 647, further said: "This case arose prior to the Act of 1876, which now prescribes a different

rule as to the minors being made parties in those cases from that which prevailed under the Act of 1854; now the rule is somewhat similar to the English rule referred to, and must be followed in all proceedings instituted since its passage." See also *Scott v. Winningham*, 79 Ga. 492.

**Rule in Kentucky.**—In *Benningfield v. Reed*, 8 B. Mon. (Ky.) 105, the court said that "the doctrine must now be considered as settled that an actual notification to the infant of the pendency of the suit against him is not indispensable to the jurisdiction of the court." See also *U. S. Bank v. Cockran*, 9 Dana (Ky.) 395; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Banta v. Calhoun*, 2 A. K. Marsh. (Ky.) 166.

But in *Allsmiller v. Freutchenicht*, 86 Ky. 204, the court said that the appointment of a guardian *ad litem* for infants who had not been summoned to answer did not bring the infants into court, and that the appointment itself was void.

**Loose Use of "Void" and "Voidable."**—Considerable confusion has been caused by the loose use of the word "void" by appellate courts in reversing judgments for this error. Thus, in a number of cases on appeal the court has said that the judgment below was void. See *Kremer v. Haynie*, 67 Tex. 450; *Sprague v. Haines*, 68 Tex. 215.

In *Alston v. Emmerson*, 83 Tex. 231, the court said that while the above cases, and probably other cases wherein judgments were reversed for want of service of process on minors, notwithstanding they were represented by guardians *ad litem*, contained expressions from which an inference might be drawn that the writer of the opinion inclined to the view that judgment rendered under such circumstances were void, what was meant was that they were *voidable* merely, and subject to direct attack only. See also *McAnear v. Epperson*, 54 Tex. 220. So, in *Hodges v. Wise*, 16 Ala. 509, it was said that the appointment of a guardian *ad litem* for infant non-residents was void where there had

runs thus: The chancery court is the general guardian of all infants within its jurisdiction, and by virtue of its general powers has authority to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*; its authority may be exercised whenever the fact of infancy is established, and the infant is within the jurisdiction of the court. The improper exercise of this authority may be reviewed on error, but the act is not void, and the decree rendered could not, therefore, be attacked collaterally for want of jurisdiction.<sup>1</sup> In the great majority of cases, however, it is held that infant defendants must be properly served with process, and that until this is done the court has no jurisdiction over them, and the appointment of a guardian *ad litem* is absolutely void.<sup>2</sup>

been no publication or process; but in *Preston v. Dunn*, 25 Ala. 507, it was held that the court did not mean *void*, but only *voidable*. See also *Bondurant v. Sibley*, 37 Ala. 565.

1. *Preston v. Dunn*, 25 Ala. 512, citing *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 166; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *Calwell v. Boyer*, 8 Gill & J. (Md.) 136; *Robb v. Irwin*, 15 Ohio 689.

"The security of the infant depends upon the protective care of the court, and the fidelity and aid of the guardian appointed to represent him and watch over his interests. When, therefore, a guardian *ad litem* has been appointed by order of the court and has answered for the infant, the decree, although there may be no actual judicial notification to the infant of the pendency of the suit, is not void, but only erroneous." *Benningfield v. Reed*, 8 B. Mon. (Ky.) 105. See also *U. S. Bank v. Cockran*, 9 Dana (Ky.) 395.

2. *California*. — *Gray v. Palmer*, 9 Cal. 616; *Randolph v. Bayue*, 44 Cal. 366; *Johnston v. San Francisco Sav. Union*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53.

*Georgia*. — *Scott v. Winningham*, 79 Ga. 492.

*Illinois*. — *Crocker v. Smith*, 10 Ill. App. 376; *Whitney v. Porter*, 23 Ill. 445; *McDermaid v. Russell*, 41 Ill. 489; *Clark v. Thompson*, 47 Ill. 25; *Greenman v. Harvey*, 53 Ill. 386; *Chambers v. Jones*, 72 Ill. 275.

*Indiana*. — *Peoples v. Stanley*, 6 Ind. 410; *Abdil v. Abdil*, 26 Ind. 287; *Hawkins v. Hawkins*, 28 Ind. 66; *Carver v. Carver*, 64 Ind. 194; *Hough v. Canby*, 8 Blackf. (Ind.) 301.

*Iowa*. — *Allen v. Saylor*, 14 Iowa 435; *Good v. Norley*, 28 Iowa 188; *Hunter's Estate*, 84 Iowa 388.

*Kansas*. — *Claypoole v. Houston*, 12 Kan. 324.

*Kentucky*. — *Allsmiller v. Freutchenicht*, 86 Ky. 198. But see earlier Kentucky cases cited *supra*.

*Missouri*. — *Fischer v. Siekmann*, 125 Mo. 165; *Shaw v. Gregoire*, 41 Mo. 407. But see *Day v. Kerr*, 7 Mo. 426, where infant defendants appeal without service of process upon them and a guardian *ad litem* was appointed on their own motion. It was held that the decree was not void and could not be assailed collaterally.

*New York*. — *Crouter v. Crouter*, (Supreme Ct.) 17 N. Y. Supp. 758; *Ingersoll v. Mahgam*, 84 N. Y. 622; *Davis v. Crandall*, 101 N. Y. 321; *Crouter v. Crouter*, 133 N. Y. 56; *Potter v. Ogden*, 136 N. Y. 384; *Sloane v. Martin*, 145 N. Y. 524; *Mace v. Scott*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 100; *Walter v. De Graaf*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 406; *Varian v. Stevens*, 2 Duer (N. Y.) 635.

*Ohio*. — *Moore v. Starks*, 1 Ohio St. 369; *Keys v. McDonald*, 1 Handy (Ohio) 287.

*South Carolina*. — *Finley v. Robertson*, 17 S. Car. 435; *Genobles v. West*, 23 S. Car. 154; *Riker v. Vaughan*, 23 S. Car. 187; *Whitesides v. Barber*, 24 S. Car. 373; *Tederall v. Bouknight*, 25 S. Car. 275; *Rollins v. Brown*, 37 S. Car. 345; *Morgan v. Morgan*, 45 S. Car. 323. *Contra*, *Bulow v. Witte*, 3 S. Car. 308; *Walker v. Veno*, 6 S. Car. 459; *McCrosky v. Parks*, 13 S. Car. 92.

*Tennessee*. — *Bruce v. Bruce*, 11 Heisk. (Tenn.) 760; *Wheatley v. Harvey*, 1 Swan (Tenn.) 484; *Frazier v.*

(d) **Collateral Attack.** — Where the judgment is held to be void, for the reason under discussion, it may of course be attacked

Pankey, 1 Swan (Tenn.) 75; Greenlaw v. Kernahan, 4 Sneed (Tenn.) 379; Ivey v. Ingram, 4 Coldw. (Tenn.) 129; Stephenson v. Stephenson, 3 Hayw. (Tenn.) 123; Rucker v. Moore, 1 Heisk. (Tenn.) 729; Linnville v. Darby, 1 Baxt. (Tenn.) 307; Crippen v. Crippen, 1 Head (Tenn.) 128; Cowan v. Anderson, 7 Coldw. (Tenn.) 284; Robertson v. Robertson, 2 Swan (Tenn.) 198; Martin v. Porter, 4 Heisk. (Tenn.) 407; Taylor v. Walker, 1 Heisk. (Tenn.) 734.

*Wisconsin.* — Helms v. Chadbourne, 45 Wis. 60; Foster v. Hammond, 37 Wis. 185.

**Argument Supporting View that Service Is Jurisdictional.** — In Good v. Norley, 28 Iowa 199, in support of the view that the appointment of a guardian *ad litem* without service upon the minor confers no jurisdiction, the court said: "The appearance of the guardian *ad litem* was based upon a judicial act of the court, namely, the appointment of such guardian. Now, the appointment could not have been made unless the court had jurisdiction of the person of the infant; but it possessed no such jurisdiction, for no process or notice was served upon the infant. Here, then, we have jurisdiction to make the order of sale claimed by reason of another judicial act, which was itself *coram non jure*." The court further said: "Such guardians are appointed to defend against suits, and as we have seen, they are clothed with no other powers or duties. When appointed, a suit is pending and the infant is in court. In this case the proceeding was not pending as to the infant, for no process had been issued. The commencement of a suit is the service of notice or its delivery to the proper officer for service. Code 1851, §§ 1663, 1714. There is certainly no principle of law which will warrant the appointment of a guardian *ad litem* until the infant is served with process or is in court in person. A contrary doctrine will permit the court to acquire jurisdiction without process by adjudications of which the party whose rights are thereby affected may know nothing and when he has no day in court. \* \* \*

An extended examination and discussion here of these authorities would prove unprofitable. They are in conflict, and cannot be reconciled. Such

being the condition of the authorities, we are left to principle and reason whereon to base our conclusion, and we are satisfied it is well supported."

**Answer Does Not Cure Defect.** — The failure to serve an infant defendant with process is not cured by an answer of the guardian *ad litem*, and consequently the minors are not bound by the decree. Clark v. Thompson, 47 Ill. 25.

**Defective Service by Publication.** — Where infants are not in court owing to the fact that notice by publication was irregularly given, the appointment of a guardian *ad litem* is void. McDermaid v. Russell, 41 Ill. 489.

A court acquires no jurisdiction to appoint a guardian *ad litem* for an infant where the latter makes no appearance, and where the attempted service of summons upon him by publication is based upon an insufficient affidavit. Claypoole v. Houston, 12 Kan. 324.

**Appearance Not Effected by Appointment.** — The appointment of a guardian for minors without process does not effect an appearance for them, nor give the court jurisdiction over them. Moore v. Starks, 1 Ohio St. 369.

**Service on Infant Over Fourteen.** — Where an infant over the age of fourteen years is a party to an action, the court is not authorized to appoint a guardian *ad litem* to appear for him until after summons has been served on the infant, nor has the infant any power to nominate an attorney. McCloskey v. Sweeney, 66 Cal. 53.

**Service After Appointment.** — In *Indiana* it was held at an early day that it was not essential that service of process should precede the appointment of a guardian, but the record must show both to have been done. Hough v. Canby, 8 Blackf. (Ind.) 301.

**Appointment Before Completion of Service by Publication.** — A guardian *ad litem* cannot be appointed for an infant before the service of process is completed. Thus where by statute service of a summons by publication without the state is not completed until six weeks after the publication and the infant is served personally, a guardian cannot be appointed until after the expiration of the six weeks, and such appointment will confer no jurisdiction.



either directly or collaterally. But where it is held to be merely erroneous, it cannot be collaterally attacked.<sup>1</sup>

(e) **North Carolina Curative Act — Present Practice.** — In North Carolina, according to the present practice, no jurisdiction can be acquired over infant defendants except by service of process upon them, and no authority resides in the court to appoint a guardian *ad litem* before that time.<sup>2</sup>

**Former Practice.** — A different practice, however, for a long time almost universally prevailed in this state, and guardians *ad litem* were appointed without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and judgments rendered under such circumstances were held to be not void, but at most irregular.<sup>3</sup> The infants must have been represented, however, by a guardian *ad litem*, and their interests protected.<sup>4</sup>

**Former Practice Sanctioned by Statute.** — This practice has been expressly recognized and confirmed by statute. This statute provides that any actions or special proceedings pending on the 14th day of March, 1879, or theretofore determined, against

*Crouter v. Crouter*, (Supreme Ct.) 17 N. Y. Supp. 758, affirmed 133 N. Y. 55.

**Partition Under Statute.** — In *Allen v. Saylor*, 14 Iowa 437, it was held in a statutory proceeding to partition lands under the Code of 1851 that unless there is a completed service upon the minors the court has no jurisdiction to appoint a guardian *ad litem* or to make any order that might prejudice their rights.

**Sale of Infant's Land.** — A guardian *ad litem* cannot be appointed or answer for minors until process has been served upon them. A sale of their lands, under such circumstances, is not only voidable, but absolutely void, and the sale incapable of confirmation. *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129. See also *Wheatley v. Harvey*, 1 Swan (Tenn.) 484.

**In South Carolina**, according to the early practice, the appearance of an infant by a guardian *ad litem* duly appointed for that purpose was sufficient although there was no service of process on the infant, though it was held even then that it would be better practice to serve the infant. *Rollins v. Brown*, 37 S. Car. 345; *Bulow v. Witte*, 3 S. Car. 308; *Walker v. Veno*, 6 S. Car. 459; *McCrosky v. Parks*, 13 S. Car. 92.

But the practice has been changed, and service of process upon the infant is now necessary. See cases cited *supra* in this note.

1. See cases cited *supra*, III. 3. f. (2) (c), *Effect to Render Proceedings Void*.

2. **Present Rule in North Carolina.** — *Young v. Young*, 91 N. Car. 362; *Allen v. Shields*, 72 N. Car. 504; *Moore v. Gidney*, 75 N. Car. 34; *Stancill v. Gay*, 92 N. Car. 463; *Larkins v. Bullard*, 88 N. Car. 35; *Doyle v. Brown*, 72 N. Car. 393; *Perry v. Adams*, 98 N. Car. 167; *Hare v. Hollomon*, 94 N. Car. 14; *Matthews v. Joyce*, 85 N. Car. 258; *Howerton v. Sexton*, 90 N. Car. 581; *Cates v. Pickett*, 97 N. Car. 21; *Cunninggim v. Peterson*, 109 N. Car. 33; *Harrison v. Harrison*, 106 N. Car. 284.

3. See cases cited in preceding note.

4. **Guardian Ad Litem and Defense Necessary.** — *Hare v. Hollomon*, 94 N. Car. 21; *Harrison v. Harrison*, 106 N. Car. 282; *Howerton v. Sexton*, 90 N. Car. 581; *White v. Morris*, 107 N. Car. 99.

In *Larkins v. Bullard*, 88 N. Car. 35, certain infants were directed to be made parties, but were not served with process, nor was any guardian *ad litem* appointed for them, nor did their names appear anywhere in the record, and it was held that the judgment rendered against them was irregular, and the court had the power to set it aside; *Ruffin, J.*, saying: "It would be a plain violation of right to leave the judgment standing so as to operate as an estoppel upon these infants, when the court can see that no real defense was ever made for them."

infants on whom there was no personal service of summons, should be valid and binding.<sup>1</sup>

**This Statute Does Not Apply** to cases where there has never been any service upon the infant, nor upon any person representing him, but it was merely intended to cover cases of defective service, where personal service was omitted as to the infant.<sup>2</sup> Nor does it apply where the infant was not represented by a guardian *ad litem* or otherwise.<sup>3</sup>

(f) **Distinction Between Personal Actions and Actions In Rem.** — In a number of cases a distinction is drawn between purely personal actions and actions *in rem*, or *quasi in rem*. In the former class of cases it is held that jurisdiction can only be acquired by service of process, while in the latter class it is held that service of process is not essential to jurisdiction, and that the appointment of a guardian *ad litem* brings the minor into court; and although such proceedings may be erroneous the judgment or decree is not void.<sup>4</sup>

**1. North Carolina Curative Act.** — Clark's N. Car. Code Civ. Proc., § 348. This statute is valid. Howerton v. Sexton, 90 N. Car. 581.

It seems that under this statute decrees against infants who were not served are binding, except where fraud has entered into them. Hare v. Holomon, 94 N. Car. 14; McGlawhorn v. Worthington, 98 N. Car. 199; White v. Morris, 107 N. Car. 92; Cates v. Pickett, 97 N. Car. 21; Smith v. Gray, 116 N. Car. 311.

**Illustration of Defect Cured by Statute.** — Where a petition to sell lands for assets was filed, and service made on the infant defendants, but no guardian *ad litem* was appointed until after the order of sale, when one was appointed who was represented by the attorney of the plaintiff, who was also the purchaser of the land, and came in and consented to the order of sale, the irregularity was not such as rendered the judgment void, and was cured by the statute. Fowler v. Poor, 93 N. Car. 466.

**Illustration of Defect Not Cured by Statute.** — Where proceedings were irregular and void because process was not served upon the husband of a female defendant, and because infant defendants who were not served with process were represented by a guardian *ad litem* appointed before the petition was filed, on nomination of the plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infants, it was held that the statute did not

validate the proceedings. Gulley v. Macy, 86 N. Car. 721.

**2. Statute Cures Defective Service, Not Total Want of Service.** — Staftill v. Gay, 92 N. Car. 462; Perry v. Adams, 98 N. Car. 167; White v. Morris, 107 N. Car. 99; Smith v. Gray, 116 N. Car. 311.

**Service Accepted by Infant.** — Where an administrator filed a petition to make assets, and the heir at law, an infant under fourteen years of age, accepted service of the summons, and a guardian *ad litem* was appointed, who filed an answer, but no actual service was ever made, the irregularity was cured by the statute. Cates v. Pickett, 97 N. Car. 21.

**3. Guardian Ad Litem Necessary.** — Harrison v. Harrison, 106 N. Car. 282. In this case there was a petition to make real estate assets, but no service was made upon the defendants, except one, and the infant defendants were not represented either by guardian *ad litem* or otherwise, and the land brought only one-third of its value, and the sale was without notice to the defendants of its time and place. It was held that these proceedings were in such utter disregard of the rights of property and the fundamental principles of law that they might be pronounced void, on motion in the cause made many years after final judgment.

**4.** In Sloane v. Martin, 145 N. Y. 524, the cases illustrating this distinction are collated and ably discussed, and the conclusion is reached that in an action to subject certain property to

(g) **Probate Proceedings.** — In probate proceedings it is often held that service of process is not necessary to confer jurisdiction to appoint a guardian *ad litem*.<sup>1</sup> But this rule is by no means a

the payment of partnership debts the appointment of a guardian *ad litem* for an infant upon the application of his mother gave the court jurisdiction without actual service upon the infant, the action being in the nature of a suit *in rem*. See also *New York L. Ins. Co. v. Bangs*, 103 U. S. 435; *Carrington v. Brents*, 1 McLean (U. S.) 174; U. S. Bank *v. Ritchie*, 8 Pet. (U. S.) 128; *Woolridge v. McKenna*, 8 Fed. Rep. 650; *Matthews v. Joyce*, 85 N. Car. 265; *Robb v. Irwin*, 15 Ohio 689. Compare *Galpin v. Page*, 18 Wall. (U. S.) 350; *Mohr v. Manierre*, 101 U. S. 422.

Most of the above cases were reviewed in *Sloane v. Martin*, 145 N. Y. 524, and the conclusion was reached that they fairly held that "the need of service on the infant exists in personal actions, but does not exist in those *quasi in rem*." The court further said: "A similar, though not the same, distinction runs through our cases in this state. On the one hand we held in *Ingersoll v. Mangam*, 84 N. Y. 622, by force of an explicit statute, that in foreclosure actions service of the summons must precede the appointment of a guardian *ad litem*; while, on the other hand, in an action of partition which that statute did not govern, we also held that such precedent service was not essential to the jurisdiction. *Gotendorf v. Goldschmidt*, 83 N. Y. 110."

**Partition.** — Under a statutory provision relative to partition proceedings, that when an infant defendant resides without the state the plaintiff may apply to the court and will be entitled to an order designating a guardian *ad litem* for the infant defendant, unless such infant, or some one in his behalf, in the number of days specified in the order, shall procure to be appointed a guardian for the infant, and the court shall give special directions in the order for the manner of service thereof upon the infant, it is not necessary that the infant should be served with process. *Gotendorf v. Goldschmidt*, 83 N. Y. 111. See also *Althause v. Radde*, 3 Bosw. (N. Y.) 410; *Wood v. Martin*, 66 Barb. (N. Y.) 241.

1. *Price v. Winter*, 15 Fla. 66, holding that the statutes of *Florida* do not require the service of process upon an

infant heir in order to acquire jurisdiction in proceedings for the sale of lands of a decedent, but that the statute requires the court to appoint a guardian, and that such appointment is essential; *Stuart v. Allen*, 16 Cal. 473, holding that where the statute is silent as to the time when the guardian *ad litem* is to be appointed, an order of sale is not void because a copy of the order to show cause was not served upon the minor heirs before such appointment. But see the following note.

**Mississippi.** — In *M'Allister v. Moyer*, 30 Miss. 258, it was decided that under the Code of 1857 the probate court had no jurisdiction to appoint a guardian *ad litem* until after notice to the infant by service of process or publication. This case was overruled in *Burrus v. Burrus*, 56 Miss. 92, wherein it was held that the court could make such an appointment without process for the minor, and after the answer of the latter was filed by his guardian *ad litem*, could render a valid decree affecting the infant's interests.

An order of the probate court made in 1856, for the sale of land to pay a testator's debts, was not void because the guardian *ad litem* was appointed to answer for the infant devisees, who had no general guardian, before they were served with a citation. Until the Act of March 5, 1846, no statute of this state required the appointment of a guardian *ad litem* in any case in the probate court. The statute specified the circumstances in which such guardian should be appointed, and did not include the case of a minor who had no general guardian; and although it would seem that in such case, if any, a guardian *ad litem* should have been appointed, still the court cannot extend the statute beyond its plain terms. *Johnson v. Cooper*, 56 Miss. 608.

In *Ohio* it is held that probate sales cannot be attacked collaterally for an irregularity in appointing a guardian without service of process on the infants. *Ewing v. Higby*, 7 Ohio, pt. i., 198; *Ewing v. Hollister*, 7 Ohio, pt. ii., 138; *Snevely v. Lowe*, 18 Ohio 368.

In *Sheldon v. Newton*, 3 Ohio St. 504, it was said that these decisions had stood as a rule of property for twenty

universal one.<sup>1</sup> It would seem that many of these cases would fall within the distinction adverted to between personal actions and actions *in rem*.

(h) **Appointment for Infant Not a Party.** — The appointment, however, of a guardian *ad litem* for an infant who is not at the time a party to the suit is absolutely void.<sup>2</sup>

(i) **Effect of Subsequent Service.** — It has been held that where the appointment of a guardian *ad litem* is void because made before service of process upon the infant, a subsequent service of process will not cure the defect;<sup>3</sup> but in a few cases the view is taken that the appearance and recognition of the guardian *ad litem* after

years, and that the rule of *stare decisis* should be applied.

1. **California.** — Where a statute requires that the heirs of a testator must be cited on the probate of his will, the appointment of an attorney to represent the minor heirs, who were not cited, and his appearance for them are nullities. *Randolph v. Bayue*, 44 Cal. 366.

**New York.** — There is no jurisdiction of the surrogate to appoint a special guardian for an infant until such infant has been brought into court by the service of process in the manner prescribed by law, and until the jurisdiction is so acquired the appointment of a special guardian is an absolute nullity. *Potter v. Ogden*, 136 N. Y. 384; *Ingersoll v. Mangam*, 84 N. Y. 622; *Davis v. Crandall*, 101 N. Y. 321; *Crouter v. Crouter*, 133 N. Y. 56.

**Iowa.** — In proceedings commenced by a guardian of a person of unsound mind, affecting the property interests of his ward, and asking an order against the interest of the latter, a guardian *ad litem* should be appointed to make defense for the ward, but the court has no jurisdiction to make such appointment before proper service of notice of the proceeding has been made upon the ward. *Hunter's Estate*, 84 Iowa 388.

2. *Bondurant v. Sibley*, 37 Ala. 565. Where an infant who is a necessary party is not made such, and is not even named in the bill, the defect is not supplied by the filing of an answer for him by a guardian *ad litem*. *Dixon v. Donaldson*, 6 J. J. Marsh. (Ky.) 576. See also *Larkins v. Bullard*, 88 N. Car. 35.

So, in an analogous case, an insane person must be made a party to the action before the court has jurisdiction

to appoint a guardian *ad litem*. *Boyd v. Dodson*, 66 Cal. 360.

A mere order appointing a guardian *ad litem* will not make the wards parties to the suit. *Frazier v. Pankey*, 1 Swan (Tenn.) 75.

3. The fact that process was not served upon infant defendants until after the appointment of a guardian *ad litem*, and after he had filed an answer in their behalf, will render a sale of the infants' land not merely irregular and voidable, but absolutely void and incapable of confirmation. *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129. Compare *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 379, where it was said that a sale will not be held void in ejectment merely because the guardian *ad litem* was appointed before service on the infant, where the infant was subsequently served and the guardian *ad litem* appeared after such service. See also cases cited in following note.

"It is well established that the jurisdiction of the court over infants depends upon the service of process upon those infants. Therefore, the jurisdiction of the court over the infants in question did not exist until the summons had been completely served upon them, which the Code says is six weeks after the publication or personal service out of the state. The guardian in question was appointed long before this period had expired. Therefore, the court had no jurisdiction of the infants at the time of such appointment. It may be true that jurisdiction was acquired when the service became complete by expiration of time. But that jurisdiction, subsequently acquired, could not breathe life into acts done prior to the acquirement of any authority to act." *Crouter v. Crouter*, (Supreme Ct.) 17 N. Y. Supp. 759.

service upon the infant amount to an appointment *de novo*, or *nunc pro tunc*.<sup>1</sup>

(j) **Appointment by Commissioners Without Service.** — It has been held, in the *District of Columbia*, that nonresident infant defendants might be subjected to the jurisdiction of a chancery court by the appointment of a guardian *ad litem* by commissioners appointed by the court.<sup>2</sup>

#### g. APPLICATION AND PROCEEDINGS FOR APPOINTMENT —

(1) **In General.** — Statutory provisions respecting the appointment of a guardian *ad litem* should be strictly pursued,<sup>3</sup> but mere irregularities which do not affect substantial rights will not vitiate judgments or decrees obtained in the action.<sup>4</sup>

**By What Court.** — The appointment is usually made in the court wherein the action is pending for which the guardian *ad litem* is appointed; but, as has been seen, the probate court is sometimes authorized to appoint a guardian *ad litem* for an action pending in another court.<sup>5</sup>

1. *Bustard v. Gates*, 4 Dana (Ky.) 429, holding that in such case the irregularity did not affect the jurisdiction. Compare *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, in which this case is distinguished.

Where a guardian is appointed for infants not served with summons to answer a petition, but who are served with summons to answer subsequent pleadings, they are bound by a judgment only so far as to the matters to which the subsequent pleadings relate. *Allsmiller v. Freutchenicht*, 86 Ky. 198.

2. The appointment of a guardian *ad litem* by commissioners appointed by the court, and the taking of an answer by such a guardian, will be recognized as a substitute for actual service upon the infant. *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

3. *In re Van Vranken*, (Supreme Ct.) 3 N. Y. Supp. 445; *Carrigan v. Drake*, 36 S. Car. 364; *Riker v. Vaughan*, 23 S. Car. 187.

**Rules of Practice** respecting the appointment of guardians *ad litem* are intended for the protection of infant defendants, and a strict observance of them is necessary to support a decree adverse to infants when it is directly assailed. *McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 406; *Rowland v. Jones*, 62 Ala. 322.

In Louisiana, where an absentee is sought to be reached and to be affected by a decree appertaining to real estate situated within the state, the appointment of a curator *ad hoc* to represent

him is jurisdictional, and the mode of appointment must conform strictly to the constitutional provisions. *Gates v. Gaither*, 46 La. Ann. 286.

**What Statute Governs.** — The validity of an appointment of a guardian *ad litem* for infant defendants will be determined by the statute in force at the time of the appointment. *Harvey v. Cubbedge*, 75 Ga. 792.

**Objections to Appointment — When Too Late.** — After answer by an infant and judgment entered on the issues, the regularity of the appointment of the guardian interposing the answer cannot be questioned. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62.

4. *Ward v. Lowndes*, 96 N. Car. 367.

**A Substantial Compliance** with statutes and rules of practice of the court in appointing a guardian *ad litem* is sufficient. *Peck v. Adsit*, 98 Mich. 639.

5. See *supra*, III. 3. c. *Power to Appoint*.

Where by statute a guardian *ad litem* may be appointed either in the court wherein the action is pending or by a probate judge, the latter may appoint the guardian, although the order requiring the infant to procure the appointment stated that the application would be made to the court in which the action was pending. *Lyles v. Haskell*, 35 S. Car. 391.

**In England** the guardian is either assigned by the court in which the suit is brought, or by writ out of chancery; every court there having the power *ex necessitate* of assigning to an infant suitor a guardian *pro lite*, and it is

(2) *Application Ore Tenus or in Writing*—Generally.—The appointment may be made on mere suggestion or application *ore tenus* in open court,<sup>1</sup> but it is better and more usual practice to make the appointment only upon formal petition in writing.<sup>2</sup>

requisite that the guardian should be specially admitted to prosecute or defend. The guardian in case of an infant defendant is constituted upon the infant's appearance with the person intended before a judge at his chambers, or else upon his petition accompanied by an agreement signed by the intended guardian, and an affidavit of the fact. The judge thereupon grants his fiat, upon which the rule or order for the admission is drawn up by the proper clerk. If the defendant does not appear by guardian in the time allowed by the rules of court, the plaintiff must procure an affidavit of the service of the writ, and that the defendant is an infant and has not appeared; upon which an order will be granted, that unless the infant appears within six days after the personal service of the order, plaintiff may assign John Doe for his guardian and enter appearance for the defendant. A record of the admission is made in the Common Pleas, but in the King's Bench it is only recited in the court, etc., as *J. S. per A. B., guardianum suum, ad hoc per curiam specialiter admissum*, etc. But this record appears not to be essential, for where the plaintiff, being an infant, had sued by his guardian, but the entry on the roll was no more but '*J. S., guardianum suum*,' omitting the clauses *per curiam specialiter admissum*, as the common course is, and as it was alleged it ought to be; but *per curiam*, the entry is sufficient; for if, in fact, the guardian was not admitted by the court, a writ of error lies." *Mercer v. Watson*, 1 Watts (Pa.) 349.

1. *Emeric v. Alvarado*, 64 Cal. 530; *Fall River Foundry Co. v. Doty*, 42 Vt. 413.

On suggestion that the defendant is an infant, the court will appoint a guardian *ad litem*. *Barclay v. Govers*, 1 Cranch (C. C.) 147.

2. *Emeric v. Alvarado*, 64 Cal. 530; *Rhineland v. Sanford*, 3 Day (Conn.) 279; *Young v. Young*, 91 N. Car. 362. See also Rules of Practice in Superior Cts., 89 N. Car. 612.

"It is a serious mistake to suppose that a next friend or a guardian *ad*

*litem* should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians *ad litem* and their duties are prescribed by statute. The Code, § 181. But while the statute (§ 180) allows infants to sue by their next friends, the manner of the appointment of them and their duties are left as at the common law. As to their appointment, Tidd, in his work on Practice, says, at page 100: 'To constitute a *prochein ami* or guardian, the person intended, who is usually some near relation, should come with the infant before a judge at his chambers, or else a petition should be presented to the judge on behalf of the infant, stating the nature of the action, and, if for the defendant, that he is advised and believes he has a good defense thereto, and praying in respect of his infancy that the person intended may be assigned him as his *prochein ami*, or guardian, to prosecute or defend the action. This petition should be accompanied by an agreement signifying the assent of the intended *prochein ami* or guardian, and an affidavit made by some third person that the petition and agreement were duly signed. On being applied to in either of these ways, the judge will grant his fiat, upon which a rule or order should be drawn up and filed with the clerk of the rules in the King's Bench, for the admission of the *prochein ami*, or guardian," etc. 2 Arch. Pr. 154; 2 Sell. Pr. 65, Appendix (Forms) 504; Story's Eq. Pl., §§ 57, 58, and note. It would have been better if such practice, or the substance of it, had prevailed in this state from the beginning, but a loose practice has been recognized and pursued by the courts, and we cannot now disturb rights that have been acquired under it. If the strict methods in this respect of the English courts had prevailed, it could scarcely be possible that calamitous cases, like this seems to be, and many similar ones that have come before this court, and many that have

(3) *Affidavit for Appointment.* — Sometimes the appointment is required to be made only upon affidavit.<sup>1</sup>

(4) *Prayer in Bill for Appointment.* — While it is the better practice to insert a prayer for the appointment of a guardian *ad litem* in the bill, yet it is not absolutely necessary, since the court may make the appointment on motion of either party.<sup>2</sup>

(5) *What Petition Should Allege.* — The petition for the appointment of a guardian *ad litem* for an infant defendant should set forth the facts which confer upon the court the authority to make the appointment.<sup>3</sup> For example, in a chancery

not, could happen. This evil, in the future, may be easily and thoroughly corrected." *Morris v. Gentry*, 89 N. Car. 255.

1. *Sufficiency of Affidavit.* — Ky. Civ. Code, § 52, designates certain persons on whom service may be made in case an infant be a defendant, and the Act of January 16, 1882, provides that if all such persons be plaintiffs, on affidavit of one of them, showing such fact, the clerk will appoint a guardian *ad litem* for the infant on whom the summons shall be served. Under this statute a judgment against infant defendants was held not void where the affidavit on which the guardian *ad litem* for them was appointed was made by their father, the plaintiff, who was the only one on whom process could be served, their mother being dead, but failed to state that there was no other on whom it could be served. *Walch v. Davis*, (Ky. 1895) 32 S. W. Rep. 281.

So, an affidavit stating that the plaintiff is the mother and the guardian of the infants, and with whom they reside, is sufficient to authorize the appointment without an allegation that she is the person having charge of them. *Robinson v. Clark*, (Ky. 1896) 34 S. W. Rep. 1083.

An affidavit stating that the infant defendant has no statutory guardian, nor curator, nor committee, except his father, is sufficient, without the qualifying words "within the state." *Donaldson v. Stone*, (Ky. 1889) 11 S. W. Rep. 462.

*Who May Make Affidavit — Attorney.* — The affidavit for the appointment of a guardian *ad litem* required by section 38 of the Code, may be made by either the plaintiff or his attorney, whether the plaintiff is in the county or out of it, it being expressly so provided. Therefore, section 550 of the Code, providing that an affidavit required to be

made by a party may be made by his attorney when he is absent from the county, does not apply to the affidavit provided for by section 38. But the court is not inclined to adjudge that, even if section 550 applied, the judgment would be void because of the failure of the attorney's affidavit for the appointment of a guardian *ad litem* to show that the plaintiff, his client, was absent from the county. *James v. Cox*, 88 Ky. 270.

*Filing Affidavit.* — The affidavit may be filed in court or with the clerk. *James v. Cox*, 88 Ky. 270.

*Tennessee Code*, § 442, authorizing the clerk and master to appoint guardians *ad litem* at his office, "upon it being made to appear by affidavit that infants sued have no regular guardian," applies only to the practice before the master and not to appointments by the court. *Martin v. Porter*, 4 Heisk. (Tenn.) 407.

In *Alabama* the 23d chancery rule requires the appointment to be made upon an affidavit or a sworn bill. *Rhett v. Mastin*, 43 Ala. 86; *Carter v. Ingraham*, 43 Ala. 78.

2. *Rhoads v. Rhoads*, 43 Ill. 239. See also *Rhett v. Mastin*, 43 Ala. 86. And see *infra*, III. 3. g. (6) *Who May Apply*.

3. *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

*Where Resident Infant Is Temporarily Absent.* — N. Y. Code of Civ. Proc., § 473, authorizes the court in cases where an infant defendant residing in the state is temporarily absent therefrom to make an order appointing a guardian *ad litem*, and provides that the summons may be served upon such guardian. Under this statute, to authorize the appointment of a guardian *ad litem*, the moving papers must show that the infant is a resident of the state and is temporarily absent therefrom. *Smith v. Reid*, 19 Civ. Pro.

case the petition should show that the infant has been served with process, and that an order for his appearance has been made and served.<sup>1</sup> So, also, the petition should name the proposed guardian,<sup>2</sup> and state that he consents to his appointment.<sup>3</sup> The petition should likewise show that the proposed guardian is a fit and proper person to be appointed.<sup>4</sup> In one state at least the petition should be signed by infants over fourteen years of age.<sup>5</sup>

(6) *Who May Apply.*—A guardian *ad litem* may be appointed on motion of either party,<sup>6</sup> and the appointment will always be made upon petition of the infant in his own name.<sup>7</sup> So, also, it has been held that a nonresident guardian of an infant residing with him may petition within the state for the appointment of a guardian *ad litem* in partition proceedings.<sup>8</sup> But a mother has no such interest in the future prospects of her minor married child as will entitle her to petition for the appointment of a guardian on a proceeding for divorce wherein the daughter is defendant.<sup>9</sup>

Rep. (Brooklyn City Ct.) 363, 134 N. Y. 568.

**Where Infant Is a Nonresident.**—Where the petition is by the committee of a nonresident infant lunatic, and does not show that the infant lunatic resided with the petitioner, or was under his charge or custody, such omission, if it be a defect, may be cured by amendment after judgment. *Rogers v. McLean*, 11 Abb. Pr. (N. Y. Supreme Ct.) 440.

**Allegations as to Residence of Relatives.**—Where by statute notice is required to be given to the relatives residing within the county, of infants for whom a guardian *ad litem* is sought to be appointed, the petition for the appointment should show which of the relatives reside within the county. *Matter of Feely*, 4 Redf. (N. Y.) 306.

In *Alabama*, under the 23d chancery rule, the appointment of a guardian *ad litem* for an infant defendant in chancery must be made on affidavit showing the fact of infancy, and whether the infant is under or over fourteen years of age, or on sworn bill showing the fact of infancy and the age of the minor. *Rhett v. Mastin*, 43 Ala. 86; *Carter v. Ingraham*, 43 Ala. 78.

1. *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

2. *Brassington v. Brassington*, 2 Anstr. 369; *Rhineland v. Sanford*, 3 Day (Conn.) 279.

3. *Rhineland v. Sanford*, 3 Day (Conn.) 279. See *infra*, III. 3. g. (16) *Consent of Guardian to Act.*

4. *Smith v. Palmer*, 3 Beav. 10; *Foster v. Cantley*, 17 Jur. 370.

Orders for the appointment of guardians *ad litem* for infants served with petitions "in matters," will issue as of course upon the usual affidavit of their solicitor that they are infants, that the proposed guardian is uninterested, and that they are proper persons to be appointed. *In re Barrington*, 27 Beav. 272.

**Showing Pecuniary Responsibility.**—The moving papers must show the pecuniary responsibility of the proposed guardian. *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434.

5. *Carrigan v. Drake*, 36 S. Car. 364.

6. *Rhoads v. Rhoads*, 43 Ill. 239. See also *infra*, III. 3. g. (13) *Appointment on Application of Plaintiff.*

7. *Bush v. Linthicum*, 59 Md. 344; *Filmore v. Russell*, 6 Colo. 171; *Eisenmenger v. Murphy*, 42 Minn. 84.

In *Colorado* the appointment may be made on application of the infant himself if over fourteen years of age, or if he neglects to comply, or is under fourteen years of age, then upon the application of any party to the action, or of any relative or friend of the infant. *Filmore v. Russell*, 6 Colo. 173.

**On Affidavit of Infant's Solicitor**, an order of appointment will issue as of course. *In re Barrington*, 27 Beav. 272.

8. *Rogers v. McLean*, 34 N. Y. 536, *affirming* 11 Abb. Pr. (N. Y.) 444, *reversing* 31 Barb. (N. Y.) 304.

9. *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299.



(7) *Appointment Without Application*.—In some cases the appointment may be made by the court of its own motion without any application.<sup>1</sup>

(8) *Notice of Application*.—Notice of application for the appointment of a guardian *ad litem* for an infant defendant is usually required to be served upon the parent, general guardian, or some person exercising authority over him,<sup>2</sup> but in special cases notice of the application may be dispensed with.<sup>3</sup> Where the father or other natural guardian is complainant, the next

1. See also *infra*, III. 3. *k. Control and Duty of Court*.

In New York, under a statutory provision that when an infant is a party and does not appear by his general guardian the surrogate must appoint a special guardian, no application is needed, but the duty is imposed upon the surrogate, and if on the return of the citation no application for the appointment is voluntarily made, the surrogate may make the appointment of his own motion. *Ex p. Ludlow*, 5 Redf. (N. Y.) 391.

In Colorado, when it is necessary to appoint a guardian *ad litem* for a minor over fourteen years of age, the minor, or some one in his behalf, must apply for the appointment within ten days after service; and it would seem that the court is authorized to appoint only upon such application where the minor is fourteen years old or over. *Filmore v. Russell*, 6 Colo. 171.

2. *Christie v. Cameron*, 2 Jur. N. S. 635; *O'Brien v. Maitland*, 4 De G. F. & J. 331; *Leese v. Knight*, 8 Jur. N. S. 1006.

**Notice to General Guardian**.—Under statutory provisions that a special guardian can be appointed only for an infant who has a general guardian and there is no appearance of the latter, or where his interests are adverse to those of the infant, it is irregular practice to appoint a special guardian on the application of an infant without notice of the application having first been given to the general guardian. *Farmers' L. & T. Co. v. McKenna*, 3 Dem. (N. Y.) 219.

**Notice to Next of Kin**.—In *Pennsylvania* it is held that a notice of the application for the appointment of a guardian *ad litem* should be given to the next of kin. *Graham's Estate*, 14 W. N. C. (Pa.) 31.

**The Court May Prescribe What Notice** shall be given of an application for the appointment of a guardian *ad litem*.

*Mace v. Scott*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 100.

Under statutory provisions that where an infant resident defendant is temporarily absent from the state, the court may in its discretion make an order designating a person to be his guardian *ad litem*, unless he or some one in his behalf procure such a guardian to be appointed within ten days after service of copy of the order, and that the court may give special directions in the order respecting the service thereof, where such an order directs service to be made on the father of the infant, such service must be made on the father within the state. *Uhl v. Loughran*, 14 Civ. Pro. Rep. (N. Y. Supreme Ct.) 344.

3. *Cookson v. Lee*, 15 Sim. 302; *Wood v. Logsdon*, 22 L. J. Ch. 257; *Turner v. Snowden*, 10 Jur. N. S. 1122; *Lambert v. Turner*, 31 L. J. Ch. 494; *Lloyd v. Rossmore*, 9 Ir. Eq. R. 488.

**Waiver of Notice by Appearance and Consent**.—Though notice of an application for the appointment of a guardian *ad litem* may not have been given as required by statute, yet if it appear that the parties entitled to notice appeared and consented to the appointment, it will be deemed valid. *Smith v. Biscailuz*, 83 Cal. 344.

**Appointment by Court of Its Own Motion**.—In *In re Monell*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377, it was held that the provision of the Code of Civil Procedure, § 2531, to the effect that when a person other than the infant applies for the appointment of a special guardian, eight days' notice of the application must be served on the infant, did not have the effect to prevent a surrogate from appointing a special guardian of his own motion, without notice on proceedings for the accounting of an administrator, where during the proceedings the general guardian had been removed.

nearest relative is entitled to be heard, on the selection of a proper guardian *ad litem* to defend the suit.<sup>1</sup>

(9) *Proof of Infancy.* — Before the appointment of a guardian *ad litem* the court should be satisfied of the infancy of the defendant, but in the absence of statute the appointment is valid although it is made without affidavit of the minority.<sup>2</sup> The appointment of a guardian *ad litem* for a party to the suit is of itself conclusive evidence of infancy, for the purpose of the appointment, but for that purpose alone.<sup>3</sup>

(10) *Appearance of Infant in Court.* — It is not necessary for infant defendants to appear or be brought into court before a guardian *ad litem* can be appointed.<sup>4</sup>

(11) *Appointment by Commission.* — In some jurisdictions the practice has prevailed, in cases where the infant was not personally brought before the court, of appointing a commission composed of one or more persons who were authorized to go to the infant and appoint a guardian for the purpose of answering and defending the suit, and who were also authorized to take the answer and return it to the court.<sup>5</sup> Where infants were brought

**Ex-parte Appointment.** — Where after a decree giving liberty to apply for the appointment of a guardian *ad litem*, new parties became interested, on petition a guardian *ad litem* for the infant new parties may be appointed *ex parte* to represent them in the proceeding. *Butler v. Halsey*, 4 Sandf. Ch. (N. Y.) 354.

**Where Infant Is an Absentee.** — Under the provisions of the Act of 1833, authorizing the appointment of the registers and clerks guardians *ad litem* of infant defendants in partition suits, the court of chancery may appoint the register or clerk guardian *ad litem* of an infant defendant who is an absentee, without security, and without any notice of the application to the infant except the general notice for the absentee to appear and answer. *Minor v. Betts*, 7 Paige (N. Y.) 596.

1. *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

2. In Alabama an affidavit of infancy is required, and the appointment of a guardian *ad litem* without proof of infancy is an error for which a decree against the infant will be reversed. *Rhett v. Mastin*, 43 Ala. 86; *Walker v. Hallett*, 1 Ala. 379; *Erwin v. Ferguson*, 5 Ala. 158; *Carter v. Ingraham*, 43 Ala. 78. See also Eq. Rule 23, Rev. Code Ala., p. 826.

**Presumption in Support of Appointment.** — Where there is sufficient evidence that an order appointing a guardian

*ad litem* was actually made, the presumption is that it was made on sufficient proof. *Stevenson v. Kurtz*, 98 Mich. 493.

"The court having jurisdiction of the person of the parties, and the decree reciting the fact that it appeared to the satisfaction of the court that said parties are minors, we would presume that satisfactory evidence was presented of the fact, even if proof was necessary in case of appointment of guardian *ad litem* by the court. It is true that the clerk and master is authorized to appoint guardians *ad litem* at his office, 'upon its being made to appear by affidavit that infants sued have no regular guardian.' Code 4420, subs. 4. But this regulation applies only to the practice before the master. We know of no provision of the Code making such requirement for the appointment when made by the court." *Martin v. Porter*, 4 Heisk. (Tenn.) 412.

3. *Peak v. Pricer*, 21 Ill. 164.

4. *Ray v. M'Iroy*, 1 A. K. Marsh. (Ky.) 612; *Banta v. Calhoun*, 2 A. K. Marsh. (Ky.) 166. See also cases cited *supra*, III. 3. *e. Power to Appoint.*

5. *Cooper's Eq. Pl.* 108; *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128; *Duncanson v. Manson*, 3 App. Cas. (D. C.) 267. In *Snowden v. Snowden*, 1 Bland (Md.) 550, Chancellor Bland reviews the English practice of appointing guardians by commission, and compares it with the practice in Maryland.

into court a guardian *ad litem* was appointed without a commission.<sup>1</sup>

(12) *Discretion of Court.* — The court is vested with a large discretion in regard to the appointment of a guardian *ad litem*.<sup>2</sup>

(13) *Appointment on Application of Plaintiff* — *In General.* — If an infant defendant neglects or refuses to apply for the appointment of a guardian *ad litem*, and no one does so on his behalf, such guardian may be appointed by the court at the instance of the plaintiff.<sup>3</sup>

In *Smith v. Palmer*, 3 Beav. 10, a guardian *ad litem* was appointed for infants residing in Scotland, the application being made by motion to save expense of a commission.

"The English Practice appears to be to require the personal presence of the infant in court, or by his praying a commission, to have a guardian assigned him. *Cooper's Equity* 108, 109; 2 *Fonblanque* 237. So when the infant is a nonresident, a commission must go. *Tappen v. Norman*, 11 Ves. Jr. 563. But the practice does not seem to be certain, for in *Thompson v. Jones*, 8 Ves. Jr. 141, service of process on the father-in-law was held to be service on the infant. We are of opinion that it is not absolutely necessary that the infant should be brought personally before the court, to enable the court to appoint a guardian *ad litem*; such has not been our practice hitherto. In the case of nonresidents it would be impossible; in the case of extreme infancy, useless; and in cases where the infant is not in the vicinity of the court, though within the state, expensive and troublesome; and would frequently be a great hardship on the infant without any corresponding benefit. Nor do we think that in the case of nonresident infants there is any necessity as is contended to send a commission abroad. The only effect of such a course would be to enable the infant to make a nomination, in cases where he was of sufficient age, and the guardian must at last be appointed by the court." *Walker v. Hallett*, 1 Ala. 388.

1. *Reinhart v. Orme*, 1 Cranch (C. C.) 244. And see cases cited in preceding note.

2. *Walker v. Hallett*, 1 Ala. 379; *Smith v. Taylor*, 34 Tex. 589.

It is always within the discretion of the court to determine whether or not the *cestui que trust* should be formally made a party, and a guardian *ad litem*

appointed for him. *Freeman v. Prendergast*, 94 Ga. 384.

3. *Georgia.* — *Nicholson v. Wilborn*, 13 Ga. 467; *Jack v. Davis*, 29 Ga. 219.

*Illinois.* — *Peak v. Shasted*, 21 Ill. 137; *Kesler v. Penninger*, 59 Ill. 134.

*Iowa.* — *Ralston v. Lahee*, 8 Iowa 17.

*Kentucky.* — *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468.

*New Hampshire.* — *Clarke v. Gilman-ton*, 12 N. H. 515.

*New Jersey.* — *Judson v. Storer*, 5 N. J. L. 627.

*New York.* — *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194; *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301; *Fearing v. Clawson*, 1 Hall (N. Y.) 55; *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304; *Mockey v. Grey*, 2 Johns. (N. Y.) 192.

*Vermont.* — *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

*England.* — *Williams v. Wynn*, 10 Ves. Jr. 159; *Stone v. Atwell*, 2 Stra. 1076.

Where a Nonresident Infant defendant who has been served by publication fails to appear within the time limited by statute, the complainant may apply for the appointment of a guardian *ad litem*. *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301.

**Either Party May Apply.** — Subject to the rule that the court will not permit the adverse party to choose the guardian for an infant, the guardian may be appointed on motion either of the plaintiff or of the defendant. *Ralston v. Lahee*, 8 Iowa 17.

**If a Minor Has Appeared by Attorney** the plaintiff at any time, upon ascertaining that the defendant is a minor, may move to strike out the appearance of the attorney and for the appointment of a guardian *ad litem*, and if the defendant fails within a time fixed by the court to name a guardian, the plaintiff will be at liberty to name one. *Nicholson v. Wilborn*, 13 Ga. 467.

The Plaintiff Must at His Peril see that a guardian *ad litem* is appointed, as otherwise no binding decree can be rendered.<sup>1</sup> The plaintiff cannot proceed with his case to judgment until a guardian *ad litem* has been appointed.<sup>2</sup>

**Discontinuance.** — The failure of the plaintiff to move for the appointment of a guardian *ad litem* is not, however, such laches as will work a discontinuance of the action.<sup>3</sup>

**Duty of Court.** — Where infancy appears it is the duty of the court to see that a guardian is appointed whether the plaintiff moves or not.<sup>4</sup>

**Time of Application.** — The time in which an infant is to appear after service must elapse before an application can be made by complainant for the appointment of a guardian *ad litem*.<sup>5</sup>

**Rule or Order Nisi.** — The usual practice in this regard is to grant a rule or order upon the application of plaintiff requiring the infant to appear and procure the appointment of a guardian *ad*

**Highway Proceedings.** — Where a committee, appointed by the Court of Common Pleas upon a petition for a highway, made a report laying out the highway over the land of infants, who did not appear, it was held that the court might, upon motion by the petitioners, appoint a guardian *ad litem* for the infants, upon whom legal notice might be served of the time and place for hearing the owners of the land. *Clarke v. Gilmanton*, 12 N. H. 515.

**Infants Are Bound** by a decree to which they are parties where they were represented by a guardian *ad litem* who interposed a formal answer, although the guardian was appointed at the instance of the solicitor for the adverse party. *McCrosky v. Parks*, 13 S. Car. 93.

1. *Roach v. Hix*, 57 Ala. 576; *Montgomery v. Montgomery*, 3 Barb. Ch. (N. Y.) 132; *Mason v. Denison*, 15 Wend. (N. Y.) 64; *Clarke v. Gilmanton*, 12 N. H. 515; *Shipman v. Stevens*, 2 Wils. 50; *Swan v. Horton*, 14 Gray (Mass.) 179; *Peak v. Shasted*, 21 Ill. 137; *Wilder v. Eldridge*, 17 Vt. 226.

**Duty of Plaintiff to Apply.** — A guardian *ad litem* must be appointed, and the duty devolves upon the plaintiff in the action to have the appointment made, if no mention to that effect proceeds from the other side. *Swan v. Horton*, 14 Gray (Mass.) 179.

If at the time of the rendition of a judgment against a minor he was not represented by a guardian, the rendition of the judgment is error, it being the duty of the plaintiff to apply to the

court for a guardian *ad litem*, and if he fails to do so he cannot object if the judgment is set aside on its appearing that the defendant was a minor. *Peak v. Shasted*, 21 Ill. 137.

2. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 470; *Roach v. Hix*, 57 Ala. 576.

So where infants are nonresidents who have been served by publication. *McDermaid v. Russell*, 41 Ill. 489; *Mace v. Scott*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 100; *Walker v. Hallett*, 1 Ala. 379; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44; *Shropshire v. Reno*, 5 Dana (Ky.) 583; *Swan v. Horton*, 14 Gray (Mass.) 179; *Stinson v. Pickering*, 70 Me. 273.

3. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 470.

"It is clear also that if a plaintiff happens to know that a defendant is an infant he may move the court to appoint a guardian for him. But it is nowhere said that he must do it under penalty of discontinuing his action. This would be unreasonable, as the plaintiff may oftentimes not have the means of knowing that the defendant is an infant. It is to his interest to know it if it be so, otherwise he runs the risk of taking a judgment liable to be reversed, but we cannot conceive that he is obliged to do what may be an impossibility." *Turner v. Douglass*, 72 N. Car. 133.

4. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468; *Concklin v. Hall*, 2 Barb. Ch. (N. Y.) 136.

5. *Anonymous*, 10 Paige (N. Y.) 41.

*litem* within a limited time after service of a copy of the order, in default of which one will be appointed for him.<sup>1</sup>

**Service of Order.** — Generally, a copy of such order must be personally served upon the infant if he is of the age of fourteen years or upwards, and if he is under that age, then upon his general guardian, or his relative, friend, or other person with whom he resides.<sup>2</sup>

1. *Nicholson v. Wilborn*, 13 Ga. 468; *Judson v. Storer*, 5 N. J. L. 627.

**Statement of Chancery Practice.** — In *Concklin v. Hall*, 2 Barb. Ch. (N. Y.) 136, it was held that a peremptory order obtained by the plaintiff for the appointment of a guardian *ad litem* for infant defendants is regular, so far at least as to protect the title of a purchaser under a decree in a suit in which such order is made. In this case the court said: "The order for the appointment of the guardian *ad litem* was regular; so far at least as to protect the title of the purchaser under the decree. There is no unbending rule of practice in relation to the appointment of a guardian *ad litem* for an infant defendant upon the application of the complainant, where the infant and his friends neglect to procure the appointment of a guardian *ad litem* for him within twenty days after the return day of the subpoena. The usual practice is to grant an order *nisi*, appointing some suitable person guardian *ad litem* for the infant defendant, unless the defendant, within ten days after the service of a copy of the order, procures the appointment of another person, as prescribed in the case of *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304. But this court has also sanctioned the practice of giving notice to the infant at the time of serving the subpoena, where he is of the age of fourteen or upwards, or to his relative or protector, in whose presence the subpoena is served, where he is under that age, that if he does not procure the appointment of a guardian *ad litem*, within twenty days after the return day of the subpoena, the complainant will apply to the court to appoint a guardian *ad litem* for him without further notice. And in the case of infants who are absentees, it is a matter of course to make an absolute order for the appointment of a guardian *ad litem* for them without further notice, where they or their friends do not procure a guardian to be appointed within twenty days after the

expiration of the time limited in the order of the court for their appearance."

**Order Made Absolute as of Course.** — Upon the expiration of the ten days, upon filing an affidavit of the service of the order, and that no notice has been received of the appointment of a guardian *ad litem* by the infant, the complainant will be entitled to an order of course that the former order for the appointment of a guardian be made absolute. *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

**In Partition Causes**, where security is required from the guardian, the order must require the infant to procure a guardian to be appointed, and that he file the requisite security within the ten days, or that an order for the appointment of the person named by the court will be made absolute upon his filing such security. *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

**In Foreclosure Proceedings**, if there are infant defendants, it is a matter of course to make an absolute appointment of a guardian *ad litem*, if they or some one in their behalf do not. *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301; *Concklin v. Hall*, 2 Barb. Ch. (N. Y.) 136.

2. *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304. In this case it was further said that where the infant is a nonresident special directions must be given as to the manner of serving the order, if any notice thereof shall be deemed requisite.

**In South Carolina**, under Code of Civ. Pro., § 136, which requires notice of such application to be given to the general or testamentary guardian of the infant, if he has one, and otherwise to the person with whom he resides, it was held that in the absence of such guardian service on infants, and their father, with whom they resided, of an order continuing an action against them as heirs of a deceased defendant, and requiring them to appear and answer within twenty days, in default of which plaintiff would apply for an

**Presumption.** — In the absence of anything in the record to the contrary, it will be presumed that the guardian *ad litem* was appointed under the prayer of the petition.<sup>1</sup>

(14) *Considerations Affecting Choice of Appointee* — **In General.** — In appointing a guardian *ad litem* for an infant defendant, the person who will be most likely to protect the rights of the infant should be selected.<sup>2</sup> The person selected should be fully competent to understand and manage business affairs,<sup>3</sup> and must be a real and not a fictitious person.<sup>4</sup> A person without the jurisdiction will not be appointed.<sup>5</sup>

**Appointment of General or Testamentary Guardian.** — Ordinarily, the general or testamentary guardian of the infant will be appointed,<sup>6</sup> but if for any reason it appears that such guardian is not the best person to represent the infant, the court may in its discretion appoint some one else.<sup>7</sup>

**Appointment of Nearest Relative.** — Where for any reason the general or testamentary guardian is not appointed, the infant's nearest relative not concerned in point of interest in the matter in question is usually selected as being the one most likely to protect the infant's interests,<sup>8</sup> but it is not absolutely necessary that the

order, was substantially a notice for them to have a guardian *ad litem* appointed to enable them to appear in answer, and that in default thereof plaintiff would proceed to have one appointed, and that no further notice was required. *Lyles v. Haskell*, 35 S. Car. 391.

1. *Smith v. Smith*, 69 Ill. 308.

2. *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Denny v. Denny*, 8 Allen (Mass.) 311.

**Proof of Capacity Collaterally.** — The appointment of a guardian *ad litem* is full proof of his capacity until set aside by appeal or in an action of nullity. *Keller's Succession*, 39 La. Ann. 579.

**Qualification in Surrogate's Courts.** — Where a statute does not prescribe the qualifications of a guardian *ad litem* in the surrogate's court, it is good practice to require the same qualifications as are required of a guardian *ad litem* in the Supreme Court. *Story v. Dayton*, 22 Hun (N. Y.) 450.

**The Executor** is not necessarily the guardian. *Rhoads v. Rhoads*, 43 Ill. 239.

3. *Walker v. Hallett*, 1 Ala. 379; *Story v. Dayton*, 22 Hun (N. Y.) 450.

4. **The Appointment of "John Doe"** as guardian *ad litem* is error, *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398; though it seems that the old practice

sanctioned such appointments. *Mercer v. Watson*, 1 Watts (Pa.) 337; *Fearing v. Clawson*, 1 Hall (N. Y.) 55; *Van Deusen v. Brower*, 6 Cow. (N. Y.) 50.

5. — *v. —*, 18 Jur. 770.

6. *Story v. Dayton*, 22 Hun (N. Y.) 450; *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233; *Patterson v. Pullman*, 104 Ill. 80; *Kesler v. Penninger*, 59 Ill. 134; *Scott v. Winningham*, 79 Ga. 492; *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194; *Mathewson v. Sprague*, 1 Curt. (U. S.) 457; *Howard v. Abergavenny*, Dick 31.

A guardian is the proper representative in all legal proceedings, and should be regarded as such unless some good reason appears to the contrary. *Patterson v. Pullman*, 104 Ill. 80. See *Kesler v. Penninger*, 59 Ill. 134.

7. *Patterson v. Pullman*, 104 Ill. 80; *Sturges v. Longworth*, 1 Ohio St. 544; *Wilson v. Vandyke*, 2 Harr. (Del.) 30.

8. *Rhoads v. Rhoads*, 43 Ill. 239; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

**Father.** — In *Jongsma v. Pfiel*, 9 Ves. Jr. 357, Lord Eldon, on motion, and to avoid the difficulty of a commission, assigned the father of an infant residing abroad as his guardian for the purpose of putting in his answer, the father not being interested in the controversy.

person appointed as a guardian *ad litem* shall be a relative of the infant.<sup>1</sup>

**Appointment of Attorney or Officer of Court.** — Where neither the guardian nor a relative of the infant is appointed, it is usual to appoint a solicitor or attorney of the court as guardian.<sup>2</sup> Oftentimes the court will appoint one of its own officers as guardian *ad litem*, where no other can be found to act.<sup>3</sup>

**Financial Ability of Appointee.** — The person appointed guardian *ad litem* must have sufficient financial ability to respond to the infant in damages for any neglect or default in the performance of his duties.<sup>4</sup>

**Nomination by Adverse Party.** — Although a guardian *ad litem* may be appointed upon the application of the plaintiff, the court will not permit the adverse party or his attorney to select the person to be appointed.<sup>5</sup>

**There Should Be Some Interest,** either relationship or the like, to show that the person claiming to be guardian is not a mere volunteer. *Foster v. Cantley*, 17 Jur. 370.

**Next of Kin Entitled to Be Heard.** — Where a father or a natural guardian of an infant defendant is complainant in a suit, the next nearest relative is entitled to a hearing as to the selection of a guardian *ad litem*. *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255.

1. *Rhoads v. Rhoads*, 43 Ill. 239, where the court said that the fact that the person is not related to the infant constituted no objection to his appointment as guardian *ad litem*.

**Appointment of Stranger a Suspicious Circumstance.** — In *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128, the court said: "It is not error, but it is calculated to awaken attention, that in this case, though the infants, as the record shows, had parents living, a person not appearing from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*."

2. *Story v. Dayton*, 22 Hun (N. Y.) 450; *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233; *Carter v. Montgomery*, 2 Tenn. Ch. 455; *Cookson v. Lee*, 15 Sim. 302; *Robinson v. Aston*, 9 Jur. 224; *Bennett v. Wheeler*, 1 Ir. Eq. R. 16; *Thomas v. Thomas*, 7 Beav. 47; *Thomas v. Gwyn*, 13 L. J. N. S. Ch. 79; *Bentley v. Robinson*, 9 Hare, appendix lxxvi.

**Appointment of Person Prohibited from Practicing.** — In the absence of any statute or rule which requires that a guardian *ad litem* shall be a solicitor,

the appointment of a clerk of the court as guardian will not render a decree rendered in the case in which the appointment was made a nullity in a collateral proceeding, or furnish a ground for setting aside a final decree, although as clerk the appointee was prohibited from practicing as solicitor in chancery. *Maloney v. Dewey*, 127 Ill. 395.

3. *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109; *Smith v. Edwardson*, Dick, 234; *Morgan v. Morgan*, 2 Moll. 362.

The court will appoint the clerk of the court or an attorney. *Carter v. Montgomery*, 2 Tenn. Ch. 455; *Cook v. Rawdon*, 6 How. Pr. (N. Y. Supreme Ct.) 233.

**Appointment in Official Capacity.** — In *McVickar v. Constable*, Hopk. (N. Y.) 102, the court expressed its determination not to appoint any officer of the court, as such, to be guardian, for the reason that it produced an inconvenient mixture of duties, and was especially embarrassing upon a change of the officers of the court.

4. *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109; *Story v. Dayton*, 22 Hun (N. Y.) 450; *McDonald v. Brass Goods Mfg. Co.*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 434; *TenBroeck v. Reynolds*, 13 How. Pr. (N. Y. Supreme Ct.) 462; *In re Daly*, 1 N. Y. City Ct. 437; *Matter of Mang*, 50 N. Y. Super. Ct. 96.

5. *Rhoads v. Rhoads*, 43 Ill. 239; *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

In *Ralston v. Lahee*, 8 Iowa 26, it is said that the statement in *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304, that "the court never selects a

**A Person Having Interests Adverse** to those of the infant should not be appointed guardian *ad litem*.<sup>1</sup> He should be an entirely disinterested person.

**Antagonistic Positions.** — A guardian *ad litem* cannot occupy antagonistic positions in the proceeding.<sup>2</sup> Thus the same person should not be appointed guardian *ad litem* for different infants whose interests are directly antagonistic.<sup>3</sup> So, also, an executor or administrator should not be appointed guardian *ad litem* in

guardian *ad litem* on the nomination of the adverse party," is to be understood to mean that the court will not permit the adverse party to select a guardian *ad litem*.

"An infant must prosecute by his guardian or next friend, and he must defend by them when sued; but the plaintiff who sues an infant cannot elect a guardian, or force a *prochein ami* upon him by his writ; he must in such case, if no one appears to defend for the infant, move the court, who will appoint a *prochein ami*. Neither can he, if he is coupled in judgment with an infant, appoint a guardian to him, or force a *prochein ami* upon him by inserting his or their names in his writ of error. If he inserts the infant's name alone in the writ, the court cannot aid him by appointing a guardian to prosecute." *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

1. *Illinois*. — *Patterson v. Pullman*, 104 Ill. 80; *Roodhouse v. Roodhouse*, 132 Ill. 360.

*Iowa*. — *Ralston v. Lahee*, 8 Iowa 17.

*Massachusetts*. — *Denny v. Denny*, 8 Allen (Mass.) 311; *Bicknell v. Bicknell*, 111 Mass. 265; *Parker v. Lincoln*, 12 Mass. 16.

*Michigan*. — *Damouth v. Klock*, 29 Mich. 289.

*New Hampshire*. — *Noyes v. Barber*, 4 N. H. 406.

*New York*. — *Story v. Bayton*, 22 Hun (N. Y.) 450; *Hecker v. Sexton*, 43 Hun (N. Y.) 593; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 258; *Matter of Frits*, 2 Paige (N. Y.) 374.

*North Carolina*. — *George v. High*, 85 N. Car. 113.

*United States*. — *Mathewson v. Sprague*, 1 Curt. (U. S.) 457.

*England*. — *Langford v. Little*, 5 Ir. Eq. R. 343; *Smith v. Palmer*, 3 Beav. 10; *Leese v. Knight*, 10 W. R. 711.

In appointing a guardian *ad litem* no person should be selected who may be adverse in feeling or interest to the person under disability, but the ap-

pointment should be of one who would faithfully protect his rights and interests in the matter. *Denny v. Denny*, 8 Allen (Mass.) 311.

**Removing Guardian Adversely Interested.** — Where it appears that a person having adverse interests has been appointed guardian *ad litem* for an infant, he should be displaced by a disinterested party before the case proceeds further. *Damouth v. Klock*, 29 Mich. 289.

**Setting Aside Decree.** — Although a guardian may have such an interest adverse to the ward as would afford a sufficient reason for removing him and appointing some other person, unless it is shown that the guardian made use of his office as such to work some injury to the interest of the infant, there is no such conclusive evidence of fraud as will authorize setting aside a decree against the latter. *Ralston v. Lahee*, 8 Iowa 17.

**A Statutory Guardian Will Not Be Appointed guardian ad litem** if his interest is directly opposed to that of the ward. *Mathewson v. Sprague*, 1 Curt. (U. S.) 457; *Parker v. Lincoln*, 12 Mass. 16; *Noyes v. Barber*, 4 N. H. 406.

2. **A Master in Chancery** who is to take an account in which an infant is interested should not be appointed guardian *ad litem* for such infant. *Walker v. Hallett*, 1 Ala. 379.

**Commissioner to State Accounts.** — It is bad practice, but not error, to appoint the same person guardian *ad litem* of infants, and commissioner to state an account against them. *Cole v. Johnson*, 53 Miss. 94.

**An Attorney or Party to the Suit** should not be appointed guardian *ad litem*. *Pinchback v. Graves*, 42 Ark. 222.

3. *Estes v. Bridgforth*, (Ala. 1897) 21 So. Rep. 512, holding that in a proceeding to probate a will the same person should not be appointed guardian *ad litem* for infant beneficiaries and for infant heirs who would take if the will were not probated.



proceedings by him to sell real estate.<sup>1</sup> The plaintiff in an action cannot be appointed guardian *ad litem* of minor defendants,<sup>2</sup> nor can the plaintiff's attorney be appointed.<sup>3</sup> It seems, however, that a codefendant may be appointed if his interests are not adverse.<sup>4</sup>

(15) *Consulting Infant as to Appointment.* — Where the infant is above the age of fourteen years it is proper to consult him in regard to the appointment of a guardian *ad litem*,<sup>5</sup> but it is not necessary to do so.<sup>6</sup> The matter rests in the sound discretion of the court.<sup>7</sup>

1. *Townsend v. Tallant*, 33 Cal. 45.

In *Story v. Dayton*, 22 Hun (N. Y.) 450, the surrogate was asked to open his decree on the ground that the guardian *ad litem*, who appeared for the infants, was a nephew of the attorney for the administrator and a clerk in his law office and was appointed on his nomination, and such appointment was condemned.

**Offices of Executor and Guardian Not Necessarily Incompatible.** — In *Sharp v. Findley*, 59 Ga. 722, the question whether there was any real incompatibility between the office of executor and that of guardian *ad litem*, in a proceeding to sell lands devised, was considered and left undecided, but the court condemned such appointment as ill advised.

In *Sharp v. Findley*, 71 Ga. 654, the court said that, while it would have been better to have appointed another, such appointment would not make the whole proceeding absolutely void, and that there was no necessary conflict of interests between the executor and the minors.

2. — *v. —*, 18 Jur. 770.

**The Appointment of a Plaintiff in an action as guardian *ad litem* for an infant defendant renders the proceeding so voidable as to entitle the purchaser of premises on foreclosure to be relieved from the purchase and to be made whole.** *Hecker v. Sexton*, 43 Hun (N. Y.) 593.

Where pending a suit plaintiff was appointed guardian of the defendant the bill was ordered to be dismissed unless plaintiff should, before the next term, show that he had resigned his guardianship. *Smith v. Dudley*, 1 Dev. Eq. (N. Car.) 358.

**The Plaintiff's Husband** should not be appointed. *Bicknell v. Bicknell*, 111 Mass. 265.

3. *Sargeant v. Rowsey*, 89 Mo. 617; *Sheppard v. Harris*, 15 L. J. N. S. Ch. 104.

The appointment of the attorney of a tax collector, not employed in the case, as the guardian *ad litem* of infant defendants in a tax suit will not invalidate a judgment against them. *Walters v. Hermann*, 99 Mo. 529.

**Business Connection with Adverse Attorney.** — In *Story v. Dayton*, 22 Hun (N. Y.) 450, it was said that the guardian *ad litem* should not even be connected in business with the counselor of the adverse party.

4. See *Bonfield v. Grant*, 11 W. R. 275; 1 Dan. Ch. Pr. 160.

**Codefendant's Interests Adverse — Effect of Appointment.** — Where there are minor parties defendant having no regular guardian, and a codefendant whose interests in the suit conflict with those of the infants is appointed guardian *ad litem* for them, a decree in the cause will not bar a subsequent suit by the minors against such defendant. *Elrod v. Lancaster*, 2 Head (Tenn.) 571.

5. *Walker v. Hallett*, 1 Ala. 379; *Roach v. Hix*, 57 Ala. 576; *Stammers v. McNaughten*, 57 Ala. 277.

6. *Beddinger v. Smith*, (Ark. 1890) 13 S. W. Rep. 734; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

"And it cannot have been necessary to cause the infant to be brought into court that he might select a suitable person to defend for him, for in many cases the imbecility of infants would preclude such a selection, and we have discovered no case where the infant has been required to choose such a guardian, but in every case the appointment appears either to have been made by the court itself, or according to the English practice, in some instances, by commissioners specially authorized by the court for that purpose." *Banta v. Calhoun*, 2 A. K. Marsh. (Ky.) 167.

7. **Considerations Affecting Discretion.** — Infants above the age of fourteen years should be consulted in the appointment of a guardian *ad litem*, if

(16) *Consent of Guardian to Act* — In General. — A guardian *ad litem* must consent to act under his appointment in order to render the appointment complete and effective.<sup>1</sup> In *New York* the acknowledged consent of the proposed guardian must be made part of the motion papers.<sup>2</sup> But ordinarily a subsequent consent to act will be sufficient.<sup>3</sup>

**How Shown.** — There must, however, in all cases be either an express assent to the appointment or some action taken by the guardian denoting his assent.<sup>4</sup> Thus he may manifest his acceptance by appearing<sup>5</sup> in the suit, and filing an answer for the infant.<sup>6</sup> The acceptance of the appointment should appear of

not attended with too much trouble or expense, as to which the chancellor will exercise a sound discretion. *Walker v. Hallett*, 1 Ala. 379.

1. *Stillwell v. Swarthout*, 81 N. Y. 109; *Cole v. McGarvey*, 6 Civ. Pro. Rep. (Oneida Supreme Ct.) 305; *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109.

A guardian appointed in partition proceedings must have notice of his appointment, and must consent to act, or the proceedings will be void. *Barns v. Branch*, 3 McCord L. (S. Car.) 19.

**Consent of Clerk and Master Unnecessary.**

— A court of equity has the power to appoint the clerk and master of the court guardian for infant defendants to appear and answer for them, and can exercise this power without, or even against, the consent of the clerk and master. *Muir v. Stuart*, 1 Murph. (N. Car.) 440.

2. *Schell v. Cohen*, 55 Hun (N. Y.) 207. See also *McVickar v. Constable*, *Hopk.* (N. Y.) 102.

**Irregularity Cured by Amendment.** —

Where, by statute, the consent of a person, duly acknowledged, to be appointed the guardian *ad litem* of an infant is required to be produced, the failure to have the consent acknowledged at the time of the appointment is a mere irregularity which may be subsequently amended. *Schell v. Cohen*, 55 Hun (N. Y.) 207.

**Appointment of Guardian ad Litem Nisi.**

— The provision of the N. Y. Code of Civ. Proc., § 472, that a guardian *ad litem* shall not be appointed unless his consent to the appointment be presented to the appointing court, was held not to apply to a guardian *ad litem nisi*, under section 473, providing for the appointment of a guardian *ad litem* for a resident defendant temporarily without the state. *Schell v. Cohen*, 55 Hun (N. Y.) 207.

3. **Consent After Order of Sale.** — The fact that the guardian did not accept his appointment as such until after the order of sale was granted was an irregularity which was cured by the facts that the sale was made after he did accept, that he assented to the sale and in his answer recommended it, that the receiver made a report to the judge who granted the order of sale, and that the judge confirmed the sale. *Deyton v. Bell*, 81 Ga. 371.

4. *Frierson v. Travis*, 39 Ala. 150; *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 108; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 166; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *U. S. Bank v. Cockran*, 9 Dana (Ky.) 395; *Daniel v. Hanagan*, 5 J. J. Marsh. (Ky.) 48; *Duval v. McLoskey*, 1 Ala. 726; *Smith v. Smith*, 21 Ala. 761; *Cato v. Easley*, 2 Stew. (Ala.) 214.

**Standing Silent in Court** is not sufficient to show assent to the appointment. *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109.

5. **Necessity of Appearance.** — As the guardian *ad litem's* willingness to manage the cause cannot regularly be known before appearance, the court should cause him to appear before any judgment is taken against the infant. *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 400.

A guardian *ad litem* having neither appeared nor answered, it is irregular to take a bill as confessed against infants. *Carneal v. Sthreshley*, 1 A. K. Marsh. (Ky.) 471.

6. **Necessity of Answer.** — As it is the duty of a guardian *ad litem* to manage the case of an infant and see to his interest, he must indicate his acceptance of the trust by filing, adopting, or causing to be filed a proper

record,<sup>1</sup> and where acceptance is not shown a judgment against the infant will be reversed.<sup>2</sup>

(17) *Oath and Bond.* — Guardians *ad litem* should qualify by oath faithfully to perform their duties,<sup>3</sup> and usually a bond is also required.<sup>4</sup> The omission to require a bond, however, will not divest the court of jurisdiction over the infant.<sup>5</sup> It is a mere irregularity which may be cured by amendment,<sup>6</sup> and it is so cured where the bond is filed *nunc pro tunc*.<sup>7</sup> The bond should run in the name of the state.<sup>8</sup> A separate bond for each infant is not imperatively required,<sup>9</sup> although it is the better practice to give several bonds.<sup>10</sup>

answer. *Alexander v. Davis*, 42 W. Va. 465.

It is error to decree against an infant defendant without appointing a guardian *ad litem* who has shown his acceptance of the appointment by filing an answer, and for such omission a decree against an infant defendant is voidable, and will be reversed upon appeal. *Alexander v. Davis*, 42 W. Va. 465.

1. *Daniel v. Hannagan*, 5 J. J. Marsh. (Ky.) 48; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453; *Fox v. Cosby*, 2 Call (Va.) 1; *St. Clair v. Smith*, 3 Ohio 355.

2. *Alexander v. Davis*, 42 W. Va. 465; *Creech v. Creech*, 10 Mo. App. 586.

**Default.** — In *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, it was said that a judgment by default against an infant is void when there is nothing in the record showing an acceptance by a guardian *ad litem* of his trust, or notice to him thereof.

3. *Hamilton v. Flume*, 2 Tex. Unrep. Cas. 694.

4. *Hamilton v. Flume*, 2 Tex. Unrep. Cas. 694; *Minor v. Betts*, 7 Paige (N. Y.) 596; *Walter v. De Graaf*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 406; *Kennedy v. Arthur*, 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 390.

**Security Where Register or Clerk Is Appointed.** — Under Act of 1833, c. 227, the court of chancery was authorized to dispense with the security required by 2 Rev. Stat. 317, § 4, in cases where the register or clerk was appointed guardian *ad litem*, but in no other case could security be dispensed with. *Minor v. Betts*, 7 Paige (N. Y.) 596. This statute has been repealed by Acts of 1880, c. 245, and has not been re-enacted; therefore, where in default of any person consenting to act as guardian *ad litem* for an infant defendant, in an action of partition, the court appoints its

clerk to act as guardian, it cannot relieve him from the necessity of furnishing the security required from guardians *ad litem* in such actions by Code of Civ. Pro., § 1536. *Fisher v. Lyon*, 34 Hun (N. Y.) 183.

5. *Reed v. Reed*, 46 Hun (N. Y.) 212; *Croghan v. Livingston*, 17 N. Y. 218.

6. *Croghan v. Livingston*, 17 N. Y. 218.

It is a defect of sufficient gravity, however, to relieve a bidder from his purchase at a sale under the decree. *Walter v. De Graaf*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 406.

7. *Croghan v. Livingston*, 17 N. Y. 218, holding that the Act of 1852, c. 277, authorizing the filing of guardian's bond after judgment in cases of actual partition, is an enabling, not a restrictive one, and that it does impair the power of a court having original equity jurisdiction to amend an irregularity by ordering such bond filed before or after a sale, as well as on an actual partition. This case was reviewed and approved in *Rogers v. McLean*, 34 N. Y. 538.

**Notice to the Parties Interested** of an application for an order *nunc pro tunc* to cure proceedings defective because of the failure of the guardian *ad litem* to file a bond as required by statute is necessary. *Walter v. De Graaf*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 406.

8. *Crouter v. Crouter*, 133 N. Y. 55.

9. *Crouter v. Crouter*, 133 N. Y. 55.

**An Omission to Direct a Several Bond** in favor of infant defendants, but permitting one bond for their joint and several benefit, is a mere irregularity which cannot be made the subject of objection or complaint by a person who has purchased under a decree made in the cause. *Reed v. Reed*, 46 Hun (N. Y.) 212.

10. *Crouter v. Crouter*, 133 N. Y. 55.

(18) *Effect of Acting Without Appointment.*—As a general rule, no person can appear as guardian *ad litem* unless he has been in fact appointed by the court,<sup>1</sup> and the appointment should appear of record.<sup>2</sup> An answer or defense interposed by one acting without appointment will not support a judgment against the infant.<sup>3</sup>

(19) *Facts Equivalent to Appointment*—In General. — Although, as a general rule, a person acting as guardian *ad litem* must have been appointed such in order to support the judgment rendered

1. *Madison v. Wallace*, 2 J. J. Marsh. (Ky.) 581; *Letcher v. Letcher*, 2 A. K. Marsh. (Ky.) 158; *Shields v. Craig*, 1 T. B. Mon. (Ky.) 72; *Ivey v. McKinnon*, 84 N. Car. 651; *Wilson v. Vandyke*, 2 Harr. (Del.) 29.

**Answer by Stranger.**—It is essential to the action of the guardian *ad litem* that a decree should be had appointing him; therefore an answer by a stranger styling himself guardian *ad litem* is not sufficient to avoid the necessity of a decree appointing him. *Darrington v. Borland*, 3 Port. (Ala.) 10.

A decree against infants is erroneous unless it appears that the person answering for them was appointed by the court to defend them. *Searcey v. Morgan*, 4 Bibb (Ky.) 66.

**Mother Cannot Answer Without Appointment.**—Where an infant, being abroad, could not be brought into court for the purpose of having a guardian appointed to put in an answer, Lord Eldon declined to allow his mother to answer as guardian, without an appointment in the usual way, there being no prior instance, but said that there must be a commission. *Tappen v. Norman*, 11 Ves. Jr. 563.

As to appointment by commission, see *supra*, III. 3. g. (11) *Appointment by Commission*.

**Contempt of Court.**—“A further consideration here is worthy of notice in regard to the Warfield infants, where the answer was filed by an attorney and counselor of this court, Mr. Seawell, as the guardian *ad litem*. Without an order appointing him he would be guilty of contempt for misbehavior, and might be dealt with for it, and would probably be subject to a proceeding for removal or suspension from the discharge of his function as attorney. Code Civ. Pro., § 1209, subd. 3, 6; § 282, subd. 2, 4; § 287, subd. 2. This we cannot presume.” *Emeric v. Alvarado*, 64 Cal. 598.

2. *Jones v. Adair*, 4 J. J. Marsh. (Ky.) 220; *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 69; *Shields v. Craig*, 1 T. B. Mon. (Ky.) 72; *Robertson v. Robertson*, 2 Swan (Tenn.) 197.

3. *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Darrington v. Borland*, 3 Port. (Ala.) 10; *Rowland v. Jones*, 62 Ala. 322; *Searcey v. Morgan*, 4 Bibb (Ky.) 97; *Shields v. Bryant*, 4 Bibb (Ky.) 525; *Shields v. Craig*, 1 T. B. Mon. (Ky.) 72; *Ivey v. McKinnon*, 84 N. Car. 651.

**A Decree Against Infants Cannot Be Supported** on the appearance and answer of a guardian *ad litem* irregularly or prematurely appointed, though the court of chancery may even recognize him as guardian. *Rowland v. Jones*, 62 Ala. 322.

**Where a Stranger to the Cause** interposes any pleading in an equity suit, for and on behalf of minors interested in the issues thereof, as their guardian *ad litem*, and the record fails to show that such party has ever been appointed or authorized by the court to act in said cause as such guardian *ad litem*, all the pleadings so interposed by such stranger are nugatory, and do not bind such minors; and all orders and proceedings in said cause predicated upon such pleading will be set aside as void. *McDermott v. Thompson*, 29 Fla. 299.

**Striking Out Answer—Judgment Not Void.**—An appearance for a minor defendant by guardian *ad litem* without the authority of an order of the court is an irregularity which may be objected to by a motion to strike out the answer. If the motion is denied, a bill of exceptions may be taken, or the objection may be raised by affidavits on motion for a new trial, under section 658 of the Cal. Code of Civ. Pro. The irregularity does not render the judgment void. *Emeric v. Alvarado*, 64 Cal. 529.

in the cause, yet there are cases in which an express appointment has been dispensed with.<sup>1</sup>

**Defense by General Guardian.** — Thus, it has been often held that where a general guardian appears and makes the defense required by law, and is heard by the court as the representative of the infant, such action is equivalent to his appointment as guardian *ad litem*.<sup>2</sup>

**Defense by Natural Guardian.** — And the same thing has also been held where the father, mother, or other natural guardian, has appeared in the suit and defended for the infant,<sup>3</sup> but the cases.

1. Where a person has appeared as guardian and in every way interposed a proper defense, the decree will not be reversed because of no formal order of appointment, or because no letters of guardianship were shown to have been put in evidence. *Tuttle v. Garrett*, 74 Ill. 444.

**Recognition in Decree.** — Where an answer filed by one styling himself guardian *ad litem*, and assuming that character, appears in the record, and is recognized as such in the decree, although no separate order of appointment has been made, yet the facts appearing must be held equivalent to a formal appointment, for it is but a form. *Tibbs v. Allen*, 27 Ill. 119.

Where the decree recited that the cause came on to be heard on the answer of the infant defendants, "by their guardian *ad litem*, William Curry, assigned them for that purpose by the court," it was held that this recognition of William Curry as the guardian *ad litem* of the infants was a sufficient appointment of him as such. *Hull v. Hull*, 26 W. Va. 27.

**In a Collateral Proceeding,** the presence of a next friend or guardian *ad litem* to represent an infant, and his recognition by the court, precludes inquiry as to his authority to act. *Sumner v. Sessoms*, 94 N. Car. 371.

**The Fact that There Are Adult Defendants** joined with the infant defendant, and that all appear by the same attorney, will not avail to prevent the infant from obtaining a reversal of the judgment. *Goodridge v. Ross*, 6 Met. (Mass.) 487; *Castledine v. Mundy*, 4 B. & Ad. 90, 24 E. C. L. 30.

2. *Cato v. Easley*, 2 Stew. (Ala.) 214; *Thompson v. McDermott*, 19 Fla. 852; *Price v. Winter*, 15 Fla. 66; *Rankin v. Kemp*, 21 Ohio St. 651; *Walker v. Hull*, 35 Mich. 488; *Beverly v. Miller*, 6 Munf. (Va.) 99.

**Recognition of General Guardian.** — The proceedings in a case are not avoided in a writ of error as to purchasers under the decree by the omission of the name of one of several infant defendants in the order appointing the guardian *ad litem*, if the answer be in the name of all, and repeatedly recognized by the court as their answer. "Even the failure of the record to show the appointment of the guardian *ad litem* would not be fatal on a direct appeal, where the court is shown in its decrees to have recognized the guardian as the proper representative of the infant." *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

Where by statute the guardians of infants are required to "appear for and defend, or cause to be defended, all suits" against their wards, if the guardian appears and answers as such and his answer is received and acted upon without objection by the court, the effect is the same as if he had been expressly appointed guardian *ad litem* by the court and had appeared and answered as such. *Rankin v. Kemp*, 21 Ohio St. 651.

Minors, defendants in chancery, having been admitted to make full defense by their general guardian, the revising court will consider the sanction given to such mode of defense as equivalent to an appointment of a guardian *ad litem*. *Cato v. Easley*, 2 Stew. (Ala.) 214.

3. *Priest v. Hamilton*, 2 Tyler (Vt.) 50; *Wrisley v. Kenyon*, 28 Vt. 5.

**Where the Mother** of an infant appeared as his guardian, though not so in fact, the decree has been sustained. *Brown v. Severson*, 12 Heisk. (Tenn.) 381; *Treiber v. Shafer*, 18 Iowa 29; *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455; *Clark v. Platt*, 30 Conn. 282; *Humphrey v. Brewer*, Vern. & S. 306.

**Where the Father** Appears and defends

are not entirely harmonious, and there is considerable authority in support of the view that the failure to appoint a guardian *ad litem* for an infant is not cured by the fact that he was represented on the trial by his parents, and had the aid of counsel to defend in his behalf.<sup>1</sup>

(20) *Presumption of Regularity of Appointment.* — Where infants have appeared and answered by a guardian *ad litem* it will be presumed in support of the judgment or decree that such guardian was regularly appointed, in the absence of anything to the contrary appearing,<sup>2</sup> and this presumption may be indulged on appeal, even though no order of appointment is found on the record.<sup>3</sup> So, also, it will be presumed that the persons for whom

in his behalf the infant has had his day in court, *Fuller v. Smith*, 49 Vt. 253; and is bound by the decree. *Simmons v. Baynard*, 30 Fed. Rep. 532.

**Appearance by a Stepfather** who answers a bill as next friend of an infant defendant will in the absence of fraud bind the infant by the decree. *Cuyler v. Wayne*, 64 Ga. 78.

1. *Johnson v. Waterhouse*, 152 Mass. 585. Compare cases cited in preceding section.

**The Mother Cannot Appear** as guardian *ad litem* without an appointment. *Letcher v. Letcher*, 2 A. K. Marsh. (Ky.) 158.

On proceedings on the contest of a will offered for probate, the appearance of the mother, who is likewise guardian in socage, will not have the effect to cure the failure to appoint a special guardian as required by law. *Matter of Bowne*, 6 Dem. (N. Y.) 51.

**Mother and Stepfather.** — Service of summons on the mother and stepfather of an infant under fourteen years of age residing with them authorizes and requires the appointment of a guardian *ad litem*, but does not authorize the mother and stepfather to appear and answer for such infant. "Nor did an appearance and answer for the infant defendant resident in the state by his mother and stepfather obviate the necessity for the appointment of a guardian *ad litem*. They were in no proper sense the representatives of the infant, except for the purpose of receiving service of process for him. The process being duly served, the court acquires jurisdiction to proceed to the appointment of a guardian *ad litem*. Without such an appointment the court cannot regularly proceed to final decree." *Irwin v. Irwin*, 57 Ala. 614.

2. *Emeric v. Alvarado*, 64 Cal. 529;

*Batchelder v. Baker*, 79 Cal. 266; *Tibbs v. Allen*, 27 Ill. 119; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Wood v. Martin*, 66 Barb. (N. Y.) 241; *Ridgely v. Bennett*, 13 Lea (Tenn.) 210; *Louisville Bank v. Leftwick*, 9 Heisk. (Tenn.) 471.

**Where No Objection** has been made to the appearance and answer by the guardian the validity of his appointment will be presumed. *Louisville Bank v. Leftwick*, 9 Heisk. (Tenn.) 471.

**In Exercise of Statutory Jurisdiction.** — Where an order appointing a guardian *ad litem* does not contain the name of one of the heirs, and there is no order of appointment under an amended or supplemental bill, and the answer of the guardian *ad litem* for the infant heir in question is not sworn to, the presumption, however, will be in favor of the regularity of the proceedings, although in the particular case the jurisdiction was conferred by statute. *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

3. If minor heirs answer by a guardian *ad litem*, and the chancellor receive the answer of the guardian, as such, for them, the high court of errors and appeals will presume that the guardian had been regularly appointed for the purpose, though no order to that effect appear in the record below. *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

**The Recital in a Final Judgment**, that a guardian appeared in pursuance of a due and proper appointment by the court as a guardian *ad litem*, is sufficient on appeal to establish his authority to interpose the answer on behalf of the infant, although there is no record entry of such appointment. *Rust v. Reives*, 24 Ark. 359; *Benjamin v. Birmingham*, 50 Ark. 433.

**Objection First Raised on Appeal.** — Ob-

the appointment was made were infants at the time.<sup>1</sup> Where an application for an appointment does not appear, it will, nevertheless, be presumed to have been made,<sup>2</sup> or that the appointment was made by the court of its own motion.<sup>3</sup>

In a Collateral Proceeding it will be presumed from the mere appointment of a guardian *ad litem* that jurisdiction had been acquired over the infant by service of process or notice.<sup>4</sup>

In a Direct Proceeding, however, this presumption will not be indulged.<sup>5</sup>

*h. ORDER OF APPOINTMENT.* — The order appointing a guardian *ad litem* should recite the facts showing authority to make the order,<sup>6</sup> and should unequivocally designate some one to act

jection as to failure of proof of the appointment of a guardian *ad litem* is not available for the first time upon appeal. *Strong v. Jenkins*, 21 Civ. Pro. Rep. (Buffalo Super. Ct.) 9.

**On Bill of Review** by infants against whom a judgment has been rendered, a petition purporting to be signed by the infant, calendar entries showing that on the date of the filing of the petition an order appointing a guardian *ad litem* was made, an answer of the infant by guardian *ad litem* interposed, and a decree referring to the answer of the infant naming him "by his guardian *ad litem*," were held to sufficiently show the fact that the order of appointment was made. *Stevenson v. Kurtz*, 98 Mich. 493.

**No Presumption that a Guardian Ad Litem Was Appointed** for an infant will be indulged on a petition in the cause to set aside the decree in the absence of proof that the records were lost or destroyed. *McDonald v. McDonald*, 3 W. Va. 676.

A person will not be presumed to have been appointed guardian *ad litem* where the appointment nowhere appears on the record, and it does not appear that he ever acted as such. *Newman v. Kendall*, 2 A. K. Marsh. (Ky.) 235.

1. *Woodson v. Leyburn*, 83 Va. 843.

2. **Presumption as to Application.** — In the absence of any showing or allegation in the statement of facts on appeal, that the appointment of a guardian *ad litem* for certain children was made without any application therefor on their part, it will be presumed that the appointment was regularly made. *Mason v. McLean*, 6 Wash. 31.

3. *Rhoads v. Rhoads*, 43 Ill. 239.

4. *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Horner v. Doe*, 1 Ind. 130; *Thomp-*

*son v. Doe*, 8 Blackf. (Ind.) 336; *Doe v. Brown*, 8 Blackf. (Ind.) 443; *Brackenridge v. Dawson*, 7 Ind. 383 (*distinguishing Doe v. Anderson*, 5 Ind. 33, wherein it was admitted that the defendants were not served with process); *Wood v. Martin*, 66 Barb. (N. Y.) 241; *Merritt v. Horne*, 5 Ohio St. 307.

5. *Martin v. Starr*, 7 Ind. 224. In *Beddinger v. Smith*, (Ark. 1890) 13 S. W. Rep. 734, it was held, upon a bill to vacate a decree, that where a guardian *ad litem* was appointed for infants, who accepted the appointment and filed an answer, and the decree recites that the cause was heard upon the answer, it will be conclusively presumed that the infants were served with legal notice. See also *Boyd v. Roane*, 49 Ark. 397.

In *Emeric v. Alvarado*, 64 Cal. 597, it was held, in a case wherein notice had been served upon the infants, that to sustain the proceedings of the court below it would be presumed, until the contrary was made to appear, that the infants were over the age of fourteen years, in which case the law required no service upon them.

6. **Showing Absence of Parent or Guardian from State.** — Where the service on the father, mother, or guardian of an infant, if he have any within the state, is part of the required service on the infant, if the sheriff's return discloses that the infant has no father, mother, or guardian in the county, it should be shown to the court, if such be the fact, that the infant has none in any other county of the state, and this fact should be recited in the decree for the appointment of a guardian *ad litem*. *Erwin v. Carson*, 54 Miss. 282. Compare *Ingersoll v. Ingersoll*, 42 Miss. 155.

The Caption of the Order may be disregarded if it otherwise appears that the

as guardian *ad litem*.<sup>1</sup> So, also, the order should designate for what defendants the guardian is to act,<sup>2</sup> and this must usually be done by naming the infants in the order.<sup>3</sup> Sometimes the order must contain special directions respecting its service upon the infant,<sup>4</sup> and must require a bond of the guardian.<sup>5</sup>

i. SERVICE ON GUARDIAN AD LITEM. — A guardian *ad litem* must be notified of his appointment,<sup>6</sup> and it is usually required that a summons or subpoena shall be served upon him.<sup>7</sup>

order appointing a guardian *ad litem* was made by proper authority. *Albrecht v. Canfield*, 92 Hun (N. Y.) 240.

1. **Appointment of Clerk Without Naming Him.** — An order appointing "the clerk of the court" guardian *ad litem* without naming him is sufficient. *Hess v. Voss*, 52 Ill. 472.

**The Failure to Characterize** an attorney appointed to represent an infant in probate proceedings as guardian *ad litem* is immaterial where his functions in fact are those of a guardian *ad litem*. *Carpenter v. Superior Ct.*, 75 Cal. 596.

2. **Several Infant Defendants.** — An order appointing a guardian *ad litem* should show for how many of the infant defendants the guardian is appointed. *Madison v. Wallace*, 2 J. J. Marsh. (Ky.) 581.

3. **Naming Infants in Order.** — An order appointing a guardian *ad litem* "for the minor heirs of P. R.," not naming them, is void, and the filing of an answer by such appointee will not cure the defect. *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

"In a court of inferior jurisdiction, if the right of the guardian *ad litem* to act turn exclusively upon the order of appointment, the order ought perhaps to name the infants. *Rucker v. Moore*, 1 Heisk. (Tenn.) 726. But even in such case the defect might be cured by the recognition of the guardian by the court." *Ridgely v. Bennett*, 13 Lea (Tenn.) 215.

In *Sullivan v. Sullivan*, 42 Ill. 315, it was held that where the record fails to show that a portion of the defendants are minors, an order appointing a guardian *ad litem* for the minor defendants without naming them is inoperative, affects the rights of no person, and cannot be assigned as error, however erroneous, because not prejudicial. If, however, it appeared that a portion of the defendants were minors the order could be reviewed.

4. **Directions as to Service of Order.** — Under N. Y. Code of Civ. Proc., § 473,

providing that in an order appointing a guardian *ad litem* the court must make special directions respecting the service thereof upon the infant. The directions must be made by the court, and cannot be made by the judge at chambers. *Uhl v. Loughran*, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 386.

5. **Requiring Bond.** — Under the New York Code of Civil Procedure, an order appointing a guardian *ad litem* must require the giving of a bond by the guardian and fix its amount. *Walter v. De Graaf*, 19 Abb. N. Cas. (N. Y. Super. Ct.) 406; *Kennedy v. Arthur*, 18 Civ. Pro. Rep. (N. Y. Supreme Ct.) 390.

6. *Barns v. Branch*, 3 McCord L. (S. Car.) 19.

**Notice to the Infant Alone** is insufficient; the guardian *ad litem* must also be notified. *Strayer v. Long*, 83 Va. 715.

7. *McDermott v. Thompson*, 29 Fla. 299; *State v. Mitchell*, 29 Fla. 302; *Coffin v. Cook*, 106 N. Car. 376; *Gulley v. Macy*, 81 N. Car. 356; *Moore v. Gidney*, 75 N. Car. 34; *Williamson v. Hartman*, 92 N. Car. 236.

**Service Before Appointment.** — Service of process on one as guardian *ad litem* before his appointment, is unauthorized, and a return to that effect is extra-official and void, and furnishes no evidence that he was appointed guardian *ad litem*.

**Copy of Bill or Complaint.** — In *North Carolina* a copy of the complaint and a summons must be served on guardians *ad litem*. *Gulley v. Macy*, 81 N. Car. 356; *Moore v. Gidney*, 75 N. Car. 34. But in *Jones v. Drake*, 2 Hayw. (N. Car.) 237, it was held not necessary to serve a copy of the bill on the guardian after he is appointed.

**Harmless Error.** — Where an infant was duly served with process and a guardian *ad litem* was appointed, but no process was served on the guardian, who made no defense, and it only appeared inferentially that he knew of the pendency of the action, but it did not



**j. POWERS AND DUTIES OF GUARDIANS AD LITEM — (1) In General — Nature of Duties.** — It has already been seen that an infant cannot appear and conduct his defense in person, but must, in general, do so by a guardian *ad litem*,<sup>1</sup> to whom all necessary notices of interlocutory proceedings must be given.<sup>2</sup> "This guardian is to do for him what with riper judgment he would do for himself; he is to appear for him in his proper person, employ competent attorneys and counsel to prepare and plead his cause; he is to collect testimony, summon witnesses, and at the trial to afford such aid to his counsel as may be necessary in unexpected difficulties. It is only by exercising that attention and vigilance in the cause of the minor, which he would exert in his own, that he fairly discharges his duty. When all this has been done, everything in point of privilege has been secured to the infant which the law contemplates or justice demands."<sup>3</sup>

**Powers Limited and Strictly Construed.** — But a guardian *ad litem* cannot control a case intrusted to his charge with as full authority

appear that the infant had any defense, and adults whose rights were identical sued in the same action made no defense, it was held that the judgment was not so irregular that it would be set aside on an application made several years thereafter. *Williamson v. Hartman*, 92 N. Car. 236.

1. See *supra*, I. 10. **Conduct of Suits — Disability of Infants.**

2. **Notice of Taking Accounts.** — In suits affecting the interest of infant parties it is not sufficient to notify them by publication of the taking of accounts, where the guardian *ad litem* was not named in the publication, nor otherwise served with notice. *Strayer v. Long*, 83 Va. 715.

**Notice of Taking Depositions.** — Depositions cannot be read against infants where it does not appear that their guardian *ad litem* was served with notice. *Walker v. Grayson*, 86 Va. 337.

Code Va., §§ 2435, 2619, requiring depositions to be taken in the presence of a guardian *ad litem*, or on interrogatories agreed on by him, relates only to suits for the sale of land of persons under disability, and not to suits generally in which infants may be interested. Therefore, in an action to set aside a conveyance where a guardian *ad litem* has had notice of the taking of depositions, it is not necessary that it should appear that they were taken in his presence before they can be read in evidence. *Moore v. Triplett*, (Va. 1895) 23 S. E. Rep. 69.

**Notice of Taking Testimony Before Master.** — Testimony taken before a master as to material evidence without notice to a guardian *ad litem* of infant defendants, is not admissible against them. *Boyer v. Boyer*, 89 Ill. 447; *Turner v. Jenkins*, 79 Ill. 228. Even though the guardian *ad litem* make no positive objection on the hearing. *Turner v. Jenkins*, 79 Ill. 228.

**Notice of the Time and Place for Hearing Landowners** in a proceeding to lay out a highway, is insufficient if served only upon infant owners. A guardian *ad litem* must be appointed, and notice served on him. *Clarke v. Gilmanton*, 12 N. H. 515.

3. *Mercer v. Watson*, 1 Watts (Pa.) 349.

**A Guardian Ad Litem Is a Full Representative** of the rights and interests of the minor, for the particular case in which he is appointed, and he is clothed with as full and perfect authority for that suit as the general guardian has for all the duties incident to his office. And it was as competent for the legislature to provide for a special guardian, in certain circumstances, as for a general guardian in all other cases. *Burrus v. Burrus*, 56 Miss. 92.

**Appearance of Absent Infant by Guardian — Effect.** — The power exercised by courts of equity to appoint guardians *ad litem* for infant defendants is one to be exercised for their benefit; and therefore the appearance of an absent infant by such a guardian does

as the minor could if he were of age.<sup>1</sup> His power to bind his ward is strictly construed.<sup>2</sup> But in the absence of fraud or gross misconduct his acts are binding upon the minor.<sup>3</sup>

**Powers Limited to Particular Suit.** — The powers of a guardian *ad litem* are limited to the particular suit in which he is appointed,<sup>4</sup> but his authority continues to the end of the suit.<sup>5</sup>

**Powers Limited to Claim Set Up.** — He can defend only against the claim set up by the plaintiff.<sup>6</sup>

**May File Cross-bill.** — He is not, however, limited to objection and opposition merely; he may file a cross-bill or do any affirmative act which may be essential to the protection of the infant's interests in the litigation.<sup>7</sup>

**Execution of Deeds.** — The general practice of the chancery court requires the guardian *ad litem* to execute, acknowledge, and deliver deeds for and on behalf of infant defendants.<sup>8</sup>

not have the effect of a voluntary appearance, so as to obviate the necessity for the statutory bond to be given by the complainant. *Erwin v. Ferguson*, 5 Ala. 158.

1. *Le Bourgeoise v. McNamara*, 82 Mo. 189; *Revely v. Skinner*, 33 Mo. 98; *McClure v. Farthing*, 51 Mo. 109.

2. *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69.

**A Special Guardian Is the Agent of the Court**, and can take no lawful steps without authority from his principal. *Titman v. Riker*, 43 N. J. Eq. 122.

3. *Smith v. Taylor*, 34 Tex. 589. But see *infra*, III. 4. *Answer or Plea*.

**A Collusive Arrangement to Prevent Competition** at a judicial sale, and a sale in pursuance thereof, to the injury of an infant, is a fraud in law, and must be set aside upon a proper application. This is not a matter of discretion, and may be reviewed on appeal in the court of appeals. *Howell v. Mills*, 53 N. Y. 322.

4. *Wheatley v. Harvey*, 1 Swan (Tenn.) 484; *Hannum v. Wallace*, 9 Humph. (Tenn.) 129; *Larkin v. Mann*, 2 Paige (N. Y.) 27; *Roberts v. Stanton*, 2 Munf. (Va.) 129.

A special guardian, appointed simply to represent an infant devisee in a private sale of land, has no authority to bind the infant by a judgment in a suit brought by the guardian to compel the purchaser to take title; and therefore, if the will presents a reasonable doubt as to whether the infant's interest can lawfully be sold, the purchaser will be released from his contract. *Armstrong v. Wernstein*, (Supreme Ct.) 6 N. Y. Supp. 148.

**A Guardian Ad Litem Appointed to Prosecute** an action for an infant has no authority to bring or prosecute more than the one particular action in which he was appointed. *Rosso v. Second Ave. R. Co.*, 13 N. Y. App. Div. 375.

5. Where a demurrer interposed by a guardian *ad litem* to a petition has been sustained and the petition is amended, there is no necessity for the reappointment of the guardian *ad litem*. *Carpenter v. Superior Ct.*, 75 Cal. 596.

6. **In a Partition Suit** a guardian *ad litem* for an infant defendant can defend solely against the claim set up for a partition of the common estate, and acts by him in excess of this authority are null and void. "The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet so far, at least, as the rights of infants are involved, the court has no jurisdiction except over the matter of partition." *Waterman v. Lawrence*, 19 Cal. 210.

7. *Sprague v. Beamer*, 45 Ill. App. 17. 8. *Van Schaick v. Stuyvesant*, 2 Edw. Ch. (N. Y.) 204; *In re Windle*, 2 Edw. Ch. (N. Y.) 585.

**Signing Deed by Guardian Ad Litem.** — A guardian executing a deed for an infant under the direction of the court should sign it in the name of the infant by himself as guardian *ad litem*, thus, A. B. by C. D., his guardian *ad litem*. *In re Windle*, 2 Edw. Ch. (N. Y.) 585. See also *Hyatt v. Seeley*, 11 N. Y. 52.

(2) *Defense and Answer.* — It is the Duty of a Guardian Ad Litem to make proper defense for his ward,<sup>1</sup> and until this has been done no judgment should be rendered affecting the interests of the infant.<sup>2</sup> The cause cannot be heard without an answer interposed for the infant defendants.<sup>3</sup>

1. *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; *Stunz v. Stunz*, 131 Ill. 210; *Peak v. Pricer*, 21 Ill. 164.

**The Guardian Ad Litem Is Responsible** for the character of the defense, and is liable to the infant in damages if he neglects his duty. *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304; *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 166.

**The Guardian Ad Litem Must Always Put In a Defense**, and cannot omit it because he does not think the infants are proper parties to the suit. *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. (N. Y.) 414.

**Vexatious Defenses.** — Though a guardian *ad litem* will not be warranted in interposing useless or vexatious defenses, yet he must interpose a defense in fact, so far as may be necessary to protect the rights and interests of the ward. It is his duty to examine into the case and determine what the rights of his ward are, what defenses exist, and demand and make such defense as the exercise of care and prudence will dictate. He must exercise that care and judgment that reasonable and prudent men exercise, and submit to the court for its determination all questions that may arise, take its advice and act under its direction in the steps necessary to secure and preserve the rights of the minor defendants. *Stunz v. Stunz*, 131 Ill. 211.

**Inability to Make Defense.** — In *Kentucky* the guardian *ad litem* must make a defense or report his inability to do so. *Morrison v. Beckham*, 96 Ky. 72.

As to report of inability to defend, see *infra*, p. 674.

A judgment against an infant defendant should never be rendered except after his appearance in the action by a guardian *ad litem* on a defense, unless the court is first satisfied that the guardian has been vigilant and faithful and has ascertained that there was no available defense. *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

**2. Defense Necessary** — *Arkansas.* — *Haley v. Taylor*, 39 Ark. 104; *Pinchback v. Graves*, 42 Ark. 222; *Morris v. Edmonds*, 43 Ark. 427.

*Illinois.* — *Peak v. Pricer*, 21 Ill. 164; *Stunz v. Stunz*, 131 Ill. 210.

*Kentucky.* — *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 166; *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Booker v. Kennerly*, 96 Ky. 415; *Morrison v. Beckham*, 96 Ky. 72.

*New York.* — *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. (N. Y.) 414.

*North Carolina.* — *Bass v. Bass*, 78 N. Car. 376.

*Ohio.* — *Long v. Mulford*, 17 Ohio St. 484.

**A Case Cannot Proceed to Judgment** until a guardian *ad litem* has been appointed and has made a defense for the infant defendant. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468.

**Decree Without Defense Erroneous.** — A decree against a minor without service of process upon him and defense by guardian is error. *Haley v. Taylor*, 39 Ark. 104.

**Constructive Service — Necessity of Defense.** — Civ. Code of Practice, Ky., § 55, which provides that no judgment can be rendered against an infant until after a defense by a guardian, applies as well to infants proceeded against upon constructive process as to those actually served with summons. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468.

**Judgment on Counterclaim.** — A judgment rendered against an infant complainant on a counterclaim, without a guardian *ad litem* and a reply for the infant, cannot be sustained. *Morris v. Edmonds*, 43 Ark. 427.

**3. Answer Necessary** — *Alabama.* — *Roach v. Hix*, 57 Ala. 576; *Daily v. Reid*, 74 Ala. 415.

*Florida.* — *Thompson v. McDermott*, 19 Fla. 855.

*Illinois.* — *Enos v. Capps*, 12 Ill. 255.

*Indiana.* — *Pugh v. Pugh*, 9 Ind. 132.

*Kentucky.* — *Henly v. Gore*, 4 Dana (Ky.) 136; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453; *Johnson v. Johnson*, 1 Dana (Ky.) 367; *Ullery v. Blackwell*, 3 Dana (Ky.) 300; *Shield v.*

The Effect of a Failure of the guardian *ad litem* to answer and make defense<sup>1</sup> is to render the judgment or decree entered in the cause erroneous,<sup>2</sup> but such error will not divest the court of jurisdiction previously acquired over the infant.<sup>3</sup> The judgment is

Bryant, 3 Bibb (Ky.) 525; Beeler v. Bullitt, 4 Bibb (Ky.) 12.

Massachusetts. — Walsh v. Walsh, 116 Mass. 377.

Michigan. — Walker v. Hull, 35 Mich. 488.

Mississippi. — Ingersoll v. Ingersoll, 42 Miss. 155.

Ohio. — Massie v. Donaldson, 8 Ohio 377.

Virginia. — Ewing v. Ferguson, 33 Gratt. (Va.) 548.

It is the Duty of the Complainant to see that a guardian *ad litem* interposes an answer for his ward. Roach v. Hix, 57 Ala. 576.

**A Guardian Ad Litem Must Interpose Answer** in behalf of an infant defendant. Thompson v. McDermott, 19 Fla. 852; Enos v. Capps, 12 Ill. 255; Ullery v. Blackwell, 3 Dana (Ky.) 300.

The Case Is Not at Issue until a guardian *ad litem* has been appointed and has filed an answer. Daily v. Reid, 74 Ala. 415; Ewing v. Ferguson, 33 Gratt. (Va.) 548.

**1. An Infant Defendant Cannot Be Bound** by a decree in a cause in which a guardian *ad litem* improperly appointed filed no answer. Freeman v. Russell, 40 Ark. 56.

**Decree Held Void.** — In Chandler v. McKinney, 6 Mich. 217, a guardian *ad litem* was appointed in a foreclosure suit, who accepted the appointment, but, neglecting to answer, was defaulted, and a decree of foreclosure and sale was made which gave the infant no day in court after becoming of age, and in fact the infant did not come of age until after the expiration of the time for appealing from the decree. It was held that the decree was absolutely void.

As to infant's day in court, see *infra* IV. 4. *Infant's Day in Court.*

**Harmless Error.** — The failure of the guardian *ad litem* to answer may constitute harmless error. Thus, where it does not appear that any successful resistance could have been made to the petition, nor that any injury accrued therefrom to any of the defendants, the decree will not be reversed merely because the guardian *ad litem* put in no answer, and thus failed to protect the

interest committed to his keeping and defense. Howerton v. Sexton, 90 N. Car. 586. See also, to same effect, Williamson v. Hartman, 92 N. Car. 236.

**Dismissing Bill Without Prejudice.** — Where infants have been made parties, the failure of their guardian to answer and make defense is not a sufficient reason for dismissing the bill without prejudice. Henly v. Gore, 4 Dana (Ky.) 134.

2. Lee v. Braxton, 5 Call (Va.) 459; Rhoads v. Rhoads, 43 Ill. 239; Richards v. Richards, 17 Ind. 636; Ullery v. Blackwell, 3 Dana (Ky.) 300; Beeler v. Bullitt, 4 Bibb (Ky.) 11; Shield v. Bryant, 3 Bibb (Ky.) 525; Searcy v. Rearden, 3 Bibb (Ky.) 528; Ingersoll v. Ingersoll, 42 Miss. 163.

In Ewing v. Ferguson, 33 Gratt. (Va.) 548, a paper purporting to be an answer was found among the papers of the cause, yet, as it did not appear that it had been filed, it was held that a decree of sale of the infant's lands was erroneous, as made without an answer filed by the guardian *ad litem*.

**The Irregularity Is Not Cured** by the subsequent appearance of the defendants by their attorney, for according to the settled rules of practice, infant defendants cannot regularly appear by attorney, and entry of their having so appeared cannot in any respect affect their case. Beeler v. Bullitt, 4 Bibb (Ky.) 12.

**Who May Assign Error.** — The failure of a guardian *ad litem* appointed for an infant in partition to file an answer is not available as error to an adult infant. McCarthy v. McCarthy, 66 Ind. 128.

**3. Error Not Jurisdictional.** — Goudy v. Hall, 36 Ill. 313, holding that the failure of a guardian *ad litem* to answer for an infant heir will not affect the jurisdiction of the court on a petition of the administrator for leave to sell real estate to pay debts.

Though the acts of a guardian *ad litem* after appointment may be erroneous, they will not be held to relate back and divest the court of the personal jurisdiction which authorized it to make the appointment. Maloney v. Dewey, 127 Ill. 395.

not void merely because no defense was made,<sup>1</sup> but it may be opened or set aside in a proper proceeding for that purpose.<sup>2</sup>

**Vigorous and Real Defense.** — A guardian *ad litem* must make the defense in the interests of the infants as vigorous as the nature of the case will admit.<sup>3</sup> He cannot perfunctorily file a formal

1. *Booker v. Kennerly*, 96 Ky. 415; *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 168; *Williams v. Williams*, 94 N. Car. 732.

The failure of infants who were summoned to answer was an error for which they might reverse the judgment, but it would not avoid, or make voidable, the judgment or sale. *Thornton v. McGrath*, 1 Duv. (Ky.) 350.

**Refusal to Open Cause.** — Where the record showed that a guardian *ad litem* was appointed in 1866, but no answer was filed for the infants, and no effort made to assert their rights, but the infant delayed action until the youngest of them was twenty-four years old, it was held that the cause would not be opened to allow them to assert their rights, when it had proceeded to an end, and all that was necessary was a final decree. *Williams v. Williams*, 94 N. Car. 732.

**Hearing Cause Without Answer — Effect of Guardian's Personal Responsibility.** — If the guardian appears and takes on himself that character, the cause may be heard without his answer; he is responsible to the infant who neglects his defense. *Banta v. Calhoon*, 2 A. K. Marsh. (Ky.) 168.

As to the effect of the guardian's personal responsibility to render his defaults binding upon the infant, see *infra*, III. 3. j. (5) (c) *View that Guardian's Defaults Prejudice Infant*.

2. *Booker v. Kennerly*, 96 Ky. 415; *Keyes v. Ellensohn*, 72 Hun (N. Y.) 392; *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635; *Moore v. Gidney*, 75 N. Car. 34; *Gulley v. Macy*, 81 N. Car. 366.

**Opening Judgment on Application of General Guardian.** — Where by statute an infant may at any time after judgment in a period terminating twelve months after attaining twenty-one show cause against a judgment, if a guardian *ad litem* appointed in the case fails to make, or attempt to make, any effort in behalf of the infant, or to properly protect or defend her rights, the judgment will be set aside upon the application of her general guardian, and she will be permitted to avail herself of any defense she had in the original action. *Booker v. Kennerly*, 96 Ky. 415.

**Vacation on Motion — Discretion of Court.** — The court may set aside the judgment in its discretion upon motion. *Keyes v. Ellensohn*, 72 Hun (N. Y.) 392.

**Vacating on Petition at Subsequent Term.** — In *Bomar v. Hagler*, 7 Lea (Tenn.) 85, after a decree was rendered for the sale of land to pay debts of a decedent, and the sale was made and reported, one of the heirs, a married woman, presented a petition by a next friend, showing that she was an infant as well as a *feme covert*, and that the defense made in her name was without her knowledge or consent, and praying that the former decree be set aside and that she be allowed to defend by a guardian *ad litem*. The prayer of the petition was granted, the former decree suspended and leave given to defend. A demurrer was thereupon filed, relying upon the statute of limitations. Upon consideration of the demurrer the chancellor held it well taken and dismissed the entire bill. Upon appeal the court said: "We are of opinion that his honor had no power in this mode to reverse or set aside decrees rendered by him at former terms, in effect adjudging all the material matters in litigation between the parties. As to the defendants, other than Mrs. Dinwiddie, this seems manifest, as they had not even asked to have the decree set aside, and we are also of opinion that the court was not authorized to vacate the former decree, even as to Mrs. Dinwiddie, upon a mere unsupported petition. *Meek v. Mathis*, 1 Heisk. (Tenn.) 534."

**Raising New Defenses.** — In *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635, a decree foreclosing a mortgage was allowed to be opened and vacated, with leave for the infants, one of whom had come of age, to put in a new answer and set up the defense of the invalidity of the mortgage, where the guardian *ad litem* had put in merely a general answer and had not raised any defense.

3. *Rhoads v. Rhoads*, 43 Ill. 239; *Sconce v. Whitney*, 12 Ill. 150; *Enos v. Capps*, 12 Ill. 255.

**Duty to Submit Every Question.** — It is

answer for his wards and then abandon the case.<sup>1</sup>

**When Defense and Answer Unnecessary.** — There are cases, however, in which an answer or defense on behalf of infants is not necessary;<sup>2</sup> as, for example, where the infants properly unite as plaintiffs in an action or proceeding to partition their real estate,<sup>3</sup> or where the guardian is unable to make any defense and reports his inability to do so.<sup>4</sup>

the duty of such guardian to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit. *Sconce v. Whitney*, 12 Ill. 150. *Enos v. Capps*, 12 Ill. 255; *Rhoads v. Rhoads*, 43 Ill. 239; *Dow v. Jewell*, 21 N. H. 486; *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304; *Stark v. Brown*, 101 Ill. 395; *Pinchback v. Graves*, 42 Ark. 227. In this last case it is said that the guardian *ad litem* must put in issue and require proof of every material allegation of a complaint prejudicial to the infant, whether it be true or not. He must put and keep plaintiff at arm's length.

1. *Stunz v. Stunz*, 131 Ill. 210; *Pinchback v. Graves*, 42 Ark. 227. In this last case the court said: "These are wise provisions, and they are so far imperative. I think, too, that a guardian *ad litem* fails in his full duty, and does not apprehend the true obligation which he voluntarily assumes, if he contents himself with simply putting in a general denial, as is commonly done, and then leaves the infant to the mercy of the rude stream of the ensuing contest. His interests after issue require protection as well as before. Proof may be required in his behalf; witnesses against him may require cross-examination. Points on error must be duly saved. With regard to these matters the statutes are not mandatory, but the caution of the legislature would fall far short of its design, and be nullified in its effect — would indeed be but empty pretense, if it be not further understood that the guardian *ad litem* should watch the interests of the infant throughout the litigation, and see to it that a vigorous and real defense throughout be made by attorney. It is a moral obligation of the imperfect sort, perhaps, which cannot be enforced, but it is none the less in contemplation of law, which aims only to be as practical as possible."

2. See *Banta v. Calhoon*, 2 A. K. Marsh (Ky.) 166.

In *Bulow v. Witte*, 3 S. Car. 308, it was said that under the former equity practice there was no prescribed mode of making an infant a party defendant except his appearance by a guardian *ad litem* appointed by the court for that purpose; that neither service of subpoena *ad respondendum* on the infant, nor an answer put in by him, was essential, though both were usual.

In *Cooper v. Hepburn*, 15 Gratt. (Va.) 551, where the purchaser under a decree objected to taking title for want of an answer on behalf of infant defendants, it was said that the court, if it deemed it necessary for the protection of the purchaser, might have directed the infant to file an answer after the objection was made.

**Partition Under New York Statute.** — In *Althause v. Radde*, 3 Bosw. (N. Y.) 410, it was held that 2 Rev. Stat. N. Y., p. 317, § 3, providing that guardians shall represent their respective minors in proceedings for partition thereby authorized, and that the acts of the guardians in relation thereto shall be binding on the minors, and as valid as if done by such minors after having arrived at full age, authorized the partition of an infant's real estate without an answer by his guardian.

3. *Power v. Power*, (Ky. 1891) 15 S. W. Rep. 523; *Smith v. Leavill*, (Ky. 1895) 29 S. W. Rep. 319; *Shelby v. Harrison*, 84 Ky. 144.

4. **Report of Inability to Defend.** — In *Kentucky* it is provided by statute that no judgment shall be rendered against an infant until his guardian *ad litem* shall have made a defense, or shall have filed a report of inability to defend. Code, § 36, subd. 3. A report stating that the guardian examined the record in the action, and that "there is no defense he can make for said infants," is a substantial compliance with this statute. *Gardner v. Letcher*, (Ky. 1895) 29 S. W. Rep. 868.

It is sufficient compliance with this statute where the statement that the guardian, "after a careful examination

(3) *Admissions and Waivers.*—Guardians *ad litem* appointed to defend cannot waive or admit away any of the substantial rights of their wards.<sup>1</sup> It is their duty, as has been seen, to make a vigorous defense, and they must demand and insist upon strict proof of plaintiff's case.<sup>2</sup> They certainly cannot admit or waive anything adverse or prejudicial to the infant,<sup>3</sup> and the rule has been often broadly stated that a guardian *ad litem* has no power to bind his ward by the admission or waiver of anything.<sup>4</sup>

of the case, is unable to make a defense," is set out in the jurat of the guardian, attached to an answer filed for the infants. *Vissman v. Bryant*, (Ky. 1893) 21 S. W. Rep. 759.

1. *Crain v. Parker*, 1 Ind. 374; *Kingsbury v. Buckner*, 134 U. S. 650; *Turner v. Jenkins*, 79 Ill. 228; *Fischer v. Fischer*, 54 Ill. 231; *Cartwright v. Wise*, 14 Ill. 417; *Waterman v. Lawrence*, 19 Cal. 210; *Power v. Harlow*, 57 Mich. 107; *Sanborn v. Mitchell*, 94 Mich. 519; *Peck v. Adsit*, 98 Mich. 639; *Daingerfield v. Smith*, 83 Va. 81; *Ewing v. Ferguson*, 33 Gratt. (Va.) 548; *Cralle v. Meem*, 8 Gratt. (Va.) 530.

2. See *infra*, III. 4. *Answer or Plea*; IV. 5. *Necessity of Basing on Full Proof*.

**Facts Cannot Be Admitted** by a guardian *ad litem*. *Le Bourgeoise v. McNamara*, 82 Mo. 189; *Revely v. Skinner*, 33 Mo. 98; *McClure v. Farthing*, 51 Mo. 109; *Thayer v. Lane, Walk.* (Mich.) 200; *Cooper v. Mayhew*, 40 Mich. 528; *Chandler v. McKinney*, 6 Mich. 217; *Smith v. Smith*, 13 Mich. 258; *Burt v. McBain*, 29 Mich. 260; *Ballentine v. Clark*, 38 Mich. 395; *Enos v. Capps*, 12 Ill. 255; *Cost v. Rose*, 17 Ill. 276; *Chaffin v. Kimball*, 23 Ill. 36; *Tibbs v. Allen*, 27 Ill. 119; *Barnes v. Hazleton*, 50 Ill. 429.

3. *Revely v. Skinner*, 33 Mo. 98; *Tucker v. Bean*, 65 Me. 352; *Fowler v. Lewis*, 36 W. Va. 112.

**The Court Will Not Permit** the rights of a ward to be prejudiced by admissions of his guardian. *Buffalo Loan, etc., Co. v. Knights Templar, etc., Assoc.*, 126 N. Y. 450.

And if it appear to the court that any admission against the interests of his ward had been made by the guardian *ad litem*, the court should grant an amendment to correct it at once. *Peck v. Adsit*, 98 Mich. 639.

**An Infant Is Not Bound** by admissions made in his or her behalf, unless such admissions are for his or her benefit. *Ralston v. Lahee*, 8 Iowa 17.

**Guardians Cannot Waive a Benefit to**

which their wards are entitled under a decree. *Hite v. Hite*, 2 Rand. (Va.) 409; *Forbes v. Mitchell*, 1 J. J. Marsh. (Ky.) 440.

**Admitting Adversary's Case.**—A guardian *ad litem* cannot confess the ground of action. *Walton v. Coulson*, 1 McLean (U. S.) 120. Thus, in an action to annul an action for fraud, the guardian has no right to admit the fraud on behalf of the infant. *Cooper v. Mayhew*, 40 Mich. 528. See also *Thayer v. Lane, Walk.* (Mich.) 200, holding that a guardian *ad litem* cannot admit the facts stated in a bill as against his ward.

That a guardian *ad litem* cannot admit anything or waive anything which goes to sustain the adversary's action, see *Collins v. Trotter*, 81 Mo. 275; *McClure v. Farthing*, 51 Mo. 109; *Newins v. Baird*, 19 Hun (N. Y.) 306; *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341; *Wood v. Truax*, 39 Mich. 628; *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69; *Cartwright v. Wise*, 14 Ill. 417; *Peak v. Pricer*, 21 Ill. 164; *Fraser v. Marsh*, 2 Stark. 41; 3 E. C. L. 308; *Cowling v. Ely*, 2 Stark. 366, 3 E. C. L. 447.

**Non-prejudicial Admissions—Harmless Error.**—If the admissions of a guardian *ad litem* are not in any manner prejudicial to the infant's rights, the fact that they were made will not be deemed reversible error. *Ralston v. Lahee*, 8 Iowa 17.

**4. Admissions of Guardians Ad Litem Generally—No Power—Arkansas.**—*Evans v. Davies*, 39 Ark. 235; *Pinchback v. Graves*, 42 Ark. 222.

*California.*—*Waterman v. Lawrence*, 19 Cal. 210.

*Illinois.*—*Cartwright v. Wise*, 14 Ill. 417; *Cochran v. McDowell*, 15 Ill. 10; *Chaffin v. Kimball*, 23 Ill. 36; *Fridley v. Murphy*, 25 Ill. 146; *Quigley v. Roberts*, 44 Ill. 503; *Turner v. Jenkins*, 79 Ill. 228; *Fischer v. Fischer*, 54 Ill. 231.

*Indiana.*—*Crain v. Parker*, 1 Ind. 374.

**Beneficial and Prejudicial Admissions Distinguished.** — There are cases, however, in which a distinction has been made between beneficial admissions and admissions which are prejudicial, and decrees based upon the former have been sustained.<sup>1</sup> So, also, it seems that the consent or agreement of a guardian *ad litem* is binding when sanctioned by the court.<sup>2</sup>

(4) *Particular Powers* — (a) **Powers Which Guardian Has.** — As to the foregoing general principles with respect to a guardian *ad litem's* powers, there is no substantial dispute. A few illustrations of particular powers which it has been held a guardian *ad litem* may exercise are here given. Thus, he may waive signature to the bill;<sup>3</sup> he may consent to taking the bill from the file;<sup>4</sup> he may enter into stipulations which will hasten the trial and determination of the cause;<sup>5</sup> he may consent to taking evi-

*Kentucky.* — Chalfant v. Monroe, 3 Dana (Ky.) 35.

*Maine.* — Tucker v. Bean, 65 Me. 352.

*Michigan.* — Burt v. McBain, 29 Mich. 261; Cooper v. Mayhew, 40 Mich. 528; Power v. Harlow, 57 Mich. 107; Sanborn v. Mitchell, 94 Mich. 519; Peck v. Adsit, 98 Mich. 639.

*Mississippi.* — Price v. Crone, 44 Miss. 571.

*Missouri.* — Collins v. Trotter, 81 Mo. 276; Revelly v. Skinner, 33 Mo. 98.

*New York.* — Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; Lathers v. Fish, 4 Lans. (N. Y.) 213; Battell v. Burrill, 50 N. Y. 13, *affirming* 10 Abb. Pr. N. S. (N. Y. Supreme Ct.) 97; Losey v. Stanley, 147 N. Y. 560.

*Ohio.* — Massie v. Donaldson, 8 Ohio 377; French v. French, 8 Ohio 214.

*Virginia.* — Daingerfield v. Smith, 83 Va. 81; Ewing v. Ferguson, 33 Gratt. (Va.) 563; Cralle v. Meem, 8 Gratt. (Va.) 530.

*United States.* — Walton v. Coulson, 1 McLean (U. S.) 125; Mathewson v. Sprague, 1 Curt. (U. S.) 457; Kingsbury v. Buckner, 134 U. S. 650.

**1. Illustration of Beneficial Admission.** — Where, upon the death of her husband, a bill was filed by a widow against her trustee, the heirs at law of a deceased trustee, and her infant children, to compel the reconveyance to her, free from trust, of her property settled by her in contemplation of marriage, and the settlement provided estates for her children in the event her husband survived her, but none, as against her, in the event that she survived her husband, the facts of the execution of the deed of settlement and

of her marriage were held, as facts for the benefit of the infant children, to be sufficiently proved by the admissions in the answer of their guardian *ad litem*, but the fact of the death of her husband, as a fact not evidently for the benefit of the infants, was referred to a master for proof. Eaton v. Tillinghast, 4 R. I. 276.

**Presumption.** — Where in a partition it appears that if the facts stipulated on behalf of the infant were proved the partition would be denied, the court will not presume that a more favorable showing could be made. Claxton v. Claxton, 56 Mich. 557.

2. Carman v. Cowles, 2 Redf. (N. Y.) 414; Rainey v. Chambers, 56 Tex. 17.

3. **Waiving Signature to Bill.** — Turner v. Jenkins, 79 Ill. 228, holding that the failure to sign the bill is a mere irregularity which will be deemed to have been waived by answer of the guardian *ad litem*.

4. N — v. N —, 31 L. T. N. S. 79.  
5. Kingsbury v. Buckner, 134 U. S. 650.

In Biddinger v. Wiland, 67 Md. 359, it was held that a person appointed solicitor and guardian to answer for an infant defendant in equity had power to stipulate that the cause might be submitted without argument upon testimony taken before the infant's answer had been filed.

Where on the final settlement of an executor's account an interested minor is cited and a guardian *ad litem* appointed for him, the latter may waive notice of citations and consent to hearing. Pollock v. Buie, 43 Miss. 140.

In Reference to Mere Matters of Form, preliminary to a trial, and which can-



dence by affidavit,<sup>1</sup> or deposition.<sup>2</sup> So, also, he may waive a jury trial,<sup>3</sup> or findings of fact,<sup>4</sup> or an appeal bond,<sup>5</sup> and he may elect to go into "hotchpot."<sup>6</sup>

(b) **Powers Which Guardian Has Not.** — On the other hand, it has been held that a guardian cannot consent to the shortening of legal notice to his ward;<sup>7</sup> nor to the taking of testimony before an unauthorized person;<sup>8</sup> nor to the introduction of evidence of facts occurring since the filing of the bill.<sup>9</sup> So, also, it has been held that the guardian *ad litem* cannot consent to change the tribunal for the trial, or that the decision shall be upon principles other than those applicable to like cases in the forum where the suit is pending;<sup>10</sup> nor can he consent that the decision shall abide

not ordinarily affect or prejudice the merits of the case or the interests of the minors, a guardian *ad litem* may exercise a sound discretion; and that for the purpose of saving delay and a useless accumulation of costs, and to expedite the final termination of the suit, such guardian may, if acting fairly and in good faith, consent to waive service of a copy of the declaration and notice of the revivor to the action, and agree that the suit shall be revived at the term at which the suggestion of the death is made, when it is manifest that such course, so far from being prejudicial to the interests of the heirs, will obviously be to their advantage. *Hannum v. Wallace*, 9 *Humph. (Tenn.)* 129.

1. **Taking Evidence by Affidavit.** — Guardians may consent without leave of court to taking evidence by affidavit instead of *viva voce*. *Fryer v. Wiseman*, 45 *L. J. Ch.* 199; *Tillotson v. Hargrave*, 3 *Madd.* 494.

2. *Knatchbull v. Fowle*, 1 *Ch. Div.* 604.

3. *White v. Morris*, 107 *N. Car.* 92.

4. **Waiving Findings of Fact.** — *Cal. Code Civ. Pro.*, § 634, providing that findings of fact may be waived by the several parties to an issue of fact, applies to infants appearing by guardian as well as to adults. *Western Lumber Co. v. Phillips*, 94 *Cal.* 54.

5. *Kingsbury v. Buckner*, 134 *U. S.* 650.

6. **Bringing Advancement into Hotchpot.** — With the concurrence of the court, the guardian *ad litem* has the power to elect and to bring an advancement into hotchpot. *Andrews v. Hall*, 15 *Ala.* 85. But see *Barnes v. Hazleton*, 50 *Ill.* 430, where it was said that a minor could not bring an advancement into hotchpot; nor be charged with laches in omitting to do so.

7. *Mathewson v. Sprague*, 1 *Curt. (U. S.)* 457.

8. *Fischer v. Fischer*, 54 *Ill.* 231, holding that a guardian cannot consent to the appointment of a special master to take testimony.

9. *Wood v. Truax*, 39 *Mich.* 628.

10. "It is true this court held, in the case of *Hannum v. Wallace*, 9 *Humph. (Tenn.)* 129, that a guardian *ad litem* might, for the benefit of the heirs, waive the service of a copy of a declaration in ejectment on himself, but that he could not submit the cause to arbitration. The court say: 'He is to defend the suit in the court from which he derives his authority, according to the rules and principles of law applicable to the case, as administered in that tribunal, and in conformity with the ordinary mode of trial and practice of the court in similar cases. It is not within the scope of his authority, or duty, to consent to change the tribunal for trial, or that the decision shall be upon principles other than those applicable to like cases in the forum in which the suit is pending. His special and restricted power admits of the exercise of no such discretion.'" *Frazier v. Pankey*, 1 *Swan (Tenn.)* 75.

**Consent to Hearing in Another District or Circuit.** — A guardian *ad litem* may consent in like manner as any other party to a suit that an appeal may be heard in a district other than that in which the cause was decided. *Kingsbury v. Buckner*, 134 *U. S.* 650.

A guardian *ad litem* may consent to the removal of a suit from one circuit court to another, under a statute allowing the circuit court upon the motion of any party to the suit to remove such suit to any other circuit court. *Lemmon v. Herbert*, 92 *Va.* 653. And see *Morriss v. Virginia Ins. Co.*, 85 *Va.* 588.

the determination of another cause, unless, at least, the causes are precisely identical in the facts and principles involved, so far as the infant is concerned.<sup>1</sup> He cannot satisfy judgment<sup>2</sup> nor discharge the interest of a witness so as to render him competent;<sup>3</sup> nor waive an affidavit for an appeal,<sup>4</sup> nor purchase at a foreclosure sale under the decree.<sup>5</sup>

(5) *Effect of Defaults* — (a) *In General*. — It is a general rule that an infant cannot be prejudiced by any act, default, or admission on the part of his guardian *ad litem*,<sup>6</sup> for, as has been seen, the infant is a ward of the court, and the court is bound to protect him notwithstanding the failure of his guardian to do so.<sup>7</sup> Thus, the failure of the guardian *ad litem* to object to incompetent

**Reference to Master.** — The guardian *ad litem* of an infant defendant should not consent to a general reference to a master to take an account against the infant, until he has ascertained that the rights of the infant can be protected on such reference. *Jenkins v. Freyer*, 4 Paige (N. Y.) 47.

**1. Stipulation to Abide Determination of Another Suit.** — A stipulation by an attorney that an action shall abide the event of another action is not binding on an infant party unless it is approved and ratified by the court upon a showing that it is for the interest, or, at least, not prejudicial to the interest, of the infant. It must appear that the matters in controversy in the two actions, so far as the infant is affected, are precisely the same, and that he is represented in both actions by the same guardian *ad litem*. *Eidam v. Finnegan*, 48 Minn. 53.

"A guardian *ad litem* has but one duty, and that is to defend the action. *Revely v. Skinner*, 33 Mo. 98. It is unnecessary to say that when there are several actions pending between the same parties, involving precisely the same facts, the guardian may not agree to submit the whole upon a single examination of witnesses, or, which is in effect the same thing, that the decision of one shall decide the whole. Such an agreement may be consistent with his duty, but that is not this case. The record shows that the agreement was made by the attorneys of the other parties, who did not and could not represent the minors, and that it was made after the trial of the other cause, a cause not shown to have involved the same issues and evidence, but only evidence and points substantially similar." *McClure v. Farthing*, 51 Mo. 110.

2. Neither a guardian *ad litem* nor an attorney employed to defend the infant can satisfy the judgment or decree rendered in the infant's favor. *Glass v. Glass*, 76 Ala. 368.

A guardian *ad litem* is not entitled to receive payment of a judgment. *Smith v. Redus*, 9 Ala. 99; *Burt v. McBain*, 29 Mich. 261; *Westbrook v. Comstock*, Walk. (Mich.) 314; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425.

3. *Walker v. Ferrin*, 4 Vt. 523.

4. *Trapnall v. Burton*, 24 Ark. 371.

5. Prior to the adoption of section 1679 of N. Y. Code of Civ. Pro., prohibiting the guardian of an infant to purchase on foreclosure sales, a purchase by a guardian *ad litem* was voidable at the election of the ward. *Dugan v. Denyse*, 13 N. Y. App. Div. 214.

6. *Chipman v. Union Pac. R. Co.*, 12 Utah 68; *Daingerfield v. Smith*, 83 Va. 81; *Jackson v. Sears*, 10 Johns. (N. Y.) 435; *Lenox v. Notrebe*, Hempst. (U. S.) 251; *Price v. Crone*, 44 Miss. 577; *Stephens v. Van Buren*, 1 Paige (N. Y.) 479.

Equity will not suffer the interests of an infant to be prejudiced by admissions or laches. *Long v. Mulford*, 17 Ohio St. 484; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

**Mere Non-action** on the part of the guardian will not be considered as a waiver of anything in favor of infants, whether it relates to mere practice or to the substance of the defense. *Turner v. Jenkins*, 79 Ill. 228.

**Not Prejudiced by Mispleading.** — An infant will not be prejudiced by erroneous admissions of the guardians in pleading, where the error may be corrected by amendment. *Moore v. Woodall*, 40 Ark. 42.

7. See *supra*, I. 2. *Infants as Wards of Court*.

evidence will not authorize such evidence to be admitted or considered, and its admission may be assigned for error.<sup>1</sup> The court is bound to notice and exclude incompetent and illegal evidence, notwithstanding the failure of the guardian *ad litem* to object.<sup>2</sup>

**On Appeal.** — The same rule obtains on appeal,<sup>3</sup> and the appellate court will protect the rights of infants, although no objection or exception is taken,<sup>4</sup> and even though there is no appeal on the part of the infant.<sup>5</sup>

(b) **Protecting Infant Notwithstanding Failure to Plead.** — No advantage can be taken of the failure of an infant to plead, but it is the duty of the court to give the infant the benefit of every defense to an action against him, which he might have made if formally pleaded.<sup>6</sup> Thus, although not expressly urged in the answer, an infant defendant is entitled to take advantage of the statute of frauds<sup>7</sup> or the statute of limita-

1. *Johnston v. Johnston*, 138 Ill. 385.

2. *Johnston v. Johnston*, 138 Ill. 385; *Cartwright v. Wise*, 14 Ill. 417; *Barnard v. Barnard*, 119 Ill. 92; *Waugh v. Robbins*, 33 Ill. 181. See also *Lloyd v. Kirkwood*, 112 Ill. 338.

3. *Branch v. Mitchell*, 24 Ark. 431.

4. *Smith v. Smith*, 13 Mich. 258.

5. *Tillar v. Cleveland*, 47 Ark. 287; *Kempner v. Dooley*, 60 Ark. 526.

6. *Arkansas*. — *Branch v. Mitchell*, 24 Ark. 431; *Trapnall v. Burton*, 24 Ark. 371.

*Kentucky*. — *Turner v. Short*, (Ky. 1887) 4 S. W. Rep. 347; *Huhlein v. Huhlein*, 87 Ky. 247.

*Illinois*. — *Lloyd v. Kirkwood*, 112 Ill. 329; *Gilmore v. Gilmore*, 109 Ill. 277; *Stark v. Brown*, 101 Ill. 395.

*Michigan*. — *Chandler v. McKinney*, 6 Mich. 219.

*Mississippi*. — *Price v. Crone*, 44 Miss. 571; *Westbrook v. Munger*, 64 Miss. 575.

*New York*. — *Bowers v. Smith*, 10 Paige (N. Y.) 193; *Stephens v. Van Buren*, 1 Paige (N. Y.) 479; *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635; *Schermerhorn v. Barhydt*, 9 Paige (N. Y.) 28.

*Tennessee*. — *Bomar v. Hagler*, 7 Lea (Tenn.) 85. See also *infra*, III. 3. *k. Control and Duty of Court*.

In *Westbrook v. Munger*, 64 Miss. 575, the court said it would sustain a defense made out in the proof, but not pleaded or even hinted at in the answer, in order to protect the infant defendants.

In *Chancery* a ward may be allowed relief not asked for by the guardian *ad litem* in express terms. *Huhlein v. Huhlein*, 87 Ky. 247.

The chancery court will look to the record in all its parts, and of its own motion give to the infant the benefit of all objections and exceptions as fully as if they were explicitly pleaded. *Price v. Crone*, 44 Miss. 571.

**Illustrations.** — Where infants are defendants in a suit brought by a creditor of the decedent against heirs or devisees, a reference should be directed to inquire whether there are any other creditors belonging to the same class with the complainant or to a prior class; although the infants in their answer have not set up that fact as a defense *pro tanto*. *Schermerhorn v. Barhydt*, 9 Paige (N. Y.) 29.

In an action to foreclose a mortgage, where the guardian *ad litem* fails to set up the invalidity of the mortgage, the court will open the decree and allow the infants to come in and answer anew, and set up as a defense such invalidity. *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635. So, also, to the same effect, *Chandler v. McKinney*, 6 Mich. 219.

Infants will not lose the benefit of an objection to the jurisdiction of the court that would have been valid on demurrer by failing to demur, nor even if the objection is not made at the hearing. *Branch v. Mitchell*, 24 Ark. 431.

**Cross-bill Unnecessary.** — The court protects the rights of an infant without the necessity of his filing a cross-bill. *Gilmore v. Gilmore*, 109 Ill. 277.

7. In *Grant v. Craigmiles*, 1 Bibb (Ky.) 203, the court applied, for the benefit of the infant, the statute against frauds and perjuries to a bill for the specific performance of a parol contract

tions,<sup>1</sup> or the laches of complainant,<sup>2</sup> or the fact that there is an adequate remedy at law.<sup>3</sup>

This Rule Applies to the Appellate Court as well as to the trial court.<sup>4</sup>

(c) **View that Guardian's Defaults Prejudice Infant.** — In a few cases the view is taken that the infant may be prejudiced by the neglect or default of the guardian in conducting his defense.<sup>5</sup> Where the interests of infants are prejudiced by acts or omissions on the part of their guardian *ad litem*, they will have their remedy against him and his sureties,<sup>6</sup> and it is sometimes said that it is in consequence of this liability that a recovery suffered by the guardian after appearance will bind the infants.<sup>7</sup>

for land, although the statute was not insisted upon by the guardian. *Compare Thornton v. Vaughan*, 3 Ill. 218, where a contrary conclusion was reached.

1. *Bomar v. Hagler*, 7 Lea (Tenn.) 85.

2. Where a bill to establish a resulting trust against an infant showed upon its face that the trust, if any, arose twenty-five years prior to the suit, it was held that the failure to require the guardian *ad litem* to set up laches as a defense was sufficient to justify the appellate court in setting aside the decree. *Lloyd v. Kirkwood*, 112 Ill. 329.

3. The infant can object to the jurisdiction on the ground that the remedy is at law and not in equity, although the guardian has not raised the objection in his answer. *Bowers v. Smith*, 10 Paige (N. Y.) 193.

4. *Trapnall v. Burton*, 24 Ark. 371.

When any of the defendants in a chancery suit are minors the court is the guardian of their rights and must give them on appeal as well as below the benefit of every ground of defense of which they might have availed themselves by demurrer or by general and particular denial of the allegation of the bill. *Branch v. Mitchell*, 24 Ark. 431.

5. **Illustrations — Failure to Assert Defense.** — In *Cocks v. Simmons*, 57 Miss. 183, it was held that an infant defendant was concluded by the decree enforcing a vendor's lien on his land, although he had a title which his guardian *ad litem* failed to assert.

In *Matthews v. Joyce*, 85 N. Car. 258, it was said that a successful plaintiff cannot be made to forego advantages of his victory, because his opponent defending in a representative capacity has fraudulently omitted to set up an available defense, if such failure was not the result of collusion with the plaintiff.

In *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348, it was held that an infant was bound by a judgment rendered against him, although his guardian *ad litem* had failed to interpose the defense of infancy.

**Appeal — Prerequisites to Review.** — In *Morrison v. Beckham*, 96 Ky. 72, it was held that error in rendering a judgment against infants where no defense was made and no report filed by the guardian *ad litem*, stating that he was unable to make a defense as required by statute, would not be considered on appeal unless called to the attention of the trial court.

In *Alexander v. Frary*, 9 Ind. 481, it was held that after the appointment of a guardian *ad litem* the infant stands in court upon the issues made like any other defendant, and that it was for him to move for a new trial and to put on evidence in the record if he wished to raise a question upon it on appeal. See also *Wells v. Smith*, 44 Miss. 303.

**Pleading in Confession and Avoidance — Necessity.** — In *Roe v. Angevine*, 7 Hun (N. Y.) 679, it was held in an action to foreclose a mortgage that matter by way of confession and avoidance was not admissible under a general denial, although the defendant was an infant.

6. *Reed v. Reed*, 46 Hun (N. Y.) 212; *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398; *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341.

Where a guardian *ad litem* neglects his duty to the infant, and thereby such infant sustains an injury, the guardian will not only be punished for his neglect, but he will also be liable to the infant for all damages he may have sustained. *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

7. *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398.

In *Banta v. Calhoon*, 2 A. K. Marsh.

*k.* **CONTROL AND DUTY OF COURT.** — In suits against infants the duty of guarding their interests devolves in a considerable degree upon the court.<sup>1</sup> As has been seen, the infant is considered a ward of the court and entitled to its protection.<sup>2</sup> The court performs this duty through the medium of a guardian *ad litem* appointed for the purpose, and who is subject to the court's control. But it is the court's duty to protect the infant whether the guardian *ad litem* does so or not.<sup>3</sup>

**Duty to Appoint Guardian.** — Although persons interested in procuring a valid judgment against infant defendants will ordinarily see to it that a guardian *ad litem* is appointed, it is the duty of the court to appoint a guardian *ad litem*, whether application therefor is made or not.<sup>4</sup>

(Ky.) 166, it was held that where a guardian appears and takes upon himself that character the cause may be heard without his answer, but he is responsible to the infant if he neglects to defend.

**Contra.** — The fact that the guardian was not responsible to an infant will make a judgment for an attorney by the guardian valid. *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341.

**In Connection with This Question** of the effect of the personal liability of the guardian *ad litem* to the infant for his defaults to render such default binding upon the infant, compare the rule as to the effect of an attorney's personal liability to render binding an unauthorized appearance; see article APPEARANCES, vol. 2, p. 685.

1. *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

2. See *supra*, I. 2. *Infants as Wards of Court*.

**The Courts Will So Far Protect** an infant defendant as to see that he is properly served with process, that a guardian *ad litem* is appointed, and a formal answer filed for him. *Alexander v. Frary*, 9 Ind. 481.

An infant is entitled to the protection of the court upon a summary application to set aside a sale in partition as well as in a formal action. *Howell v. Mills*, 53 N. Y. 322.

Where the interests of minors and those assuming to act as next friend are hostile to each other, it is the duty of the court to appoint a guardian *ad litem*, and the minors should be represented by counsel distinct from those representing the hostile interests. *Ames v. Ames*, 151 Ill. 280.

3. *Cavender v. Smith*, 5 Iowa 157; *Sheahan v. Wayne Circuit Judge*, 42 Mich. 69; *Burt v. McBain*, 29 Mich. 261.

The court will interfere to protect infants when it is manifest that they are entitled to something, although their guardian *ad litem* neglects to look after their interests. *Stark v. Brown*, 101 Ill. 395.

**The Court Should Cause the Guardian Ad Litem to Appear** before any judgment can be taken against the infant. *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398. See also *infra*, IV. 5. *c. Judgments by Default or Decrees Pro Confesso*.

4. *Morris v. Edmonds*, 43 Ark. 427; *Peak v. Pricer*, 21 Ill. 164; *Kesler v. Penninger*, 59 Ill. 134; *Lloyd v. Kirkwood*, 112 Ill. 329; *Holmes v. Field*, 12 Ill. 424; *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468; *Sharp v. Pell*, 10 Johns. (N. Y.) 486; *Morris v. Gentry*, 89 N. Car. 248; *Alexander v. Davis*, 42 W. Va. 465; *Myers v. Myers*, 6 W. Va. 369.

**If No One Can Be Found to Accept the Appointment** as guardian and to appear for the infant, it is the duty of the court to appoint one of its officers whom it can control, and to see that he enters an appearance. *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109.

**On Appeal** from a 'surrogate, it is the province of the appellate court to appoint a guardian *ad litem* to protect the interests of the infant. *Matter of Hewitt*, 65 How. Pr. (N. Y. Surrogate Ct.) 188; *Kellinger v. Roe*, 7 Paige (N. Y.) 363; *Underhill v. Dennis*, 9 Paige (N. Y.) 209; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 89; *Moody v. Gleason*, 7 Cow. (N. Y.) 482; *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567.

**Control Over Guardian.** — The guardian *ad litem* is an officer of the court,<sup>1</sup> and as such is subject to its control.<sup>2</sup> Thus, the court may compel the guardian *ad litem* to answer,<sup>3</sup> and it is its duty to do so.<sup>4</sup> The court must see to it that the guardian makes proper defense,<sup>5</sup> and it will see that proper pleadings are interposed to present any defense the infant may have,<sup>6</sup> or at all events to give the infant the benefit of such defense without being specially pleaded.<sup>7</sup>

1. See *supra*, III. 3. *b. Guardian Ad Litem as a Party and as an Officer of Court.*

2. If a guardian *ad litem* accept the appointment the court may compel him to discharge his duty. *Covington, etc., R. Co. v. Bowler*, 9 Bush (Ky.) 468; *Greenup v. Bacon*, 1 T. B. Mon. (Ky.) 109.

3. *Richards v. Richards*, 17 Ind. 638; *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. (N. Y.) 414.

In Chancery the court may compel the guardian *ad litem* to answer or appoint a successor, and defer the hearing until an answer is filed. *Henly v. Gore*, 4 Dana (Ky.) 136.

4. *Sconce v. Whitney*, 12 Ill. 150.

5. *Lloyd v. Kirkwood*, 112 Ill. 330; *Peak v. Pricer*, 21 Ill. 164; *Henly v. Gore*, 4 Dana (Ky.) 134.

In *Berrett v. Oliver*, 7 Gill & J. (Md.) 191, it was held to be the duty of a court of equity to see that the rights of infants were not prejudiced or abandoned by the answer of their guardians. See also *Kent v. Taneyhill*, 6 Gill & J. (Md.) 1.

It is the duty of the court to exact a vigorous defense of the infant's interests. *Sconce v. Whitney*, 12 Ill. 150.

**Statute of Limitations.** — A court of equity is bound to set up the statute of limitations in favor of an infant defendant, against his will even, as against a demand in favor of a mother, unless the case discloses some circumstance which renders such plea inequitable. *Alling v. Alling*, 52 N. J. Eq. 92.

**Statute of Frauds.** — The court will not require a guardian *ad litem* to set up the statute of frauds to defeat specific performance of a parol contract relating to lands. *Thornton v. Vaughan*, 3 Ill. 218. Compare *Grant v. Craigmiles*, 1 Bibb (Ky.) 203, where the court gave an infant defendant the benefit of the statute of frauds although not insisted upon by his guardian.

**Failure to Require Defense of Laches.** — In *Lloyd v. Kirkwood*, 112 Ill. 329, it

was said that if a guardian, whether general or guardian *ad litem*, neglects to protect the interests of his ward, it is the duty of the court *sua sponte* to compel him to do so upon its acquisition of the knowledge of such neglect. It was accordingly held that the failure of the court to require a guardian *ad litem* to set up a defense of laches was such error on the face of the proceedings and the decree as to justify the court in setting aside the decree upon a bill filed by the infant.

**Withdrawal of Plea and Default — Error.**

— In *Peak v. Pricer*, 21 Ill. 164, it was held to be error for the court to permit the guardian to withdraw a plea, or to permit and allow a judgment by default to be entered against an infant.

6. *Lloyd v. Kirkwood*, 112 Ill. 329; *Morris v. Edmonds*, 43 Ark. 427.

**Supervision of Pleadings.** — If an infant is defending, and his guardian has failed to file some pleading essential to the admission of his defense, or has filed one so imperfect as not to be sufficient for that purpose, it is the duty of the court, whenever the fact is disclosed, to see that proper pleading is filed on behalf of the infant before such proceeding. *Lloyd v. Kirkwood*, 112 Ill. 329.

7. See *supra*, III. 3. j. (5) (b) *Protecting Infant Notwithstanding Failure to Plead.*

It is the duty of the chancellor to protect the interests of minors, whether the proper defense is made or not; and for this purpose he should look to the record in all its parts, and, of his own motion, give to the infant the benefit of all objections and exceptions as fully as if specially pleaded. The infant can waive none of his rights. *Price v. Crone*, 44 Miss. 571.

**Nonresident Defendants.** — It is the duty of the court without any demurrer to see that a complaint against a non-resident who is represented only by a guardian *ad litem*, appointed by the court, states a cause of action within its jurisdiction before rendering a de-

**Removal of Guardian.** — The court has power to remove a guardian *ad litem*,<sup>1</sup> and it is its duty to do so if at any time the interests of the infant demand it.<sup>2</sup>

**1. FEES AND ALLOWANCES** — (1) *Making the Allowance.* — Guardians *ad litem* are entitled to compensation for their services,<sup>3</sup> and the court has power to make a reasonable allowance to them for that purpose.<sup>4</sup>

**The Allowance Should Be Reasonable** in amount, having in view the character of the litigation and the labor performed.<sup>5</sup>

**By What Court.** — The allowance should be made by the court wherein the services were rendered.<sup>6</sup>

crec against him. *Bonner v. Little*, 38 Ark. 397.

**1. Revoking Appointment.** — A court of chancery may rescind an order appointing a guardian *ad litem*, made pending a cause there, where another person had been previously appointed who filed an answer for the infants. *Walker v. Mobile Bank*, 6 Ala. 452.

**2.** *Walker v. Hull*, 35 Mich. 488; *Damouth v. Klock*, 29 Mich. 289; *Henly v. Gore*, 4 Dana (Ky.) 133; *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341.

**3.** *Williams v. Ewing*, 31 Ark. 229; *Walton v. Yore*, 58 Mo. App. 562; *Sconce v. Whitney*, 12 Ill. 150; *In re Wadsworth's Estate*, (Surrogate Ct.) 6 N. Y. Supp. 932; *Matter of Hewitt*, 65 How. Pr. (N. Y. Surrogate Ct.) 187; *Kerbaugh v. Vance*, 5 Lea (Tenn.) 113.

**In Arkansas**, under Gantt's Digest, § 4502, relative to the fees of guardians *ad litem*, such guardians are entitled to compensation only when appointed upon application of plaintiff. *Williams v. Ewing*, 31 Ark. 229.

**Services of a Guardian Ad Litem Are Regarded as Necessaries**, for which the estate of the infant is liable in a proper proceeding. *Nagel v. Schilling*, 14 Mo. App. 576; *Walton v. Yore*, 58 Mo. App. 566.

**4.** *Walker v. Hallett*, 1 Ala. 379; *Weed v. Paine*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 200; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Carter v. Montgomery*, 2 Tenn. Ch. 455.

**Surrogate's Court—Extra Allowances.** — In *New York* a special guardian is entitled to no more costs than are prescribed by statute. The surrogate has no power to make an extra allowance. *Matter of Tracy*, 18 Abb. N. Cas. (Erie Surrogate Ct.) 242; *Matter of Hewitt*, 65 How. Pr. (N. Y. Surrogate Ct.) 187. But see *McCue v. O'Hara*, 5 Redf. (N.

Y.) 336, where it is said that the power of the surrogate to make allowances to the guardian *ad litem* of an infant exists independently of any express provision of law or rule of court.

**5.** *McCallon v. Cohen*, (Tex. Civ. App. 1897) 39 S. W. Rep. 973; *Smith v. Smith*, 69 Ill. 308.

**6.** *Walton v. Yore*, 58 Mo. App. 562, citing *Matter of Mathews*, 27 Hun (N. Y.) 254; *Gott v. Cook*, 7 Paige (N. Y.) 521; *McCue v. O'Hara*, 5 Redf. (N. Y.) 336; *Kerbaugh v. Vance*, 5 Lea (Tenn.) 113; *Wilbur v. Wilbur*, 138 Ill. 446; *Holloway v. McIlhenny Co.*, 77 Tex. 657; *Robinson v. Fidelity Trust, etc., Co.*, (Ky. 1889) 11 S. W. Rep. 806; *Cole v. Superior Ct.*, 63 Cal. 86.

**Review on Appeal—Excessive Allowance.** — Under a statute allowing a guardian *ad litem* reasonable compensation for his services to be taxed as costs, where there is no evidence in the record showing the extent of the services rendered, so that the appellate court may intelligently pass upon the question, an allowance of fifty dollars will not be set aside as excessive. *McCallon v. Cohen*, (Tex. Civ. App. 1897) 39 S. W. Rep. 973.

**Power of Surrogate—Services on Appeal.** — The *New York* Code of Civil Procedure, § 2589, provides that the costs of an appeal from the determination of the surrogate may be made payable out of the estate, or fund, or personality by the unsuccessful party, as directed by the appellate court, or, if such a direction is not given, as directed by the surrogate. And in *Schell v. Hewitt*, 1 Dem. (N. Y.) 249, it was held that this section did not authorize the surrogate to award costs of an appeal, but only related to the mode of payment; unless so directed by the appellate court, the surrogate's court cannot compensate a special guardian

**Taxation of Charges** in favor of guardian *ad litem* must be made in the original suit, and cannot be made after the cause has been finally disposed of.<sup>1</sup>

**Several Defendants.** — The allowance may be *in solido* for several minor defendants.<sup>2</sup>

**Reimbursement for Expenses.** — The guardian *ad litem* is, of course, entitled to a reimbursement for reasonable and necessary expenses.<sup>3</sup>

(2) **Payment Out of Property Protected.** — The court may make the guardian's compensation a lien on the property protected,<sup>4</sup> or order it paid out of any property of the minor within its jurisdiction.<sup>5</sup> Compensation cannot be awarded, however, out of a fund belonging to the adverse party;<sup>6</sup> and it has been said that where there is no fund under control of the court, belonging to the infant, the allowance to the guardian *ad litem* must be limited to the taxable costs.<sup>7</sup>

appointed by it for services rendered in proceedings upon the appeal, but he must resort for relief to the appellate tribunal wherein he rendered the services.

1. *Smith v. Smith*, 69 Ill. 308, holding, however, that a petition for such taxation while the cause is pending would be regarded as a continuation of the original cause.

2. In *Walton v. Yore*, 58 Mo. App. 562, it was held that where a guardian had been appointed for several minors in proceedings to contest the validity of a will, which were unsuccessful, the appointment was for the benefit of the minors jointly, though their interests differed, and that the allowance should be made to the guardian and *in solido*.

3. Application by a guardian *ad litem* for the payment of expenses incurred by him in the suit must be made before the fund which he has procured for the infant is paid over. *Leopold v. Meyer*, 10 Abb. Pr. (N. Y. C. Pl.) 40, 2 Hilt. (N. Y.) 580.

4. A chancery court appointing a guardian *ad litem* may set apart to him reasonable compensation, and make out a lien upon the property protected, whether such property is real or personal. *Kerbaugh v. Vance*, 5 Lea (Tenn.) 113; *Persons v. Young*, 7 Lea (Tenn.) 293.

5. The power to award compensation to a guardian *ad litem* out of the subject-matter of an equitable suit is inherent, and does not depend upon statute. *Weed v. Paine*, 31 Hun (N. Y.) 10.

**Will Contest — Allowance Out of Estate.**

— In *Walton v. Yore*, 58 Mo. App. 562, it was held that in proceedings attacking the validity of a will, the court had no jurisdiction to make an allowance to the guardian *ad litem* for minor devisees out of the estate devised, the estate not being property in court. Compare *Wilbur v. Wilbur*, 138 Ill. 446, where it was contended that the guardian *ad litem's* fee should have been charged to the unsuccessful proponent of the will; but it was held that there was no error in the decree of the trial court, charging such fee against the estate. This latter case was cited approvingly in *Hutchinson v. Hutchinson*, 152 Ill. 354.

**Duty of Court to Protect Guardian and Attorney.** — Where money belonging to an infant has been paid into court, it is the duty of the court to make proper inquiries, and to protect the rights of the guardian *ad litem* or his solicitor before putting the fund out of its control. *Sheahan v. Wayne* Circuit Judge, 42 Mich. 69.

6. *House v. Whitis*, 5 Baxt. (Tenn.) 690.

**In Partition** the allowance made a guardian *ad litem* should be taxed against his ward, and not against all the parties to the proceeding. *Holloway v. McIlhenny Co.*, 77 Tex. 657. But in *Missouri*, under the statute governing partition, the court may make a reasonable allowance to guardians *ad litem*, to be taxed and paid as other costs in the case. *Walton v. Yore*, 58 Mo. App. 562.

7. "The compensation in such cases



(3) *Payment by Plaintiff.* — Under the statutes of some states the plaintiff<sup>1</sup> or the person who procured the appointment of

comes out of the estate of the infant. *In re Howe*, 2 Edw. Ch. (N. Y.) 484; *Union Ins. Co. v. Van Rensselaer*, 4 Paige (N. Y.) 87. If there is no fund under the control of the court, belonging to the infant, the allowance which can be awarded the guardian *ad litem* is ordinarily limited to the taxable costs. *Gott v. Cook*, 7 Paige (N. Y.) 544; *Fraser v. Thompson*, 4 De G. & J. 663. In this state we have no taxable costs in the sense in which these words are used in England and New York. They mean, properly, the costs of the solicitor for professional services, the charges being regulated by statute or usage. The only costs of litigation in this state are the fees of the clerk, sheriff, and other ministerial officers, the state tax, and the fixed charges for depositions. The solicitor performs no services for which he is entitled to allowance in the bill of costs. The compensation which he can claim is against his client, and includes the honorary charge for professional services as counsel, and any demand he may have for expenses incurred in behalf of his client. The functions of the barrister and solicitor are blended in one individual, and the fee which the lawyer charges, and is entitled legally to demand, is a single claim for his services in both capacities. In view of this fact, I held, in *Yourie v. Nelson*, 1 Tenn. Ch. 614, that the court had the power to provide reasonable compensation for a guardian *ad litem* of infants, to be charged, where there were no funds of the infant in court, in the bill of costs. *Walker v. Hallett*, 1 Ala. 379. Such compensation would be in the nature of taxable costs, and should not be measured by the standard of ordinary professional services. It might vary, according to circumstances, from five to twenty dollars. The guardian *ad litem* in this case is entitled to such compensation, to be taxed in the bill of costs." *Carter v. Montgomery*, 2 Tenn. Ch. 458.

"The power to declare a lien upon property *sub judice* necessarily implies the existence of such property. If, in fact, there be no fund, there is nothing on which to rest the jurisdiction. Ordinarily, too, if there is no fund, the costs awarded a trustee, etc., will only be the costs between party and party. 2 Dan. Ch. Pr. 1512. But

this rule is not without exception. *Edenborough v. Canterbury*, 2 Russ. 93. Ordinarily, too, the taxable costs alone of a guardian *ad litem* can be allowed out of funds which belong to others. *Union Ins. Co. v. Van Rensselaer*, 4 Paige (N. Y.) 87, 2 Hoff. Ch. Pr. 74; *Gott v. Cook*, 7 Paige (N. Y.) 544. In this last case, Ch. Walworth says: 'The infant children of Mrs. Kane having no vested interest in the estate, there is nothing out of which any counsel fees for them can be allowed. And the court is not authorized to charge a fund which may eventually all belong to others, with anything more than the taxable costs of their guardian *ad litem*.' But the court may provide reasonable compensation for guardians *ad litem*. *Walker v. Hallett*, 1 Ala. 379; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280. Infants might otherwise be unprotected. I am of opinion, and have in one or two cases considered that I was authorized to fix the compensation of the guardian *ad litem*, and allow the same to be charged as taxable costs. But it is obvious that such allowances cannot be measured by the standard of ordinary professional services. It is more in the nature of a tax fee formerly allowed in this state of from five to ten dollars, and now allowed by Act of Congress in the United States courts of from ten to twenty dollars." *Yourie v. Nelson*, 1 Tenn. Ch. 617.

1. *Williams v. Ewing*, 31 Ark. 229, construing *Gantt's Dig.*, § 4502.

**In Kentucky.**—Under the Civil Code of Kentucky, § 38, providing that the court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff and to be taxed in the costs, where the guardian *ad litem* files a cross petition and secures affirmative relief, the order providing for the payment to the guardian *ad litem* by the plaintiff should provide that upon payment of it the plaintiff should be allowed credit therefor against the ward. *Huhlein v. Huhlein*, 87 Ky. 247. And where the ward by a counterclaim or set-off becomes in fact a plaintiff and recovers, while the nominal plaintiff is defeated, the costs must be paid by the ward, and not by the plaintiff, in the original proceedings. *Huhlein v. Huhlein*, 87 Ky. 247.

the guardian *ad litem* is required to pay the latter's costs and allowances.<sup>1</sup>

(4) *Taxing Allowance as Costs.* — It is also sometimes provided by statute that the allowances of the guardian may be taxed as costs.<sup>2</sup>

(5) *Attorney's Fees.* — An allowance may be made to a guardian *ad litem* of a reasonable amount for attorney's fees, or, to prevent circuity of action, the allowance may be made direct to the attorney.<sup>3</sup>

**Where Execution Against Infant Defendants Is Returned Unsatisfied,** under Rev. Stat. Tex., art. 2427, making parties to a suit liable for costs, and providing that if the costs cannot be collected from the party against whom the same have been adjudged execution may issue against any party in such suit for the amount of costs incurred by such party, a guardian *ad litem* for an infant defendant may collect his fees from a successful plaintiff. *Ashe v. Young*, 68 Tex. 123.

1. Under an Illinois Statute, providing that a reasonable sum shall be allowed a guardian for his charges as such, to be paid by the party on whose motion he was appointed, and to be taxed in the bill of costs, where the guardian is appointed under a prayer contained in the petition the costs and allowances must be taxed against the complainant. *Smith v. Smith*, 69 Ill. 308. This statute was amended in 1872, and in Illinois the complainant is no longer required to pay counsel fees and other expenses of the guardian *ad litem*. *Hutchinson v. Hutchinson*, 152 Ill. 347.

2. *Walker v. Hallett*, 1 Ala. 379, holding that in suits for the foreclosure of mortgages the guardian *ad litem*'s compensation may be taxed in a bill of costs; *Walton v. Yore*, 58 Mo. App. 562, holding that under the Missouri Partition Act a reasonable allowance to the guardian *ad litem* may be taxed and paid as other costs in the case; *Yourie v. Nelson*, 1 Tenn. Ch. 614, holding that the court may make an allowance in the nature of a tax fee. See also *Carter v. Montgomery*, 2 Tenn. Ch. 455.

**Taxing Costs Against Successful Defendant.** — Where, by statute, costs must be taxed against the unsuccessful party, an allowance to a guardian *ad litem* cannot be taxed as costs against infant defendants, where the latter were suc-

cessful in their defense. *Walton v. Yore*, 58 Mo. App. 562.

**Collecting Charges by Action.** — Where a guardian *ad litem* is unable to tax his charges as costs, because of the disposal of the original suit, and he is entitled to his reasonable charges, and the right to reimbursement therefor, he may have a guardian appointed and recover his claim against such guardian and collect it out of the minor's estate. *Smith v. Smith*, 69 Ill. 308.

3. **The Better Practice** is for the guardian *ad litem* to apply to the court for leave to employ counsel, and the court should, on granting leave, fix the amount necessary to expend in the defense, and this sum, on a showing of its insufficiency, may be increased by the court. *Smith v. Smith*, 69 Ill. 308; *Colgate v. Colgate*, 23 N. J. Eq. 372.

**A Reference** to ascertain what amount will be a proper compensation may be had upon application of the solicitor. *Stewart v. Hoare*, 2 Bro. C. C. 663.

A guardian *ad litem* should be served with a copy of the order, or otherwise informed of the amount of compensation claimed, and of the time and place of executing the reference; and if the solicitor is also a guardian *ad litem* the notice should be served upon the infant, who is entitled to have another guardian *ad litem* appointed to appear for him on the reference. *Carter v. Montgomery*, 2 Tenn. Ch. 455; *Perkins v. Perkins*, 9 Heisk. (Tenn.) 95.

**Reasonableness of Charges.** — Where the property involved in litigation, belonging to an infant defendant, was of the value of about forty thousand dollars, and the suit was not a complicated one, presenting but few questions of fact or law, nor one which required any considerable degree of skill or large amount of labor, it was held that an allowance recommended by the master in chancery of one hundred and nine dollars and two cents to the guardian

*m. TERMINATION OF OFFICE.* — The authority of a guardian *ad litem* terminates with the judgment or decree in the case.<sup>1</sup> It is likewise terminated by his removal pending the cause,<sup>2</sup> or by the expiration of his ward's minority.<sup>3</sup>

**4. Answer or Plea** — *a. IN GENERAL* — (1) *Manner, Time, and Necessity.* — The answer of an infant must be filed by his guardian *ad litem*.<sup>4</sup> Accordingly, an infant cannot answer until a guard-

for expenses incurred, and three thousand five hundred dollars for attorney's fee, was, as to the latter item, too large, and that under the circumstances one thousand dollars would be a liberal if not a large attorney's fee. *Smith v. Smith*, 69 Ill. 308.

**Attorney's Fees as Costs.** — In *Hutchinson v. Hutchinson*, 50 Ill. App. 87, it was held that a statute providing that a person appointed guardian *ad litem* shall not be liable for the costs of the suit, and shall be allowed a reasonable sum for his charge as guardian, to be fixed by the court and taxed in his bill of costs, contemplated the taxation as costs of the guardian's charges, but not of his expenses in the employment of counsel. This case was affirmed on appeal. *Hutchinson v. Hutchinson*, 152 Ill. 347. But see *Ames v. Ames*, 151 Ill. 280.

**The Surrogate's Court** will not make an allowance to a special guardian for his counsel fees. *Matter of Johnston*, 6 Dem. (N. Y.) 355.

1. *Davis v. Gist*, *Dudley Eq. (S. Car.)* 1.

**The Dismissal of an Action** will terminate the authority of a guardian *ad litem*, except as to further proceedings by way of motion for relief, or by appeal in that action. *Rosso v. Second Ave. R. Co.*, 13 N. Y. App. Div. 375.

**Surrogate's Decree — Appeal.** — "The special guardian alleges that during the pendency of these appellate proceedings he rendered services which are worthy of compensation, and he now asks that such compensation be awarded him out of the assets of the estate. In opposition to this claim it is urged that the functions of the applicant as special guardian ceased with the entry of the surrogate's decree, and that he was neither required nor empowered by virtue of his office to represent the infants thereafter. This view, as it seems to me, is correct. If the interests of an infant need protection in proceedings upon appeal from the surrogate, it is the province of the appel-

late court to appoint for that purpose a guardian *ad litem*." *Matter of Hewitt*, 65 How. Pr. (N. Y. Surrogate Ct.) 188, citing *Kellinger v. Roe*, 7 Paige (N. Y.) 363; *Underhill v. Dennis*, 9 Paige (N. Y.) 209; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.) 89; *Moody v. Gleason*, 7 Cow. (N. Y.) 482; *Fish v. Ferris*, 3 E. D. Smith (N. Y.) 567.

2. See *supra*, III. 3. *k. Control and Duty of Court.*

The court may remove the guardian *ad litem* in its discretion. *Clarke v. Gilmanton*, 12 N. H. 515.

**Appointment of General Guardian.** — The appointment of a general guardian will not have the effect to revoke the appointment of a special guardian. *In re Monell*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 377. To the same effect, see *Hicks v. Hicks*, 79 Wis. 465 (insane ward).

3. *Lang v. Belloff*, 53 N. J. Eq. 298. See also *supra*, I. 8. *Attainment of Majority Pending Suit.*

4. *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Pugh v. Pugh*, 9 Ind. 132; *Wells v. Wells*, 6 Ind. 447; *Alexander v. Frary*, 9 Ind. 481; *McEndree v. McEndree*, 12 Ind. 97; *Abdil v. Abdil*, 26 Ind. 287; *Blake v. Douglass*, 27 Ind. 416; *Peak v. Pricer*, 21 Ill. 164. See also *supra*, I. 10. *Conduct of Suit: — Disability of Infants.*

**On the Denial of a Motion to Strike Out the Answer** of an infant, because interposed by a person not appointed guardian *ad litem* by order, a bill of exceptions may be taken, or objections may be raised by affidavits on motion for a new trial under Code Civ. Pro. Cal., § 658. *Emeric v. Alvarado*, 64 Cal. 529.

**Taking Answer by Commission.** — As to the former practice in *Maryland* of taking an infant's answer by a commission, see *Calwell v. Boyer*, 8 Gill & J. (Md.) 136. See also *supra*, III. 3. *g. (10) Appearance of Infant in Court.*

This method of taking an infant's answer has been abolished in *Maryland*. See *Biddinger v. Wiland*, 67 Md. 359.

ian *ad litem* is appointed.<sup>1</sup> The cause cannot regularly proceed to judgment until a plea or answer is filed.<sup>2</sup>

**Duty of Guardian.** — If a person accept the office of guardian *ad litem*, it is his duty to plead, and he cannot refuse to do so merely because of an opinion on his part that his wards are improper or unnecessary parties.<sup>3</sup>

(2) *Form and Sufficiency.* — Infants answering by guardian *ad litem* may deny generally the allegations of the petition,<sup>4</sup> or they may answer specially,<sup>5</sup> or they may even adopt an answer already on file.<sup>6</sup> But it has been said to be irregular practice for a guardian *ad litem* to join in an answer with other defendants.<sup>7</sup> The answer must be that of the infant himself, and not the personal answer of the guardian *ad litem*,<sup>8</sup> and should at least recite the appointment of the guardian *ad litem*,<sup>9</sup> and disclose for whom the appointment was made.<sup>10</sup> The answer of an infant cannot

1. *Coleman v. Northcote*, 7 Jur. 528.

**Time of Answering.** — That a guardian *ad litem* was appointed, an answer filed, an order for report, proof, and report and order of sale at the same term, is no ground of exception by a purchaser as to the validity of a sale. *Martin v. Porter*, 4 Heisk. (Tenn.) 408.

Under a rule of court that "all dilatory pleas shall be filed on or before the third day of the term at which the action is entered," when an infant is defendant the filing of such a plea before the third day after suggestion of infancy to the court and the appointment of a guardian *ad litem* is a compliance with the rule. *Fall River Foundry Co. v. Doty*, 42 Vt. 412.

2. See *infra*, IV. 5. c. *Judgments by Default or Decrees Pro Confesso*.

3. *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. (N. Y.) 414. He has no power to pass upon such question, but must answer. *Kitson v. Cutts*, 9 L. J. N. S. Ch. 138.

If the guardian fails to answer the court should compel him or remove him and appoint a substitute. *Henly v. Gore*, 4 Dana (Ky.) 133. See also *supra*, III. 3. *k. Control and Duty of Court*.

4. *Revely v. Skinner*, 33 Mo. 98, holding that the rule that an answer must deny both knowledge and information does not apply. The answer of an infant need not deny the allegations of the complaint with the same strictness as is required in the case of adult infants.

5. **Special Answer.** — Where infants have a special defense, the guardian *ad litem* may answer specially, and not

generally. *Farmers' L. & T. Co. v. Reid*, 3 Edw. Ch. (N. Y.) 414.

6. **Adoption of Answer on File.** — An answer adopted by a guardian *ad litem* will be deemed sufficient if it appears that it is not merely formal, but is a denial in detail of the allegations of the complaint, and sets forth affirmatively matters of defense manifesting an intelligent interest in behalf of the infant defendants. *White v. Morris*, 107 N. Car. 92.

7. *Wood v. Truax*, 39 Mich. 628.

**Where There Is No Separate or Special Defense,** no separate or special answer need be filed in their behalf, but joinder in a common answer with the other defendants is sufficient. *Western Lumber Co. v. Phillips*, 94 Cal. 54.

8. *Johnson v. McCabe*, 42 Miss. 255; *Bull v. Dagenhard*, 55 Miss. 602; *Ingersoll v. Ingersoll*, 42 Miss. 155.

Thus, an answer of "F. B. G., guardian *ad litem* for B. E., a minor, defendant herein, answering, says that he knows nothing," etc., is insufficient. *Johnson v. McCabe*, 42 Miss. 255.

Where an answer purports to be that of an infant by his guardian *ad litem*, but it is signed by the latter, if a careful reading will show that it is in fact his answer, it will have the same effect as if formally designated and filed as the answer of the guardian in his proper person. *Durrett v. Davis*, 24 Gratt. (Va.) 302.

9. **A Copy of an Order Appointing a Guardian Ad Litem** for an infant defendant should be annexed to the plea interposed in his behalf, or should be recited in it. *Nicholson v. Wilborn*, 13 Ga. 467.

10. If it does not, it cannot be consid-

be excepted to for insufficiency.<sup>1</sup> Where a proper answer is filed for infant defendants, the mere fact that the answer was drafted by complainant's solicitors is immaterial.<sup>2</sup>

**Formal Answer.** — Ordinarily, the answer filed is a mere formal one disclaiming all knowledge or information with respect to the matters alleged in the complaint, and requiring strict proof thereof and invoking the protection of the court.<sup>3</sup> This formal answer stands as a denial so as to put the complainant upon proof of all the material allegations of his bill,<sup>4</sup> and is sufficient to let in any defense to which the infant appears entitled by the evidence.<sup>5</sup> This formal answer, however, has in some cases been disapproved,<sup>6</sup> and in some states by statute such answer is no longer sufficient, but the guardian *ad litem* must deny all the material allegations of the complaint regardless of their truth.<sup>7</sup>

ered for any purpose. *Newman v. Maldonado*, (Cal. 1892) 30 Pac. Rep. 833.

1. *Price v. Crone*, 44 Miss. 571.

2. *Hess v. Voss*, 52 Ill. 472. But see *Gulley v. Macy*, 81 N. Car. 366; *Moore v. Gidney*, 75 N. Car. 34.

**Answer Drafted by Complainant's Solicitor — Decree Not Void.** — The fact that the sworn answer of a guardian for an infant was drawn for him by a solicitor for the adverse party, though, under some circumstances, it might be taken into consideration as an item of evidence having some weight upon a question of fraud, yet as a mere fact alone will not render a sale under the decree void. *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

3. *Revely v. Skinner*, 33 Mo. 100; *Johnson v. McCabe*, 42 Miss. 255; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 368; *Ridgely v. Bennett*, 13 Lea (Tenn.) 210; *Proctor v. Scharpf*, 80 Ala. 229; *Tucker v. Bean*, 65 Me. 352.

**Illustrations of Formal Answers.** — In *Proctor v. Scharpf*, 80 Ala. 229, by the answer of the guardian *ad litem*, the infants commended themselves and their rights to the protection of the court, and asked that no decree be made to their prejudice.

In *Johnson v. McCabe*, 42 Miss. 255, it is said that the answer should be in the following form: "The answer of A, an infant under the age of twenty-one years, by B, his guardian, to the bill of complaint of C against him in chancery exhibited. This defendant cannot admit any of the matters and things alleged in the said bill, and being an infant of tender years submits his rights to the protection of this court."

A *pro forma* answer of the guardian submits the infant to the care and protection of the court. *Price v. Crone*, 44 Miss. 571.

4. *Carnall v. Wilson*, 14 Ark. 482; *Gregory v. Orr*, 61 Miss. 307; *Wells v. Smith*, 44 Miss. 296; *Wood v. Butler*, 23 Ohio St. 520. But see *infra*, III. 4. b. (2) *Necessity of Pleading Specially*.

5. *Skaggs v. Kincaid*, 48 Ill. App. 608.

**Statute of Limitations Available Under Formal Answer.** — In *Stark v. Brown*, 101 Ill. 395, it was held that an answer by a guardian *ad litem* in partition, which asks the protection of the court for the wards and denies that the complainant has any interest in or title to the property, allows the wards to avail themselves of all defenses, including the statute of limitations.

6. *Varner v. Rice*, 44 Ark. 236.

*Tucker v. Bean*, 65 Me. 352, wherein it was held that a decree upon the answer of *non sum informatus* by a guardian *ad litem* would not bind the infant. The court said: "In equity suits the usual answer of a guardian *ad litem* of an infant is that the infant knows nothing of the matter, leaving the plaintiff to prove his case if he can, and throwing the infant upon the protection of the court. Such is the answer of the guardian in this case. But such an answer was pointedly condemned in *Lane v. Hardwicke*, 9 Beav. 148; and Chancellor Kent held, in the case of *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367, that a decree upon such an answer would not bind the infant; that the plaintiff should prove his case."

7. In *Arkansas* the answer of a guardian *ad litem* must deny every material

(3) *Verification*. — In chancery, where the bill does not waive the necessity of an answer under oath, the answer must be sworn to by the guardian *ad litem*.<sup>1</sup>

A Merely Formal Answer, however, need not be verified.<sup>2</sup>

Where Guardian Required to Deny. — Nor is an oath necessary where the guardian is required to deny the allegations of the complaint irrespective of their truth.<sup>3</sup>

allegation of the complaint, and be such as to require proof of them. It is not sufficient under the code to express ignorance of the matters alleged and put the infant defendant under the protection of the court as under the old practice. *Pillow v. Sentelle*, 39 Ark. 61; *Evans v. Davies*, 39 Ark. 235; *Varnor v. Rice*, 44 Ark. 236; *Pinchback v. Graves*, 42 Ark. 222.

In Iowa, under Miller's Code, § 5626, the guardian of a minor defendant must deny in the answer all the material allegations of the petition prejudicial to the defendant.

In Kansas, under Civ. Code, § 101, the rule is the same as in Iowa. *Brenner v. Bigelow*, 8 Kan. 496.

Harmless Error. — Where an answer by a guardian *ad litem*, though failing to expressly deny the allegations of the petition, as required by statute, was treated by the court as a denial of the petition, so that the infants were not prejudiced by the want of formal denial, it was held that the error was one of form merely, and insufficient as a ground for reversal. *Randall v. Turner*, 17 Ohio St. 262.

1. *Johnson v. McCabe*, 42 Miss. 255.

Sufficiency of Verification. — A certificate of a clerk that a guardian made oath to the answer is sufficient without the signature of the guardian. *Masson v. Swan*, 6 Heisk. (Tenn.) 450.

The answer of a guardian *ad litem* sworn to before a deputy clerk has the same effect as if sworn to before the clerk himself. *Martin v. Porter*, 4 Heisk. (Tenn.) 407.

The affidavit to an answer, bearing date twelve months before the appointment of the guardian *ad litem* by whom it was made, but being entitled of the term at which he was appointed, the court held the date to be an evident clerical error. *Martin v. Porter*, 4 Heisk. (Tenn.) 407.

Presumption on Appeal. — In *Durrett v. Davis*, 24 Gratt. (Va.) 302, it was held that if a decree recites that the cause came on to be heard upon the answer

of a guardian *ad litem*, it would be presumed on appeal that the answer was sworn to, although there was no evidence of that fact in the record. This case was reviewed in *Hull v. Hull*, 26 W. Va. 27, where the court said: "In reference to this, I have only to say, that to my mind it was a plain and palpable misapplication of the maxim referred to; and if such violent presumptions are to be made by an appellate court, then no decree of a circuit court could ever be reversed, for we can always imagine that the court has made some order correcting the blunders in his decrees as the record was presented to the appellate court, and that the clerk has through inadvertence omitted to put it on the record. The decision of the court in that case was based on the presumption that this answer of the guardian *ad litem* was sworn to, which was not shown by the record. The decision was made in 1874, and is not binding authority on this court, and is by us disapproved. If the record had not shown what was the answer filed by the guardian *ad litem*, but it had been lost, and the decree stated it had been filed, then it might have been presumed that it was a proper answer and sworn to. But as the record showed on its face what was the answer of the guardian *ad litem*, and that it was not sworn to, there was no room left for presumptions."

2. Formal Answer — Verification Unnecessary. — "If the answer had undertaken to state facts or make admissions, it should have been under oath; but the answer was merely formal, stating that the infants did not know how the facts were, and submitting their rights to the protection of the court. An oath could have added nothing to such an answer." *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

3. *Pinchback v. Graves*, 42 Ark. 227.

In *Revely v. Skinner*, 33 Mo. 100, it was said that a guardian *ad litem* is frequently taken from the bystanders, and is not supposed to have any knowl-

(4) *Answer Not Binding on Infant.* — An infant is not bound by the answer of his guardian if he shows his dissent to it within the proper time.<sup>1</sup>

b. PLEA OF INFANCY — (1) *Nature of Plea.* — In general, infancy is a good plea in bar to an action upon a contract.<sup>2</sup>

edge of the matter in litigation, and hence that no verification is required to his answer.

1. *Kent v. Taneyhill*, 6 Gill & J. (Md.) 1; *Hollingsworth v. McDonald*, 2 Har. & J. (Md.) 230, note; *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 77; *Braswell v. Downs*, 11 Fla. 62.

In *Tibbs v. Allen*, 27 Ill. 119, the court said that the appointment of a guardian *ad litem* was but a form, the infant defendant being in no way affected by the answer of such person.

In *Rhoads v. Rhoads*, 43 Ill. 239, the court said that the appointment of a guardian *ad litem* is something more than a mere form, although such guardian cannot bind an infant by anything he may do or admit in his answer.

In *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 635, the court opened a decree with leave for the infants, one of whom had come of age, to put in a new answer.

**Where an Infant Is Allowed Time After Coming of Age** to show cause against a decree, he is entitled as a matter of course to put in a new answer and have the cause heard again at any time before the decree is made absolute. *Ralston v. Lahee*, 8 Iowa 17.

**Making a Better Answer.** — In *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 79, which was a petition by an infant who had arrived at age, for leave to show cause against a decree rendered against him during his minority for a specific performance of a contract made by his ancestor, the court said: "On the established principles of equity, an infant cannot be bound by the answer of his guardian if he shows his dissent to it within the proper time, although such answer will be evidence against him if at such time he neither amends nor makes a new answer, which he may do. Lord Hardwicke, in the case of *Bennett v. Lee*, 2 Atk. 531, remarked that the infant was justified in saying that his guardian had mistaken his case entirely, and that the court could not refuse his putting in a better answer and making the best defense he could. The petition in this case must be considered as tantamount to making a better answer than that of the guardian,

and a better defense to the former suit; and if considered, in opposition to the bill, without other evidence, will show that if such had been the answer, the decree would not have been made, and without further evidence cannot be supported."

2. See title *Infancy*, Am. and Eng. Encyc. of Law.

**Where There Are Several Issues**, and a plea of infancy is proved, the whole case is disposed of, and defendant is entitled to judgment, and the jury need not pass upon the other issues. *Rohrer v. Morningstar*, 18 Ohio 579.

**Foreclosure of Mortgage — Dissolution of Injunction.** — Where infancy is pleaded in a suit to foreclose a mortgage, in which a receiver had been appointed and an injunction granted, and the plea was sustained on demurrer, on motion to vacate the order granting the injunction and appointing a receiver, where neither the affidavits upon the motion nor anything in the record denied the infancy of the defendant at the time of making the notes and mortgage or showed an affirmation of the contract after attaining majority, but, on the contrary, infancy was affirmatively shown by affidavit, the order granting the injunction and appointing the receiver should be vacated. *Sparr v. Florida Southern R. Co.*, 25 Fla. 185.

**Enforcing Infant's Contract by Way of Recoupment.** — In an action by an infant to recover money paid by him for the rent of a barge, under a contract which he had rescinded, defendants are not entitled to deduct a reasonable compensation for the use of the barge while it was in plaintiff's possession and use, as this would be to enforce by way of recoupment a claim which they could not enforce by a direct suit. *McCarthy v. Henderson*, 138 Mass. 310.

**Action on Judgment — Plea of Infancy Unavailable.** — An infant cannot defend a suit on a judgment on the ground that the judgment was obtained against him while an infant. *Ludwick v. Fair*, 7 Ired. L. (N. Car.) 422; *Townsend v. Cox*, 45 Mo. 401. But see *Etter v. Curtis*, 7 W. & S. (Pa.) 170.

**Lex Loci.** — In *Thompson v. Ketchum*,

It is not a dilatory plea.<sup>1</sup>

(2) *Necessity of Pleading Specially.* — Infancy is an affirmative defense which must be pleaded,<sup>2</sup> and if not pleaded, it will be deemed to have been waived.<sup>3</sup> In some states, however, evidence of infancy may be given under the general issue.<sup>4</sup>

(3) *Who May Allege Infancy* — (a) **Infant and His Representatives.** — Infancy is a personal privilege, and no one can take advantage of it in avoidance of contracts except the infant himself, or his heirs or personal representatives.<sup>5</sup>

**A Defendant Is Not Estopped** from setting up his infancy as a defense to a contract by his fraudulent representations that he was of full age.<sup>6</sup>

8 Johns. (N. Y.) 189, suit was brought on a promissory note made in Jamaica. The defendant pleaded infancy. It was held that he must show that the plea would be good in Jamaica.

1. Greer v. Wheeler, 2 Ill. 554.

2. **The Presumption of Infancy** is never indulged as a ground of relief. It must be shown as a defense, and must be pleaded and proved. Pitcher v. Laycock, 7 Ind. 398.

Infancy will not be presumed, and until it is alleged a party need not negative such disability. Jarman v. Windsor, 2 Harr. (Del.) 162; Roe v. Angevine, 7 Hun (N. Y.) 679; Bryant v. Pottinger, 6 Bush (Ky.) 473; Clemson v. Bush, 3 Binn. (Pa.) 413; Campbell v. Wilson, 23 Tex. 252; Sliver v. Shelback, 1 Dall. (Pa.) 165.

3. **Waived if Not Pleaded.** — A plea of infancy is a personal privilege which may be waived, and if not pleaded it is waived, and the judgment is binding. Jackson v. Brunor, 16 Misc. Rep. (N. Y. City Ct.) 294; Cohee v. Baer, 134 Ind. 375; Blake v. Douglass, 27 Ind. 416; Littleton v. Smith, 119 Ind. 230.

A defendant who has failed to avail himself of a plea of infancy has no remedy by writ of error *coram nobis*. Cohee v. Baer, 134 Ind. 375.

4. **Infancy Admissible Under General Issue.** — Wailing v. Toll, 9 Johns. (N. Y.) 141; Thrall v. Wright, 38 Vt. 494; Cutts v. Gordon, 13 Me. 474; Dacosta v. Davis, 24 N. J. L. 319.

**Contra.** — Young v. Bell, 1 Cranch (C. C.) 342, holding that infancy cannot be given in evidence under a plea of *nil debet*.

5. *Alabama.* — Shropshire v. Burns, 46 Ala. 108; Hutton v. Williams, 60 Ala. 107; Jefford v. Ringgold, 6 Ala. 544.

*California.* — Hastings v. Dollarhide, 24 Cal. 195.

*Indiana.* — Harris v. Ross, 112 Ind. 314.

*Massachusetts.* — Farris v. Richardson, 6 Allen (Mass.) 119.

*New York.* — Everson v. Carpenter, 17 Wend. (N. Y.) 419; Beardsley v. Hotchkiss, 96 N. Y. 201; Taft v. Sergeant, 18 Barb. (N. Y.) 320; Palmer v. Miller, 25 Barb. (N. Y.) 399; Henry v. Root, 33 N. Y. 526 *et seq.*; Walsh v. Powers, 43 N. Y. 23; Chapin v. Shafer, 49 N. Y. 407; Sparman v. Keim, 83 N. Y. 245.

In Harris v. Ross, 112 Ind. 314, it was held that purchasers of land at a sheriff's sale could not avoid the incumbrance of a ditch assessment against it, upon the ground that a former owner, an infant, had no guardian *ad litem* appointed for him in the ditch proceedings, and was not properly notified thereof.

A decree against an infant may be voidable by him, while valid and binding on all other parties, in which case they cannot invoke his infancy to protect them against the operation and effect of the decree, nor join with him in a bill for relief against it. Hutton v. Williams, 60 Ala. 107.

**The Guardian of the Infant** may, during the guardianship, set up the infancy of his ward, to avoid a deed conveying his lands, of which the guardian was entitled to possession. Freeman v. Bradford, 5 Port. (Ala.) 270.

6. Merriam v. Cunningham, 11 Cush. (Mass.) 40; Wieland v. Kobick, 110 Ill. 16. But see Adam Roth Grocery Co. v. Hopkins, (Ky. 1895) 29 S. W. Rep. 293, which was a bill in equity against a minor for goods sold, alleging that defendant held himself out as of full



(b) **Joint Defendants — Partners.** — In a suit against two defendants on joint contract, if the infancy of one is proved on the trial of the issue of *non assumpsit*, the defendant is not entitled to a judgment of nonsuit, but the plaintiff may enter a *nolle prosequi* as to the infant, and proceed against the other defendant.<sup>1</sup>

**When a Firm in Which an Infant Defendant Is a Partner** is sued, it is the American rule to join all partners as defendants, and if the infant pleads his infancy the jury may find for the infant and against the adult partners.<sup>2</sup> In England, however, the practice seems to be to omit the infant entirely as defendant, and if nonjoinder is pleaded, infancy is a good reply, and ratification by the infant would be a good rejoinder.<sup>3</sup>

age and concealed the fact of his infancy. Defendant pleaded infancy and denied the fraud, alleging that he informed plaintiff's agent of his infancy at the time the sale was made, which plaintiff denied in his replication. It was held error to dismiss the petition on the pleadings, as the burden of proof was on the defendant to show that he informed plaintiff's agent that he was an infant. See also *Cobbey v. Buchanan*, 48 Neb. 391, where it was held that if representations of full age made by an infant are relied on to estop him from asserting infancy as a defense, such representations must be pleaded.

1. *Dacosta v. Davis*, 24 N. J. L. 319; *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160. See also cases cited in the next note.

**A Plea of Infancy by One of Several Defendants** is of no avail to the other defendants as against whom the contract in suit is valid and binding. *Reid v. Degener*, 82 Ill. 508; *Kimmel v. Schultz*, 1 Ill. 160.

**Joining Infant as a Defendant — Necessity.** — "It cannot be successfully contended that because one of several joint contractors has a defense entirely personal, such as infancy, lunacy, or bankruptcy, all the parties are absolved from the obligation. Nor can it be maintained that a suit should be brought in the first instance against all, excepting those under such disability to contract. In such an action the defendants might plead in abatement that another person was a joint promisor, and the plaintiff would then fail in the proceeding or be compelled to disparage his own contract by replying the infancy of the other promisor, which course would certainly be un-

usual, if not questionable. The effect of it would be to permit a plaintiff to take advantage of the infancy of one of the parties to a contract for the express purpose of enforcing it against the others. Such a procedure would be unjust to the other parties to the contract, and would violate a settled principle, that the defense of infancy is a personal privilege, of which the minor alone can take advantage." *Dacosta v. Davis*, 24 N. J. L. 323.

**A Joint Plea of the Infancy of One Defendant**, in an action on a joint and several bastardy bond, is bad on demurrer. *Bordentown Tp. v. Wallace*, 50 N. J. L. 13.

2. *Tuttle v. Cooper*, 10 Pick. (Mass.) 281; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Mason v. Denison*, 15 Wend. (N. Y.) 64; *Cutts v. Gordon*, 13 Me. 474; *Gay v. Johnson*, 32 N. H. 167; *Cole v. Pennell*, 2 Rand. (Va.) 174; *Kirby v. Cannon*, 9 Ind. 371; *Barlow v. Wiley*, 3 A. K. Marsh. (Ky.) 457.

And the plaintiff may enter a *nolle prosequi* against the infant. *Woodward v. Newhall*, 1 Pick. (Mass.) 500; *Exp. Nelson*, 1 Cow. (N. Y.) 417; *Dacosta v. Davis*, 24 N. J. L. 319; *Allen v. Butler*, 9 Vt. 122; *Kirby v. Cannon*, 9 Ind. 371; *Robertson v. Smith*, 18 Johns. (N. Y.) 459. But see *Connolly v. Hull*, 3 McCord L. (S. Car.) 6. Where in an action on a contract the defendant pleads nonjoinder of the copartner, a reply that such copartner is an infant is bad on demurrer. *Slocum v. Hooker*, 13 Barb. (N. Y.) 536; *Wamsley v. Lindenberger*, 2 Rand. (Va.) 478. Where, however, the infant succeeds in such case on his plea of infancy he is not entitled to costs. *Yamato Trading Co. v. Hoexter*, 44 Hun (N. Y.) 491; *Magauran v. Jamieson*, 2 Moll. 520.

3. *Burgess v. Merrill*, 4 Taunt. 468;

(4) *Trial of Issue.* — Infancy is a question of fact for the jury.<sup>1</sup> Being an affirmative defense, the burden of proof is upon the infant to establish it.<sup>2</sup>

**Right to Open and Close.** — Accordingly, where infancy is the only defense raised by the pleadings, the infant holding the affirmative is entitled to open and close.<sup>3</sup>

**Effect of Appointing Guardian Ad Litem.** — The finding of the fact of infancy necessary to an appointment of guardian *ad litem* does not dispense with proof under a plea of infancy. It is a finding for the purposes of the appointment alone.<sup>4</sup>

**c. REPLY OF RATIFICATION.** — The plaintiff may defeat a plea of infancy by setting up in reply a ratification,<sup>5</sup> but the ratification must be pleaded,<sup>6</sup> and the burden of proof is upon the plaintiff to show such ratification.<sup>7</sup> Whether or not the defendant rati-

Jaffray *v.* Frebain, 5 Esp. N. P. 47; Boyle *v.* Webster, 17 Q. B. 950, 79 E. C. L. 950.

But it was formerly thought otherwise. Gibbs *v.* Merrill, 3 Taunt. 307; *Ex p.* Henderson, 4 Ves. Jr. 163. And see Story on Partnership, § 255.

1. Ryerson *v.* Grover, 1 N. J. L. 523.

2. **Burden of Proof.** — Stewart *v.* Ashley, 34 Mich. 183; Lynch *v.* Johnson, (Mich. 1896) 67 N. W. Rep. 908; Simmons *v.* Simmons, 8 Mich. 318; Haywood *v.* Townsend, 4 N. Y. App. Div. 246; State *v.* Arnold, 13 Ired. L. (N. Car.) 184; Roberts *v.* Bethell, 12 C. B. 778, 74 E. C. L. 778.

**Where the Plaintiff Replies a Ratification** the infant has burden to show that the ratification was also made during infancy. Bay *v.* Gunn, 1 Den. (N. Y.) 108.

3. Davidson *v.* Henop, 1 Cranch (C. C.) 280.

4. Peak *v.* Pricer, 21 Ill. 164.

5. "He [the adult] may declare on the original contract, and show the new promise like any other ratification in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may therefore sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise or other act of ratification by which the defendant has deprived himself of the right to avoid the contract. In such a case the only effect of ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid

until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy." Stern *v.* Freeman, 4 Metc. (Ky.) 309. See also Henry *v.* Root, 33 N. Y. 526; Ackerman *v.* Runyon, 1 Hilt. (N. Y.) 169; Vaughan *v.* Parr, 20 Ark. 600; Thomasson *v.* Boyd, 13 Ala. 419; Curtin *v.* Patton, 11 S. & R. (Pa.) 305; Best *v.* Givens, 3 B. Mon. (Ky.) 72; Hatch *v.* Hatch, 60 Vt. 160.

**Declaration upon New Promise.** — In an action to enforce an undertaking entered into originally when the defendant was an infant, but ratified by a new promise after he came of age, the declaration should be upon the new promise. Bliss *v.* Perryman, 2 Ill. 485.

6. **Ratification Must Be Pleaded.** — American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, holding that where infancy is pleaded as defense to a bill of foreclosure, the plaintiff must plead by amendment to the bill, the facts constituting ratification relied on to avoid the defense.

7. **Burden of Proof.** — Dockery *v.* Day, 7 Port. (Ala.) 518; Fant *v.* Cathcart, 8 Ala. 725; Henry *v.* Root, 33 N. Y. 526. Where the plaintiff replies to the plea of infancy that the defendant promised to pay the debt in question after he attained his majority, the fact of infancy is admitted, and it devolves upon the plaintiff to prove his subsequent promise. Fant *v.* Cathcart, 8 Ala. 725.

And this is true, notwithstanding the protestation contained in the replication. The introduction into a replication of a protestation against the truth of the plea cannot have the effect to render it necessary for the defendant to

fied the contract, is a question for the jury.<sup>1</sup>

**5. Actions Involving Necessaries** — *a.* IN GENERAL. — Infants are liable for articles furnished them, provided such articles are necessities.<sup>2</sup>

The Burden of Proof is on the plaintiff to show that the articles were necessities.<sup>3</sup>

*b.* PROVINCE OF COURT AND JURY. — Whether articles furnished an infant are necessities or not, is a mixed question of law and fact.<sup>4</sup> In other words, there is a preliminary question

prove that which the replication confesses and avoids. *Dockery v. Day*, 7 Port. (Ala.) 518.

**1. Question for Jury.** — *Lynch v. Johnson*, (Mich. 1896) 67 N. W. Rep. 908; *Henry v. Root*, 33 N. Y. 536. See also *Bay v. Gunn*, 1 Den. (N. Y.) 108.

There is much conflict in the authorities as to whether substantially a new promise is necessary to constitute ratification, or whether a bare recognition would be sufficient. See cases cited, Am. and Eng. Encyc. of Law, title *Infants*.

**2.** See title *Infants*, Am. and Eng. Encyc. of Law.

**Remedy in Equity.** — When a minor is provided with necessities by a parent or guardian neither he nor his guardian is answerable for necessities furnished by others; but if he still have the articles furnished, he will be compelled, in a court of equity, to pay for them or return them, but the bill must be properly framed to justify such decree. *Nichol v. Steger*, 6 Lea (Tenn.) 393, 2 Tenn. Ch. 328. But in general there is no remedy in equity for necessities furnished, as the remedy at law is complete. *Oliver v. McDuffie*, 28 Ga. 522.

**Set-off.** — In a suit for necessities an infant may set off the value of his labor. *Francis v. Felmit*, 4 Dev. & B. L. (N. Car.) 498.

**Action on Note for Necessaries.** — When by the rules of court all appeals are put to issue upon a declaration for money had and received, a verdict and judgment against an infant, upon the evidence of his promissory note, given for necessities, is not erroneous, but will be sustained as if there had been a count for goods sold and delivered. *Rundel v. Keeler*, 7 Watts (Pa.) 237.

**Value Open to Examination.** — In no case, however, is the infant held for more than the real value of the necessities supplied. *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keys*, 43 Tex. 557;

*Trainer v. Trumbull*, 141 Mass. 527; *Price v. Sanders*, 60 Ind. 310; *Brooke v. Gally*, 2 Atk. 34.

The value is always open to examination as a question of fact. *Earle v. Reed*, 10 Met. (Mass.) 387; *Johnson v. Lines*, 6 W. & S. (Pa.) 80; *Beeler v. Young*, 1 Bibb (Ky.) 519.

**3.** *Wood v. Losey*, 50 Mich. 475; *Nicholson v. Willborn*, 13 Ga. 468; *Johnson v. Lines*, 6 W. & S. (Pa.) 80; *Thrall v. Wright*, 38 Vt. 494; *Mortara v. Hall*, 6 Sim. 466.

**4.** *Johnson v. Lines*, 6 W. & S. (Pa.) 80.

**"Necessaries Are a Mixed Question of Law and Fact."** — The court determines whether the articles furnished fall within the class of necessities suitable to any one, infant or adult, in the defendant's situation and condition in life; and if the court decides that they do come within the class, the jury are to decide whether the particular articles furnished were actually necessary under the circumstances of the case. \* \* \* As a matter of law, the court should have decided that the tobacco, and cash for cotton picking, were not necessities, and so of the bagging and ties." *Decell v. Lewenthal*, 57 Miss. 331. And see *Stanton v. Willson*, 3 Day (Conn.) 37; *Peters v. Fleming*, 6 M. & W. 42; *Ryder v. Wombwell*, L. R. 4 Exch. 32. But compare *Genner v. Walker*, 19 L. T. (N. S.) 398, where Cockburn, C. J., says: "I really cannot understand it [this rule], unless it means that it is to be a question of law for the judge to determine whether the articles disputed are or not necessities. If that is to be taken to be law, of course I must act upon it; but I should certainly have preferred the law as it was previously understood to be, that it was for the jury to say what articles were reasonably necessary with reference to the position of the defendant, the infant;" *Phelps v. Worcester*, 11 N. H. 51; *Beeler v. Young*, 1 Bibb (Ky.) 519;

for the court whether the articles can be necessities. In the absence of any evidence to show that the articles were necessities the question should not be submitted to the jury.<sup>1</sup> If, however, this question is decided in favor of the plaintiff, the jury must then decide whether under all the circumstances the articles were necessities for the particular defendant — that is, whether they were suitable to the minor's condition and estate, or whether he was or was not already supplied with them.<sup>2</sup> A few illustrations of cases where the question of necessities was properly submitted to the jury will be found in the notes.<sup>3</sup>

*Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Bent v. Manning*, 10 Vt. 225; *Jordan v. Coffield*, 70 N. Car. 110.

It is for the infant to show that he was already supplied. *Parsons v. Keys*, 43 Tex. 557; *contra*, *Burghart v. Hall*, 4 M. & W. 727. And see *Nicholson v. Wilborn*, 13 Ga. 467; *Thrall v. Wright*, 38 Vt. 494.

### 1. Evidence Sufficient to Go to the Jury.

— Where, to a plea of infancy, in an action for goods supplied, the plaintiff replies that they were necessities, the question of "necessaries" or "not necessities" is one of fact, and therefore for the jury. But, like all other questions of fact, it should not be left to the jury by the judge, unless there is evidence on which they can reasonably find in the affirmative. *Ryder v. Wombwell*, L. R. 4 Exch. 32.

If any part of the articles proved to have been furnished to the defendant may fall within the description of necessities, the evidence ought to be left to the jury. *Maddox v. Miller*, 1 M. & S. 738.

*Peters v. Fleming*, 6 M. & W. 42; *Brooker v. Scott*, 11 M. & W. 67.

Whether certain articles furnished a minor were necessities or not, is generally a question of fact for the jury, depending on all the circumstances of the case; the two principal circumstances being whether the articles were suitable to the minor's estate and condition, and whether he is without other means of supply. *Davis v. Caldwell*, 12 Cush. (Mass.) 512.

In an action for necessities furnished to an infant the question whether necessary or not is one of fact to be determined by the triers of fact and not by the court. *Bent v. Manning*, 10 Vt. 225.

### 3. Cases Properly Submitted to Jury.

— In *Mahoney v. Evans*, 51 Pa. St. 80, an infant operating a farm purchased unbroken cattle, which were kept for a

time on the farm, and afterwards were exchanged for a horse which was used to work the farm. In an action for the price of such cattle it was held error not to submit the question as to whether they were necessities or not, to the jury. See also, to the same effect, *Rundle v. Keller*, 7 Watts (Pa.) 239.

"Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description, viz., the breastpin and the watch-chain. The former might be a matter either of necessity or of ornament; the usefulness of the other might depend on this, whether the watch was necessary; if it was, then the chain might become necessary itself. Now it is impossible for us to say that a judge could withdraw it from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury. There was, therefore, evidence to go to the jury." *Peters v. Fleming*, 6 M. & W. 42.

In *Rundel v. Keeler*, 7 Watts (Pa.) 237, the court said: "Now, though the mother stated that she furnished her son with necessary clothing, and the counsel requested the court to charge the jury that the articles must be of absolute necessity, yet we think it was not error to leave it to a jury to decide whether a coat of cloth at four dollars and fifty cents per yard, and the rest of the suit of such price as that all, including the tailor's bill, cost less than twenty dollars, was necessary and proper for a young man of twenty years of age, and who was about to be married, and part owner of a farm. We do not mean to give up the restraints

**Instructions.** — As a general rule, the court can only instruct as to what classes of articles are necessities.<sup>1</sup>

**In Very Clear Cases,** or in the absence of any evidence to show that the articles were necessities, the court may determine as a matter of law that they are not necessities.<sup>2</sup>

**6. Arbitration, Compromise, and Settlement.** — A guardian *ad litem* appointed to defend a cause has no power to bind his ward by a submission of the matter in controversy to arbitration.<sup>3</sup> So, also, a guardian *ad litem* cannot compound a judgment or decree in favor of the infant;<sup>4</sup> nor can he compromise the

which the law puts on those who furnish infants with the means of extravagance — of disorderly or intemperate life; nor to say that an infant can engage in trade, or give bonds so as to be bound by them, or make or indorse promissory mercantile notes; nor even to concede that in all cases the jury are the sole judges of what is necessary and proper. The court ought to have a superintending power, and, in gross cases, set aside a verdict and grant a new trial. But many cases are composed of so many circumstances of which the jury are the proper judges, as that it must be submitted to them; and we think this was such a case."

1. *Stanton v. Willson*, 3 Day (Conn.) 37.

**It Is a Question of Law for the Court** whether certain articles for which an infant is sued are within the class of necessities; and, if so, the jury are to pass upon their adaptation to the condition and wants of the infant. *Merriam v. Cunningham*, 11 Cush. (Mass.) 40.

The plaintiff, a merchant, furnished the *feme* defendant during her infancy and just before her marriage with certain articles, among which were her bridal outfit and a chamber set. It was held that it was not error in the judge below to charge the jury that if they believed the articles furnished were actually necessary and of a fair and reasonable price, the plaintiff was entitled to recover. *Jordan v. Coffield*, 70 N. Car. 110.

**2. When a Question for Court.** — "We think this is the true view of the law on this subject, that whether the articles sued for were necessities or not is a question of fact to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively that some articles, as, for instance, dia-

monds or race-horses, cannot be necessities for any minor." *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Mohney v. Evans*, 51 Pa. St. 80. See also *Rundel v. Keeler*, 7 Watts (Pa.) 239.

What are necessities is a question mixed of fact and law; but where an excessive supply has manifestly been so gross as to shock the senses, the court may declare it to be inordinate in point of law. *Johnson v. Lines*, 6 W. & S. (Pa.) 80.

The rule appears to be that if the articles are of such nature that they cannot be necessities to any one, or cannot be necessities to one in the infant's degree and position, they are to be rejected by the court; but if the articles are of a kind to be suitable under certain circumstances to one in the infant's situation, the question of necessities is for the jury. See *Brooker v. Scott*, 11 M. & W. 67, and note; *Wharton v. Mackenzie*, 5 Q. B. 606, 48 E. C. L. 606; *Harrison v. Fane*, 1 M. & G. 550, 39 E. C. L. 556; *Glover v. Ott*, 1 McCord L. (S. Car.) 572; *Bouchell v. Clary*, 3 Brev. (S. Car.) 194; *Rainwater v. Durham*, 2 Nott & M. (S. Car.) 524; *Chapple v. Cooper*, 13 M. & W. 252; *Peters v. Fleming*, 6 M. & W. 42.

**3. Frazier v. Pankey**, 1 Swan (Tenn.) 75; *Hannum v. Wallace*, 9 Humph. (Tenn.) 129; *Fort v. Battle*, 13 Smed. & M. (Miss.) 133.

**Infants Cannot Bind Themselves** by submitting their rights to arbitration, and the appointment of a guardian *ad litem* after such a submission cannot cure the defect that the submission was not agreed to by one duly authorized to submit the dispute. *Jones v. Payne*, 41 Ga. 23.

**4. Burt v. McBain**, 29 Mich. 261; *Smith v. Redus*, 9 Ala. 99; *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Westbrook v. Comstock*, Walk. (Mich.) 314.

suit.<sup>1</sup> But the court may sanction a compromise, which in such case will be binding.<sup>2</sup> A guardian *ad litem* cannot of his own motion make an absolute settlement of the whole matter in controversy.<sup>3</sup>

**7. Demurrer of the Parol.** — The meaning of this barbarous phrase is that the pleadings be stayed. It is a plea interposed in a real action to stay proceedings until the infant party becomes of age.<sup>4</sup> It occurs at common law where an infant is a party to

1. It is stated in *Kingsbury v. Buckner*, 134 U. S. 680, that a guardian *ad litem* cannot bargain away the rights of the infant he represents, but he can assent to such arrangements as will facilitate the determination of a suit. It is also said that it is the duty of a court to protect the interests of infants, and see that they are not bargained away by those assuming to represent them. *Bent v. Miranda*, (N. Mex. 1895) 42 Pac. Rep. 91. See also *Lunday v. Thomas*, 26 Ga. 537; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626; *White v. Parker*, 8 Barb. (N. Y.) 48.

**A Compromise Made by a Natural Guardian** has no effect, and cannot change the rights of the minor. *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171; *Isaacs v. Boyd*, 5 Port (Ala.) 388.

**Louisiana — Homologating Proceedings of Family Meeting.** — An appeal will lie from a judgment homologating the proceedings of a family meeting, recommending a compromise relating to the interests of a minor. *Forstall's Succession*, 32 La. Ann. 97.

The homologation of the proceedings of a family meeting ratifying a compromise involving the interests of a minor will not be set aside on appeal, when it appears that the lower court, at the date of the homologation, had no evidence before it going to show whether the compromise would injure or benefit the minor. *Forstall's Succession*, 32 La. Ann. 97.

2. *King v. King*, 15 Ill. 187; *Hagy v. Avery*, 69 Iowa 434 (under Code, § 2250); *Walsh v. Walsh*, 116 Mass. 377; *Savage v. McCorkle*, 17 Oregon 42.

In *In re Birchall*, 16 Ch. Div. 41, Jessel, Master of the Rolls, said: "The court can approve a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers," and an order having been made approving on behalf of infant defendants a compromise which was objected to by their guardian and opposed by their counsel, it was held that the

court had no jurisdiction to enforce such a compromise, and that the order must be discharged.

**Compromise by General Guardian — Transfer of Realty — Notice to Ward.** — Under the Iowa Code, § 2250, a guardian has power, under the direction of the court, to compromise a suit against his ward involving the title to real estate; and in doing so he may execute a valid quit-claim deed for the real estate in litigation, without notifying the ward of the application to the court for leave to do so, as is required in ordinary cases where authority is sought to sell the real estate of the ward. *Hagy v. Avery*, 69 Iowa 434.

As to necessity of notice to ward of proceedings to transfer his title to real estate, see *infra*, VI. 2. c. *Notice of Application*.

**Confirming Compromise — Reference to Master.** — A compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat v. Holley*, 1 Beav. 423; *Brooke v. Mostyn*, 33 Beav. 457, 2 De G. J. & S. 373; *Walsh v. Walsh*, 116 Mass. 382.

In *Louisiana* the tutor may compromise respecting the rights of his ward, but he must act under the authority of the judge granted on the advice of a family meeting. *Graham v. Hester*, 15 La. Ann. 148.

3. *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589.

4. *Anderson's Law Dictionary*, p. 747.

"At a remote period of the history of English jurisprudence, when suits were prosecuted against an infant, relating to real estate which had descended to him, he was permitted to resort to his parol demurrer, which is defined to be 'a plea of privilege formerly allowed an infant sued concerning lands which came to him by descent; whereupon the court gave judgment, *quod loqueta predicta remaneat quousque*; the infant

a suit for lands descended, on his ancestor's possession; and also where an infant is sued in debt upon his ancestor's obligation, whereby a burden is sought to be laid on the fee simple.<sup>1</sup>

**Generally Abolished.** — In many if not all of the United States, demurrers of the parol have been abolished by statute.<sup>2</sup>

attained the age of twenty-one years, and when the age was granted on parol demurrer, which might happen on the suggestion of either party, the writ did not abate, but the plea was put *sine die* until the infant was of full age, and then there was a resummons.' 3 Tomlin's Law Dict. 64. Experience having shown that the practice of allowing parol demurrers was attended with much inconvenience and vexatious delays, in process of time a different rule obtained, and instead of the parol demurrer, which had been formerly interposed in behalf of infants in chancery proceedings against them, affecting their interests in lands, upon the proper proof being made, a decree was immediately entered up against them to be binding unless they should within six months after they should have attained the age of twenty-one years (being served with process for that purpose), show unto the court good cause against the said decree." *McClay v. Norris*, 9 Ill. 381.

1. 4 Min. Inst., pt. 1, p. 68; Bac. Abr., Infancy, I. 1; Chitty's Pl. 481; *Coffield v. McLean*, 4 Jones L. (N. Car.) 15; *Joyce v. McAvoy*, 31 Cal. 273; *Plasket v. Beeby*, 4 East 485.

The whole subject is examined and the cases reviewed with great learning in *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178, and in *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514. This privilege was confined to the heir alone, and did not extend to devisees. *Joyce v. McAvoy*, 31 Cal. 273.

In *Baker v. Long*, 1 Hayw. (N. Car.) 1, it was held that the demurring of the parol was feudal, and did not prevail in North Carolina.

**Form of Plea and Demurrer Thereto — Demurrer of Parol.** — "And the said Hugh, and Mary, Sarah Thompson, Joseph and Ahn, by T. Benson their attorney, and the said Sarah Beeby, by T. Beeby, who is admitted by the court of our said lord the king here to defend for the same S. B., she being within age, as guardian of the said S. B. come and defend the wrong and injury when, etc., and say that the same Sarah Beeby is within the age of twenty-one

years, viz., of the age of eighteen years and eight months, and no more, to wit, at, etc., and this they are ready to verify; wherefore, they do not suppose that during her minority she ought to answer the said T. Plasket in his said plea, etc., and pray that the said parol may demur until the full age of her, the said Sarah Beeby, etc." *Plasket v. Beeby*, 4 East 485.

**Demurrer.** — "And the plaintiff, executor as aforesaid, says that by reason of anything by them the defendants above in pleading alleged the said parol ought not to demur, nor to be delayed until the full age of the said Sarah Beeby, because the said plaintiff, as executor as aforesaid, says that said plea of them, the defendants, is not sufficient in law to preclude them from answering the said plaintiff, etc., nor that the said parol should demur till the full age of the said S. B., to which said plea, etc., he, the said plaintiff, etc., is not bound by law to answer, etc. Joinder in demurrer." *Plasket v. Beeby*, 4 East 485.

2. *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178; *Ruby v. Strother*, 11 Mo. 417; *Hendricks v. McLean*, 18 Mo. 39; *Talley v. Starke*, 6 Gratt. (Va.) 339; *Coffield v. McLean*, 4 Jones L. (N. Car.) 16; *Baker v. Long*, 1 Hayw. (N. Car.) 1; *Joyce v. McAvoy*, 31 Cal. 281; *Coffin v. Heath*, 6 Met. (Mass.) 80; *Powys v. Mansfield*, 6 Sim. 528; *Price v. Carver*, 3 Myl. & C. 157; *Enos v. Capps*, 15 Ill. 277; *Englist v. Savage*, 5 Oregon 518.

**Demurrer of Parol Not Adopted with Common Law.** — In *Joyce v. McAvoy*, 31 Cal. 280, the court said: "So, again, it may be a question whether under our statutory system of practice the rule is applicable at all. As before seen, it was founded upon reasons growing out of feudal tenures, and afterwards extended to inheritances under other tenures, as Lord Chancellor Ellenborough seems to think without any good reason, in some mode unaccountable to the English judges. The rule remained in England and the older states, greatly modified by statutory provision, however, long after the policy upon which it was founded became obsolete. And

**8. Costs.** — As a general rule, an infant defendant is personally liable for costs in the event of the suit going against him.<sup>1</sup>

In an *Action to Recover Lands Descended* to an infant, however, as the infant is unable to convey by deed he should not be taxed with costs.<sup>2</sup>

As to costs in actions by infant plaintiffs, see article NEXT FRIEND.

**IV. JUDGMENTS AND DECREES AGAINST INFANTS — 1. In General.** — It is a general rule, subject to the exception hereafter considered<sup>3</sup> that in certain cases an infant is entitled to a day in court after coming of age, to show cause against a decree, that an infant

now, in accordance with the exigencies of modern ideas, the parol demurrer upon which the equity practice was founded has been abolished by statute in England, New York, and probably other states where it prevailed. Whart. Law Dict. 558, art. Parol Demurrer; 2 Kent's Com. 245, note *b*. The principle of public policy upon which the rule was based never did exist in this state, and the rule itself, if it exists at all under our Practice Act, rests upon the statute adopting the common law as the rule of decision, where it is not otherwise provided. It would be strange indeed, in this commercial age, in a new state like California, where real estate is treated to a great extent as an article of commerce, and as few impediments thrown in the way of alienation as is compatible with security to titles, if a law should be long tolerated which would, for twenty-one years, debar a party from effectually enforcing a claim or lien against land, because his adversary happens to die, and the descent is cast upon issue, perhaps yet unborn."

1. *Perryman v. Burgster*, 6 Port. (Ala.) 99; *Gardiner v. Holt*, 2 Stra. 1217; *Bryant v. Livermore*, 20 Minn. 313; and see *Smith v. Smith*, 69 Ill. 308; but see *Morgan v. Morgan*, 11 Jur. N. S. 233, for costs on misconduct of guardian; *Lane v. Gover*, 1 Har. & M. (Md.) 459.

An unsuccessful party is to be charged with costs where he is a minor the same as where he is an adult; the statute makes no distinction. *Myers v. Rehkopf*, 30 Ill. App. 209.

**A Ca. Sa. for Costs Against an Infant** party to a suit, having been issued and returned *cepi*, was adjudged, on motion to quash the *ca. sa.*, regularly issued. *Lane v. Gover*, 1 Har. & M. (Md.) 459.

**Costs in Partition — Sale Under Execution for.** — Under the *Texas Probate Act* of 20th March, 1848, the share of each distributee, in the partition of an estate, was liable for costs in proportion to the share he received, and the payment of the same might be enforced by execution. By the act concerning guardians and wards provision is made for the raising of means to pay debts against the minor's estate by a sale of his property under the direction of the probate court. It was held that a sheriff's sale, and deed executed in pursuance thereof, under a judgment in partition awarding execution for costs against a minor distributee, vested title in the purchaser of the minor's interest. *Laughter v. Seela*, 59 Tex. 177.

**A Guardian Ad Litem** for infant defendants is not personally liable for costs. *Perryman v. Burgster*, 6 Port. (Ala.) 99; *Gaines v. Ann*, 26 Tex. 340.

2. *Tuttle v. Garrett*, 74 Ill. 444; *Clark v. Clark*, 21 Neb. 402.

**When Costs Should Not Be Awarded Against Infants.** — In a chancery order affecting the rights of infants, where, to bind them, it was necessary to procure such order, and where nothing more has been done by them, or on their behalf, than to present to the court such facts as show their rights in the matter, costs should not be awarded against them. *Smith v. Smith*, 13 Mich. 258.

**Reversal Without Costs.** — On reversal of a judgment recovered by default against an infant for whom no guardian had been appointed, the court refused to give costs, it not appearing that the plaintiff knew that the defendant was an infant. *Knapp v. Crosby*, 1 Mass. 479.

3. See *infra*, IV. 4. *Infant's Day in Court*.



properly represented is bound by the adjudication to the same extent that he would have been had all the parties been adults.<sup>1</sup>

1. *Alabama*. — *Waring v. Lewis*, 53 Ala. 615; *Rivers v. Durr*, 46 Ala. 418.

*California*. — *Smith v. McDonald*, 42 Cal. 484.

*Georgia*. — *Mayer v. Hover*, 81 Ga. 309.

*Illinois*. — *Allman v. Taylor*, 101 Ill. 185; *Lloyd v. Kirkwood*, 112 Ill. 329.

*Iowa*. — *Ralston v. Lahee*, 8 Iowa 17.

*Kentucky*. — *Waring v. Reynolds*, 3 B. Mon. (Ky.) 59.

*Maryland*. — *Ashton v. Ashton*, 35 Md. 496.

*Mississippi*. — *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514.

*Missouri*. — *Smith v. Perkins*, 124 Mo. 50; *Shields v. Powers*, 29 Mo. 315; *Creath v. Smith*, 20 Mo. 113.

*New Hampshire*. — *Simmons v. Goodell*, 63 N. H. 458.

*New York*. — *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; *Matter of Livingston*, 34 N. Y. 555; *Wood v. Martin*, 66 Barb. (N. Y.) 241; *Mutual L. Ins. Co. v. Schwaner*, 36 Hun (N. Y.) 373; *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12; *Matter of Hawley*, 100 N. Y. 206; *Matter of Tilden*, 98 N. Y. 434; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

*North Carolina*. — *Grantham v. Kennedy*, 91 N. Car. 148; *Marshall v. Fisher*, 1 Jones L. (N. Car.) 111; *Ward v. Lowndes*, 96 N. Car. 367.

*Oregon*. — *English v. Savage*, 5 Oregon 518.

*South Carolina*. — *McCrosky v. Parks*, 13 S. Car. 90.

*Texas*. — *Deering v. Hurt*, (Tex. 1886) 2 S. W. Rep. 42; *Martin v. Weyman*, 26 Tex. 460.

*Vermont*. — *Priest v. Hamilton*, 2 Tyler (Vt.) 50; *Wrisley v. Kenyon*, 28 Vt. 5.

*Virginia*. — *Wills v. Spraggins*, 3 Gratt. (Va.) 529.

*Washington*. — *Kromer v. Friday*, 10 Wash. 621.

*United States*. — *Kingsbury v. Buckner*, 134 U. S. 650.

*England*. — *Gregory v. Molesworth*, 3 Atk. 626; *Richmond v. Tayleur*, 1 P. Wms. 734, 1 Dan. Ch. Pr. 164.

A minor represented by a guardian *ad litem* is bound by whatever judgment may be recovered by or against any person who was a party to the suit at the time of its rendition. *Deering v. Hurt*, (Tex. 1886) 2 S. W. Rep. 42.

An infant is concluded by a decree enforcing a vendor's lien, though he had a title which his guardian failed to assert. *Cocks v. Simmons*, 57 Miss. 183.

In *Hatch v. Ferguson*, 57 Fed. Rep. 966, it was held that a judgment against minors, based on an unauthorized appearance of a person as their guardian, did not conclude them, and could be questioned collaterally. See also *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580.

**Argument in Support of Rule.** — "Now in the case at bar the infant was summoned and appeared in the court of law by guardian. He was called upon according to the forms of law to answer, and put forward his defense to the plaintiff's claim. The evident purpose of the statute requiring the appointment of guardians *ad litem* for infant defendants was to put them to their defense immediately, whatever the defense might be, and to conclude them when represented by guardian in regard to their defenses. What is gained by the action if the judgment rendered therein may be impeached by the infant at will by a new suit for that purpose? The object of appointing a guardian *ad litem* for an infant is to place him on equal footing with adults as regards any matters of defense which he may have. \* \* \* The law requiring the appointment of guardians *ad litem* for infant defendants was intended, in my judgment, to place them before the court, in the same situation as to their defenses as if they were adults; and it follows that they must put forward their defenses, being called upon, and having the opportunity to do so; and that the judgment regularly rendered against them concludes them the same as it would persons of full age." *Phillips v. Dusenberry*, 8 Hun (N. Y.) 354.

**Where There Was an Actual Appearance** by guardian the decree is valid, though there is no record of the fact. *Hopper v. Fisher*, 2 Head (Tenn.) 253. And where one decree has been set aside because there was no guardian *ad litem*, a subsequent decree in the same cause will not be set aside for the same reason, the record showing no appointment. *Tuttle v. Garrett*, 74 Ill. 444.

**A Decree Binds Unborn Children** where

**Infant as Plaintiff.** — This rule is especially true in cases where the infant appears as plaintiff, and the judgment or decree is in accordance with his own prayer.<sup>1</sup>

**Pleading Infancy.** — It follows that infancy cannot be pleaded to an action on a judgment.<sup>2</sup>

**The Judgment Is Valid and Binding** until set aside in a direct proceeding brought for that purpose.<sup>3</sup>

the court had jurisdiction of the parties and subject-matter. *Mayer v. Hover*, 81 Ga. 309.

**Where in Partition** the court has jurisdiction of the subject-matter and of the parties, and has appointed guardians *ad litem* for infants interested, their title is carried by the judgment and they cannot question the validity of the partition. *Wood v. Martin*, 66 Barb. (N. Y.) 241.

**A Decree Between Defendants** will be conclusive and binding upon them where an antagonism exists, so as to make them actors against each other; but if a part of the defendants are minors, and have no regular guardian, and a person is appointed guardian *ad litem* for them, who is a defendant, and whose interest in the suit is in conflict with theirs, the decree pronounced in the cause will not bar a subsequent suit by said minors against said defendant. *Elrod v. Lancaster*, 2 Head (Tenn.) 572.

**Where the Infant Is Not a Party to the Suit**, he is, of course, not bound by the judgment. *Swift v. Yanaway*, 153 Ill. 197; *Botsford v. O'Conner*, 57 Ill. 72; *Salter v. Salter*, 80 Ga. 178; *Whitesides v. Barber*, 24 S. Car. 373. But an infant may be bound, although not named in express terms in the notice. *Dahms v. Alston*, 72 Iowa 411.

Where infants are deprived of apparent rights by a decree of court, they have the power in a new action to attack it, and this, too, whether or not they were made parties to the first suit. *Joyce v. Joyce*, 5 Cal. 161.

1. See article NEXT FRIEND, and see the following cases:

*California*. — *Reed v. Ring*, 93 Cal. 96.

*Connecticut*. — *Clark v. Platt*, 30 Conn. 282.

*Georgia*. — *Evans v. Collier*, 79 Ga. 319.

*Illinois*. — *Burger v. Potter*, 32 Ill. 66; *McClay v. Norris*, 9 Ill. 370.

*Kentucky*. — *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362; *Jameson v. Moseley*, 4 T. B. Mon. (Ky.) 414.

*Mississippi*. — *Johns v. Harper*, 61 Miss. 145.

*North Carolina*. — *Becton v. Becton*, 3 Jones Eq. (N. Car.) 419; *Hicks v. Beam*, 112 N. Car. 642.

*Texas*. — *Cannon v. Hemphill*, 7 Tex. 185.

*Virginia*. — *Zirkle v. McCue*, 26 Gratt. (Va.) 517; *Brown v. Armistead*, 6 Rand. (Va.) 594.

*United States*. — *Kingsbury v. Buckner*, 134 U. S. 674.

*England*. — *Brook v. Hertford*, 2 P. Wms. 518; *Gregory v. Molesworth*, 3 Atk. 626; *Williamson v. Gordon*, 19 Ves. Jr. 114; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367, *Ewell's L. Cas.* 236.

**2. Infancy Pleaded in Action on Judgment.** — *Blake v. Douglass*, 27 Ind. 416; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 282; *Townsend v. Cox*, 45 Mo. 401; *Ludwick v. Fair*, 7 Ired. L. (N. Car.) 422; *Flynn v. Powers*, 54 Barb. (N. Y.) 550; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Hawes v. Hathaway*, 14 Mass. 233. See also *supra*, III. 4. b. *Plea of Infancy*.

**Justice's Judgment.** — In *Etter v. Curtis*, 7 W. & S. (Pa.) 170, it was held, in an action of debt on a judgment by confession rendered by a justice of the peace against an infant, that as no writ of error lay to remove the judgment and a certiorari would correct no more than errors apparent on the face of it, the infant would be allowed to plead his infancy to the action in order to prevent a failure of justice, although it was conceded that the rule was otherwise in the case of judgments rendered in courts of record. See also *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 204.

**3. Judgments Not Void but Voidable.** — An irregular or erroneous judgment against an infant stands in full force until reversed. *White v. Morris*, 107 N. Car. 92.

"Many of the acts of infants themselves *in pais* are void, and others voidable only. But with regard to judicial acts done against them, the rule is that

**Collateral Attack.** — A minor has in general no more right to attack a judgment against him collaterally than an adult.<sup>1</sup>

they are voidable only. The infant defendant has his day, frequently allowed him, and almost always in a court of equity, after he comes of age, to reverse or set aside decrees against him. If he does not avail himself of this privilege, the decision stands, and must have its force. Until measures are taken to avoid it, it likewise has its effect." *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 254.

In *Illinois* the rule is that a decree against an infant is absolute in the first instance, subject to the right to attack it by original bill, but until so attacked, and set aside or reversed, on error or appeal, it is binding to the same extent as any other decree or judgment. *Kingsbury v. Buckner*, 134 U. S. 650. See also, as to the *Illinois* rule, *infra*, IV. 4. *Infant's Day in Court*.

**1. Collateral Attack — California.** — *Reed v. Ring*, 93 Cal. 96; *Joyce v. McAvoy*, 31 Cal. 273.

*Illinois.* — *Chudleigh v. Chicago*, etc., R. Co., 51 Ill. App. 491.

*Indiana.* — *Thain v. Rudisill*, 126 Ind. 272.

*Iowa.* — *Dahms v. Alston*, 72 Iowa 411.

*Kentucky.* — *Hanna v. Spotts*, 5 B. Mon. (Ky.) 367.

*North Carolina.* — *Sledge v. Elliott*, 116 N. Car. 712; *Smith v. Gray*, 116 N. Car. 311; *White v. Morris*, 107 N. Car. 92; *Mauney v. Gidney*, 88 N. Car. 200.

*Tennessee.* — *Andrews v. Andrews*, 7 Heisk. (Tenn.) 236.

*South Carolina.* — *McCrosky v. Parks*, 13 S. Car. 90.

The validity of a decree cannot be collaterally attacked on the ground that defendant was not a minor at the time his answer was taken, especially when he was present in person before the commissioners and did not question their right to appoint a guardian *ad litem* for him, or the guardian's right to act for him. *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

**The Presumption in Favor of the Validity of a Judgment** of a court of competent jurisdiction exists in the case of judgments against infants equally as with judgments against adults, where the parties are properly within the jurisdiction of the court. *White v. Morris*, 107 N. Car. 92; *Mauney v. Gidney*, 88 N. Car. 200.

**Where in Partition Proceedings** infant defendants are duly served with process and a guardian *ad litem* is appointed, a judgment affirming the sale will not be set aside for fraud or irregularity in a collateral proceeding. *Smith v. Gray*, 116 N. Car. 311.

**Collateral Attack Where Appeal or Error Does Not Lie.** — "In *Holford v. Platt*, Cro. Jac. 464, it was held that where writ of error lies an infant can avoid a judgment against him in no other way; but where no writ of error can be had, the judgment may be attacked collaterally. The correctness of this doctrine is recognized in *Austin v. Charlestown Female Seminary*, 8 Met. (Mass.) 196. And that infants cannot be regarded as in laches for not appealing is decided in *Valier v. Hart*, 11 Mass. 300. In *Cronise v. Clark*, 4 Md. Ch. 403, already referred to, it was held that a married woman, whose mortgage made in infancy was foreclosed in chancery by a special proceeding, was not obliged to appeal from or move in that proceeding, but might treat it as a mere nullity. And in England the decisions in bankruptcy are important in throwing light on this matter. It has been decided in many cases that a minor cannot be made a bankrupt, because his trading contracts are not for his benefit, and are void. *O'Brien v. Currie*, 3 C. & P. 283, 14 E. C. L. 307; *Ex p. Adam*, 1 Ves. & B. 494; *Ex p. Henderson*, 4 Ves. Jr. 163; *Ex p. Barwis*, 6 Ves. Jr. 601; *Ex p. Lees*, 1 Deac. 705, 38 E. C. L. 646. In some cases where deception or other misconduct has taken place, the court has refused to supersede the commission, and left the party to his legal remedy, not questioning the existence of such remedy. In *Belton v. Hodges*, 9 Bing. 365, 23 E. C. L. 309, where the infant bankrupt, coming of age, sued the assignee to recover against him for the property which came into his hands, it was objected that the proper course was to move for a supersedeas. But it was held that, inasmuch as the fiat was granted against an infant, it was a mere nullity, and might be so treated anywhere. \* \* \* While no case can be found which has maintained the validity of such proceedings, we think the principles underlying the authorities we have referred to fully sustain us in our views. We deem it

The Rendition and Entry of Judgments and decrees against infants are in the main governed by ordinary principles.<sup>1</sup>

The judgment must run against the minor and not against his guardian.<sup>2</sup>

**2. Opening and Vacating.** — An infant has in general no absolute right to avoid a judgment or decree against him,<sup>3</sup> and even an irregular judgment will not be vacated as of course.<sup>4</sup>

proper, in this connection, to express our regret at the unsatisfactory condition of the law upon chancery appeals. While the limitation on writs of error \* \* \* does not begin to run until after majority, and then runs two years, the law gives but forty days in which to appeal from a decree in chancery, and contains no saving clause for infants at all. We have had occasion to perceive great hardships under this narrow rule, and believe that justice requires an amendment of the law." *Chandler v. McKinney*, 6 Mich. 222.

**1. Time of Rendition.** — In *Newins v. Baird*, 19 Hun (N. Y.) 306, it was held that *New York Code of Civil Procedure*, § 1218, which provides that a judgment shall not be taken against an infant defendant until twenty days have expired since the appointment of a guardian *ad litem* for him, only applies to judgments by default.

**Decree Directing Conveyance of Realty.** — It has been held that although a suit may proceed against an infant defending by his guardian no decree for the conveyance of real estate will be made until he comes of age. *Perry v. Perry*, 65 Me. 399; *Whitney v. Stearns*, 11 Met. (Mass.) 319.

A conveyance under a decree should be made by a special commissioner, and not by the infant's guardian. *Shelby v. Smith*, 2 A. K. Marsh. (Ky.) 514.

**Awarding Relief Not Asked For Against Infant.** — The answer of infant defendants, calling upon the complainants to prove the bill, only puts them to the proof of what is charged, and entitles them only to a decree on the case made in the bill, when proved. *Robinson v. Townshend*, 3 Gill & J. (Md.) 413.

Accordingly, in an action by an infant for an injunction and for damages, because of the maintenance and operation of an elevated road in front of plaintiff's premises, the court has no power to appoint a special guardian and authorize him to convey the in-

terest of the infant in the easements where the complaint fails to ask for such relief. *Tucker v. Manhattan R. Co.*, 78 Hun (N. Y.) 439.

In partition against an infant, the decree is *coram non judice* and void where it goes beyond the case made in the complaint and forecloses all claim of the infant to the land. *Waterman v. Lawrence*, 19 Cal. 210.

**Judgment Without Defense by Guardian.** — In *Iowa* section 2566 of the Code provides that "no judgment can be rendered against a minor until after a defense by a guardian."

"In this case no defense was made, even to the extent of filing an answer; and the judgment rendered was therefore void as to plaintiff, and did not cure the defect in the mortgage." *Dohms v. Mann*, 76 Iowa 723.

**2. Tucker v. McClure**, 17 Iowa 583. No judgment against a party as guardian can have the effect to charge either the person or estate of his ward. *Tobin v. Addison*, 2 Strobb. L. (S. Car.) 3.

**3. Regla v. Martin**, 19 Cal. 463. But see *infra*, IV. 4. *Infant's Day in Court*.

**4. Judgment Not Vacated as of Course.** — "While the court will always be careful of the rights of infants, it will not, in all cases, set aside irregular judgments against them, as of course; it will not do so where it appears from the record, or otherwise, that the infant suffered no substantial injustice." *Syme v. Trice*, 96 N. Car. 243. See also the following cases:

*Iowa.* — *Bickel v. Erskine*, 43 Iowa 213.

*Kentucky.* — *Richards v. Richards*, 10 Bush (Ky.) 617; *Pond v. Doneghy*, 18 B. Mon. (Ky.) 558.

*Maryland.* — *Kemp v. Cook*, 18 Md. 130.

*New York.* — *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348; *Gotendorf v. Goldschmidt*, 83 N. Y. 110.

*North Carolina.* — *Williamson v. Hartman*, 92 N. Car. 239; *White v. Morris*, 107 N. Car. 92; *Ludwick v.*

The Relief Which the Minor Has from an erroneous or irregular adjudication is the same as that of an adult, except in respect to the period of time within which an application for relief must be made.<sup>1</sup>

**Bona Fide Purchasers.** — A decree against an infant is so far binding that it will not be set aside so as to affect the rights of *bona fide* purchasers under it.<sup>2</sup>

Fair, 7 Ired. L. (N. Car.) 422; Marshall v. Fisher, 1 Jones L. (N. Car.) 111.

Ohio. — Rankin v. Kemp, 21 Ohio St. 651.

South Carolina. — McCrosky v. Parks, 13 S. Car. 90.

Vermont. — Fuller v. Smith, 49 Vt. 253.

England. — Morgan v. Thorne, 7 M. & W. 409; and compare Cochran v. Violet, 37 La. Ann. 221.

**Equity May, However, Interfere** to set aside a judgment against an infant where the plaintiff has no equitable claim. L'Amoureux v. Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

**No Appeal Lies** from a refusal to open a judgment on the ground that the defendant was a minor at the time of rendition. Phillips v. Allegheny Valley R. Co., (Pa. 1885) 3 Atl. Rep. 438.

1. California. — Joyce v. McAvoy, 31 Cal. 273.

Iowa. — Rawlston v. Lahee, 8 Iowa 17.

Kentucky. — Hanna v. Spotts, 5 B. Mon. (Ky.) 367.

New York. — Matter of Hawley, 100 N. Y. 206; Matter of Tilden, 98 N. Y. 434.

North Carolina. — Mauney v. Gidney, 88 N. Car. 200.

Tennessee. — Rogers v. Clark, 5 Sneed (Tenn.) 665; Winchester v. Winchester, 1 Head (Tenn.) 460; Hurt v. Long, 90 Tenn. 445; Kindell v. Titus, 9 Heisk. (Tenn.) 727; Ridgely v. Bennett, 13 Lea (Tenn.) 206; Grimstead v. Huggins, 13 Lea (Tenn.) 728; Kelley v. Kelley, 15 Lea (Tenn.) 194; Allen v. Shanks, 90 Tenn. 359.

In Mauney v. Gidney, 88 N. Car. 200, it was held that in an application under the statute for a relief against a judgment on the ground of excusable neglect, no distinction was to be made between adult and infant parties, provided the latter are represented according to the requirements of law and the practice of the court.

Infancy will prevent the statute of limitations from barring those who must necessarily join with the infant

in a writ of error to reverse a decree. Kennedy v. Duncan, Hard. (Ky.) 373.

**Grounds for Vacating.** — "An infant defendant is as much bound by a decree in equity against her as a person of full age; therefore, if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it unless upon such grounds as an adult might have disputed it, as fraud, collusion, or error. \* \* \* She may either impeach the decree on the ground of fraud or collusion between the plaintiff and her guardian, or she may show error in the decree. She may also show that she had grounds of defense which were not before the court, or were not insisted on at the hearing, or that new matter has subsequently arisen upon which the decree may be shown to be wrong." Ralston v. Lahee, 8 Iowa 17, 74 Am. Dec. 291. Or that the merits of the case were not understood by the guardian *ad litem*. Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 635.

An infant is not entitled to have a decree against him set aside, except for bad faith on the part of the guardian *ad litem* or executor, or fraud or surprise upon the court. Brick's Estate, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

**Vacating in Same Court After Term.** — In Delashmutt v. Parrent, 39 Kan. 548, it was held under Code, §§ 568 and 575, authorizing a district court to vacate or modify its own judgment after the term at which it was rendered, among other causes for erroneous proceedings against an infant, where the infancy does not appear in the record, nor the error in the proceedings, that a judgment against an infant upon insufficient notice and without any appearance by guardian or other representative might be vacated in the same court after the term when such judgment was rendered and within two years after the minor had obtained majority.

2. **Bona Fide Purchasers.** — Gronfier v. Puymirol, 19 Cal. 629; Joyce v. McAvoy, 31 Cal. 273; Lloyd v. Kirkwood,

**3. Bill to Impeach Decree — a. WHEN LIES.** — An infant may impeach a decree on the ground of fraud, collusion, or error apparent, by a bill of review, or supplemental bill in the nature of a bill of review,<sup>1</sup> and in the case of error apparent it is unnecessary first to obtain leave of the court to file the bill.<sup>2</sup>

**Attack by Original Bill.** — But an infant, unlike an adult, is not bound to proceed by way of rehearing or by bill of review;<sup>3</sup> he may attack the decree by an original bill for relief,<sup>4</sup> and it is

112 Ill. 338, *followed* in *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854; *Allison v. Drake*, 145 Ill. 501; *Sheldon v. Newton*, 3 Ohio St. 494; *Hare v. Hollomon*, 94 N. Car. 14.

And this is true, even though the decree itself may be reversed for error. *England v. Garner*, 90 N. Car. 197; *Allman v. Taylor*, 101 Ill. 185; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Gwinn v. Williams*, 30 Ind. 374 (where the judgment was obtained by the guardian for the purpose of defrauding the infant).

1. *California*. — *Waterman v. Lawrence*, 19 Cal. 210.

*Illinois*. — *Coffin v. Argo*, 134 Ill. 276; *Allison v. Drake*, 145 Ill. 500; *Lloyd v. Kirkwood*, 112 Ill. 330; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Hess v. Voss*, 52 Ill. 472; *Gooch v. Green*, 102 Ill. 507; *Haines v. Hewitt*, 129 Ill. 347.

*Mississippi*. — *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514.

See also 1 Dan. Ch. Pr. 164. *Compare* *Lloyd v. Malone*, 23 Ill. 43; *Ralston v. Lahee*, 8 Iowa 17; *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

But the decree will only be set aside upon a showing that it was prejudicial to the infant. *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

**It Is Error Apparent** on the face of the record, within the meaning of the rule, where the bill to enforce a resulting trust as against an infant heir shows upon its face that the trust arose twenty-five years before suit brought, and the decree was rendered without requiring the guardian *ad litem* to set up laches in defense. *Lloyd v. Kirkwood*, 112 Ill. 329.

**Partition — Want of Jurisdiction.** — A bill of review lies by infant to set aside a decree rendered in a suit against him for partition of common estate, where the decree would operate as a cloud on or embarrassment to the title, and where the court had no jurisdiction. *Waterman v. Lawrence*, 19 Cal. 210.

2. **Leave of Court to File Bill.** — *Lee v.*

*Braxton*, 5 Call (Va.) 459, holding that the entering of an absolute decree against infants without allowing them any day to show cause against it was error apparent for which a bill of review might be brought without leave of court; and further, that if a bill of review showing just cause be offered and refused by the chancellor an appeal lies. See also *Hendricks v. McLean*, 18 Mo. 39; and generally article BILLS OF REVIEW, vol. 3, p. 586.

In *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514, the court said that it was unnecessary for the infant to obtain leave of court where he wished to make a new defense during minority.

3. *Grimes v. Grimes*, 143 Ill. 550; *Lloyd v. Malone*, 23 Ill. 43; *Hess v. Voss*, 52 Ill. 472; *Stunz v. Stunz*, 131 Ill. 309; *Johnson v. Johnson*, 30 Ill. 215; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Gooch v. Green*, 102 Ill. 507; *Lloyd v. Kirkwood*, 112 Ill. 329.

4. *Illinois*. — *Haines v. Hewitt*, 129 Ill. 347; *Lloyd v. Kirkwood*, 112 Ill. 330; *Hess v. Voss*, 52 Ill. 472; *Lloyd v. Malone*, 23 Ill. 43; *Coffin v. Argo*, 134 Ill. 276; *Grimes v. Grimes*, 143 Ill. 550; *Johnson v. Johnson*, 30 Ill. 215; *Stunz v. Stunz*, 131 Ill. 309.

*Iowa*. — *Ralston v. Lahee*, 8 Iowa 17.

*Mississippi*. — *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514; *Sledge v. Boone*, 57 Miss. 222; *Enochs v. Harrelson*, 57 Miss. 465.

*United States*. — *Kingsbury v. Buckner*, 134 U. S. 650.

**When Original Bill Lies.** — In *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103, it was held that an infant might bring an original bill for relief against a decree which did not give him a day to show cause, such omission constituting error apparent.

In *Lloyd v. Kirkwood*, 112 Ill. 329, it was said that the right to attack a decree by original bill was subject to the qualification that the decree of a court having jurisdiction of the subject-matter of suit, and the person of the infant

unnecessary first to obtain the consent of the court to the filing of such a bill.<sup>1</sup>

**6. TIME OF FILING — Before or After Majority.** — This right to attack a decree by original bill or by bill of review may be exercised at any time before the infant attains his majority, or at any time afterwards within the period in which he may, under the statute, prosecute an appeal or writ of error for the reversal of such a decree.<sup>2</sup>

**After Time for Bringing Error.** — But a bill of review for error apparent will not lie after the expiration of the time within which such an appeal or writ of error could have been brought.<sup>3</sup>

against whom it was rendered would not be thus set aside as against third parties who had in good faith acquired rights under it, but that as against original parties to the suit and their legal representatives the rule would be enforced. This point was approved in *Allison v. Drake*, 145 Ill. 517.

**Original Bill Misnamed.** — In *Sledge v. Boone*, 57 Miss. 222, the bill, although called a bill of review, was treated as a bill by an infant to open an improper decree prejudicial to her interests, and was sustained.

1. *Grimes v. Grimes*, 143 Ill. 556.

2. *Illinois*. — *Lloyd v. Kirkwood*, 112 Ill. 329; *Allison v. Drake*, 145 Ill. 517; *Grimes v. Grimes*, 143 Ill. 550; *Kuchenbeiser v. Beckert*, 41 Ill. 172. *Compare* *McClay v. Norris*, 9 Ill. 370; *Gooch v. Green*, 102 Ill. 507; *Loyd v. Malone*, 23 Ill. 43.

*Iowa*. — *Ralston v. Lahee*, 8 Iowa 17.

*Kentucky*. — *Newland v. Gentry*, 18 B. Mon. (Ky.) 671.

*Mississippi*. — *Sledge v. Boone*, 57 Miss. 222; *McLemore v. Chicago*, etc., R. Co., 58 Miss. 514.

*Missouri*. — *Ruby v. Strother*, 11 Mo. 417.

*Tennessee*. — *Winchester v. Winchester*, 1 Head (Tenn.) 460.

*Virginia*. — *Morriss v. Virginia Ins. Co.*, 85 Va. 588.

*United States*. — *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128; *Kingsbury v. Buckner*, 134 U. S. 650.

*England*. — *Bennet v. Lee*, 2 Atk. 487; *Savage v. Carrol*, 1 B. & B. 548, 2 B. & B. 244; *Richmond v. Tayleur*, 1 P. Wms. 736.

**Common-law Rule.** — As to the time when certain judicial acts may be avoided by infants, the rule is thus stated in *Bac. Abr.*, title *Infancy and Age*, I. 5: "But matters of record, as statutes merchant and of the staple, recogni-

zances acknowledged by him, or a fine levied by him, recovery against him by default in a real action (saving in dower), must be avoided, viz., the statute, etc., by *audita querela*, and the fine and recovery during his minority [by writ of error]; for being judicial acts taken by a court or judge, the non-age of the party to avoid the same shall be tried by inspection, and not by the country.

\* \* \* Also, it is said that if an infant appear by attorney and suffer a recovery, it may for this error be reversed after the infant comes of age, because it shall be tried by the country, whether the warrant of attorney was made when under age or not."

In *Com. Dig.*, title *Infant*, it was said: "So judgment against an infant may be avoided before or after his full age by error, for that he appeared by attorney, being an infant, and not by guardian." See also *Powell v. Gott*, 13 Mo. 458; *Haigler v. Way*, 2 Rich. L. (S. Car.) 324; *Tucker v. Moreland*, 10 Pet. (U. S.) 71; *Prewitt v. Graves*, 5 J. J. Marsh. (Ky.) 117; *Boal v. Mix*, 17 Wend. (N. Y.) 132; *Chase v. Scott*, 14 Vt. 77; *Newell v. Newell*, 13 Vt. 33. The method of trial at common law of the question of infancy in such cases, viz., by inspection, upon which the above distinctions are founded, probably does not exist in any of the United States.

In *Kentucky Code of Civ. Pro.*, §§ 391, 520-22, providing for proceedings to vacate judgments within twelve months after an infant defendant reaches majority, does not require an infant to wait until majority before bringing an action to annul a judgment vacating her rights. *Park v. Bolinger*, (Ky. 1888) 8 S. W. Rep. 914.

3. *Creath v. Smith*, 20 Mo. 113; and cases cited in preceding note. See also article *BILLS OF REVIEW*, vol. 3, p. 583.

**After Decision on Appeal.** — Nor in general will a bill of review lie in the court of first instance to review a decree rendered in the cause on appeal.<sup>1</sup>

**c. PARTIES.** — In a suit by an infant to have a decree against him vacated, all the parties to the original suit must be brought before the court.<sup>2</sup>

**1. Bill to Impeach Decree After Decision on Appeal.** — "In *Southard v. Russell*, 16 How. (U. S.) 570, *cited* with approval in *Kingsbury v. Buckner*, 70 Ill. 516, it was said: 'As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is, therefore, the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with. The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree, after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits.'" See article **BILLS OF REVIEW**, vol. 3, p. 574.

"This is obviously correct, as among the numerous methods for the correction of errors of law and fact committed in the inferior courts, the appeal is the last and final one, and it could not be on any ground assumed that this might be tried, and then all the others practically included in this might be tried again. This practice would be productive of intolerable evil, and would make litigation endless." *Hurt v. Long*, 90 Tenn. 445.

The chancery court from which a cause was appealed has no jurisdiction, after entry of final decree in the Supreme Court, to review that decree upon

a pure and simple bill of review, either for error apparent, or it seems for new matter, and this rule applies to minors." *Hurt v. Long*, 90 Tenn. 445 [*citing* with approval *Wallen v. Huff*, *Thomp.* Tenn. Cas. 21; *Cox v. Breedlove*, 2 Yerg. (Tenn.) 499; *Wilson v. Wilson*, 10 Yerg. (Tenn.) 200; *Anderson v. State Bank*, 5 Sneed (Tenn.) 661]. See also *McClay v. Norris*, 9 Ill. 370.

**Decision on Appeal—How Far Conclusive.** — A decree is subject to attack by original bill for fraud, even after judgment in the appellate court; but a party, whether an infant or adult, against whom a decree is rendered by direction of the appellate court cannot impeach it by the bill filed in the court of first instance merely for errors apparent on the record that do not involve the jurisdiction of either court. *Kingsbury v. Buckner*, 184 U. S. 650. In this case it was further held that an infant, by his *prochein ami*, having elected to prosecute an appeal to the Supreme Court of Illinois from the decree rendered in the original suit brought by him, and having appeared by guardian *ad litem* to the appeal of the cross-plaintiffs in the same suit, is as much bound by the action of that court in respect to mere matters of law, not involving jurisdiction, as if he had been an adult when the appeal was taken.

In *Vaughn v. Hudson*, 59 Miss. 421, it was held that by the affirmance of their appeal infants are concluded only as to the matters appearing in the transcript of the record, and can afterwards maintain a bill of review under Code 1871, § 1265, in order to obtain justice, which they failed to secure at the hearing, because the case was not presented as on the rehearing.

**2.** *Ralston v. Lahee*, 8 Iowa 17.

In an action by a former ward, after becoming of age, to set aside a sale of land under execution, issued on a judgment rendered against him while a minor, and against another person as his guardian, but who was not such guardian, the latter is not a necessary



**4. Infant's Day in Court** — *a*. STATEMENT OF RULE. — In many jurisdictions decrees in chancery against infants are not absolute in the first instance, but the infant is entitled to a day in court after he arrives at his majority to come in and show cause why the decree should not be made absolute.<sup>1</sup> The precise limits of this doctrine cannot be ascertained with any clearness from the authorities.<sup>2</sup>

**Right Denied.** — In many jurisdictions and classes of cases, an infant is held not to be entitled to a day after majority to show cause against decree.<sup>3</sup>

party. *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307. See also *infra*, IV. 4. *f.* (2) *Notice to Parties in Interest*.

**1. Infant Entitled to Day to Show Cause** — *Delaware*. — *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97.

*Kentucky*. — *Shields v. Bryant*, 3 Bibb (Ky.) 525; *Thompson v. Peebles*, 6 Dana (Ky.) 387; *Booker v. Kennerly*, 96 Ky. 415.

*Mississippi*. — *Sledge v. Boone*, 57 Miss. 222; *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

*New Hampshire*. — *Dow v. Jewell*, 21 N. H. 470.

*New Mexico*. — *Thompson v. Maxwell Land Grant, etc., Co.*, 3 N. Mex. 269.

*New York*. — *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367. But see *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348.

*England*. — *Thomas v. Gyles*, 2 Vern. 232; *Sayle v. Freeland*, 2 Vent. 350; *Kelsall v. Kelsall*, 2 Myl. & K. 409; *Bennet v. Lee*, 2 Atk. 529.

An infant defendant, having become of age, is entitled to his day in court, and may file his separate answer, making, if he choose, an entirely new defense. *Thompson v. Maxwell Land Grant, etc., Co.*, 3 N. Mex. 269.

In *Mississippi*, art. 97, p. 555 of the Code of 1857, was intended as a substitute for the former chancery practice of allowing an infant a day, etc.

**Partition.** — Such day should be given to infants to show cause against a decree establishing a parol partition of lands in which they are interested. *Dow v. Jewell*, 21 N. H. 470.

In *Beeler v. Bullitt*, 4 Bibb (Ky.) 12, the court said: "We are aware of no case where it has been held not to apply to a decree (such as in the present case) for the partition of lands. But

if such a case could be found, we should greatly hesitate in recognizing its authority; for it is evident every reason which could in any respect have concurred to the adoption of such a rule concurs strongly to require its application to the present case."

**Showing Cause Against Bona Fide Purchaser.** — Where the right to show cause is reserved in a decree it may be enforced, even as against a *bona fide* purchaser. *Stanley v. Brannon*, 6 Blackf. (Ind.) 193. See also *supra*, IV. 2. *Opening and Vacating*.

2. "The learning afforded by reports and text-books is meagre, fragmentary, and by no means satisfactory." *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514. See also *Creath v. Smith*, 20 Mo. 118, where the court, speaking of the American cases in which the right to show cause is reserved to infant defendants, said: "They are many, and from courts of high authority, although I have seen none which states the principle on which the privilege rests, with any clearness."

This whole subject is examined with great learning in the cases of *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178, and *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

In several cases the right of an infant to a day to show cause has been doubted but not decided. See *Heath v. Ashley*, 15 Mo. 393; *Waterman v. Lawrence*, 19 Cal. 210.

It seems questionable whether under our system of practice an infant is in any case or under any circumstances entitled to have a day given in the judgment to show cause against it. *Joyce v. McAvoy*, 31 Cal. 273.

**3. When Not Entitled to Show Cause** — *California*. — *Regla v. Martin*, 19 Cal. 463.

*Illinois*. — *Mason v. Wait*, 5 Ill. 127; *McClay v. Norris*, 9 Ill. 370.

**b. RULE WHEN CONVEYANCE IS ORDERED.** — The distinction is often drawn between cases in which the infant is in form, or substance directed to make or join in a conveyance, and cases in which the title is divested by the decree itself without any act on the part of the infant; and it is held that in the former class of cases the infant is entitled to a day to show cause, but not in the latter class.<sup>1</sup> But this distinction is

*Massachusetts.* — *Walsh v. Walsh*, 116 Mass. 377 (decree against infant trustee).

*Michigan.* — *Chandler v. McKinney*, 6 Mich. 219.

*Mississippi.* — *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485; *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

*Missouri.* — *Hendricks v. McLean*, 18 Mo. 39; *Creath v. Smith*, 20 Mo. 113; *Shields v. Powers*, 29 Mo. 315.

*New York.* — *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348.

*Tennessee.* — *Winchester v. Winchester*, 1 Head (Tenn.) 461; *Rogers v. Clark*, 5 Sneed (Tenn.) 668.

*Virginia.* — *Wilkinson v. Oliver*, 4 Hen. & M. (Va.) 450; *Winston v. Campbell*, 4 Hen. & M. (Va.) 477; *Brown v. Armistead*, 6 Rand. (Va.) 594.

*England.* — *Booth v. Rich*, 1 Vern. 295; *Cooke v. Parsons*, 2 Vern. 429; *Williamson v. Gordon*, 19 Ves. Jr. 114; *Scholefield v. Heafield*, 7 Sim. 667; *Whitechurch v. Whitechurch*, 9 Mod. 124; *Loyd v. Mansell*, 2 P. Wms. 73; *Mallack v. Galton*, 3 P. Wms. 352.

The practice of giving the minors six months after coming of age to show cause against decrees rendered against them during their minority applied only to actions in equity, and not to actions at law for the recovery of money due on a contract. *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348.

In *Missouri* the minor has no right to a day to show cause in any case. *Shields v. Powers*, 29 Mo. 317.

**Infant Trustees.** — The rule requiring the decree against an infant to allow a day to show cause is held not to apply to an infant trustee. *Whitechurch v. Whitechurch*, 9 Mod. 124, *quoted* in *Creath v. Smith*, 20 Mo. 122. Even where the trust results by implication of law. *Walsh v. Walsh*, 116 Mass. 377.

**Decree Affecting Personalty.** — The day was never given in the English courts of chancery where the decree affected only personal property. *Hendricks v. McLean*, 18 Mo. 39.

In most of the American cases where a day has been given an infant to show cause, it has been done apparently without any distinction as to the subject-matter of the suit, as being either real or personal. *Creath v. Smith*, 20 Mo. 118, and cases cited *supra* in this section.

**Second Application to Show Cause.** — Where an infant, by leave of court, shows cause during minority, he is considered as a plaintiff, and therefore bound by the new decree without the right to show cause against it. *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514. See also article NEXT FRIEND.

**Rule Abrogated by Statute.** — In *Phillips v. Dusenberry*, 8 Hun (N. Y.) 348, it was held that the rule allowing an infant a day to show cause after majority is abrogated by statutes providing for the appointment of guardians *ad litem*. See also *Joyce v. McAvoy*, 31 Cal. 273; and *Creath v. Smith*, 20 Mo. 122, where the court said: "Our statutes are not framed upon the idea that such rule should prevail."

**Decrees of Surrogates' Courts.** — Surrogates' courts and courts of like jurisdiction have no power unless conferred by statute to open a decree against an infant after he attains his majority. *Brick's Estate*, 15 Abb. Pr. (N. Y. Surrogate Ct.) 12.

**1. Day Allowed Only Where Conveyance Is Ordered.** — In courts of equity the practice exists where the effect of the decree is to divest the infant of an interest in land, or where a conveyance is required of an infant, and in cases of foreclosure to give him a day after he comes of age to show cause why the decree should not be binding upon him; but in all other cases, as a general rule, he is, where a guardian *ad litem* has been appointed to act for him, as much bound by the decree as an adult. 1 *Daniell Ch. Pr.* (6th Am. ed.) 165 *et seq.* *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

The doctrine that a party under a

by no means universally recognized.<sup>1</sup>

c. RULE IN MORTGAGE FORECLOSURES. — In the case of a decree of foreclosure of a mortgage on property of an infant, the infant is allowed his day to show cause, but only for error in the decree, and he will not be then permitted to go into the accounts, or to redeem the mortgage by paying what is due.<sup>2</sup> The more

disability is entitled to a day in court has no application where title is divested by the decree, but only where the party is directed to convey. *Winchester v. Winchester*, 1 Head (Tenn.) 461. See also *Sheffield v. Buckingham*, West 684; *Hendricks v. McLean*, 18 Mo. 41; *Creath v. Smith*, 20 Mo. 121; *Shields v. Powers*, 29 Mo. 318; *Dow v. Jewell*, 21 N. H. 470; *Lockwood v. Stradley*, 1 Del. Ch. 298. But see *Ruby v. Strother*, 11 Mo. 422.

In *Coffin v. Heath*, 6 Met. (Mass.) 76, it was held to be error to decree a conveyance during the minority of defendants. This decision was approved in *Whitney v. Stearns*, 11 Met. (Mass.) 319.

1. It is tolerably clear that in the absence of statutory regulations to the contrary the rule requiring a day to be given an infant to show cause extends at least to all cases where a conveyance in form, or in substance, by the infant is required, or where he is required to unite in a conveyance. But in *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178, it was held that an infant defendant is entitled to have six months after coming of age to show cause against a decree, whenever his inheritance is bound, whether he is decreed to execute a conveyance or not, except in certain cases provided for by statute. In this case *Sheffield v. Buckingham*, West 684, was criticised, and Hoffm., V. C., said: "Upon the whole, I consider that the rule is broader than Lord Hardwicke stated it in the single case referred to, and that in general the infant must have his day, where his inheritance is affected." See also *Long v. Mulford*, 17 Ohio St. 506.

In *Eyre v. Shaftsbury*, 2 P. Wms. 102, it is said that in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age. And this very comprehensive language of the Lord Chancellor has often been quoted as declaring the rule to be universal.

In *Creath v. Smith*, 20 Mo. 113, it is said: "In many of the American

courts the rule has been adopted of giving a day apparently without regard to its origin or extent in the English courts. In *Heiatt v. Barnes*, 5 Dana (Ky.) 223, it was held to be necessary to give day to infant defendants to show cause against a decree by which land conveyed to trustees for their use by a voluntary conveyance from their father, who at the time was indebted to the plaintiffs under certain judgments, was subjected to sale to satisfy the judgments. The conveyance being of land which was subject to the payment of debts, and being made to hinder and delay creditors (as is declared in the opinion of the court), was void as to the complainants. Yet the court say the infant defendants must have day to show cause against the decree. It is obvious that if, in such case, the infants are to have this privilege, it would be difficult to state any relating to real estate in which it must not be given. It is an extreme case. \* \* \* In the opinion of the court, the decree was not erroneous because of a failure to give day to the infant defendants. The rule as stated in *Whitechurch v. Whitechurch*, 9 Mod. 125, and by Lord Hardwicke in *Sheffield v. Buckingham*, West 684, is the rule which we regard as the true rule in the English practice, and it will be seen by reference to our own statutes that the rule is not applicable here, or that our statutes are not framed upon the idea that such rule should prevail."

2. Foreclosure. — "In decrees of foreclosure against an infant there is, according to the old and settled rule of practice in chancery, a day given when he comes of age, usually six months, to show cause against the decree and make a better defense, and he is entitled to be called in for that purpose by process of subpoena." 1 Dan. Ch. Pr. 167, note; *Jackson v. Turner*, 5 Leigh (Va.) 119; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Dow v. Jewell*, 21 N. H. 491; *Coffin v. Heath*, 6 Met. (Mass.) 76.

The Infant Cannot Redeem his property when it has once been foreclosed.

usual practice, however, is not to foreclose, but to sell the property; and in that case the sale is absolute without any day to show cause.<sup>1</sup>

*d. DISTINGUISHED FROM DEMURRER OF THE PAROL.* — Although sometimes confounded, there is a distinction between the practice of making the parol demur, and the practice prevailing in chancery cases of allowing an infant a day in court after reaching majority, in which to show cause against the decree.<sup>2</sup>

*Mallack v. Galton*, 3 P. Wms. 352; *Williamson v. Gordon*, 19 Ves. Jr. 114; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *McClay v. Norris*, 9 Ill. 370.

This rule, however, does not apply to cases where there has been fraud or collusion in obtaining the decree. 1 *Dan. Ch. Pr.* 172; *Loyd v. Mansell*, 2 P. Wms. 73.

In Decrees for Strict Foreclosure it is customary to insert the provision for showing cause. *Harris v. Youman*, Hoffm. Ch. (N. Y.) 180; *Mallack v. Galton*, 3 P. Wms. 352, note; *Williamson v. Gordon*, 19 Ves. Jr. 114; *Creath v. Smith*, 20 Mo. 117.

**1. Sale Under Mortgage — No Day Allowed.** — *Booth v. Rich*, 1 Vern. 295; *Cooke v. Parsons*, 2 Vern. 429; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Creath v. Smith*, 20 Mo. 113; *Wilkinson v. Oliver*, 4 Hen. & M. (Va.) 450.

The court, however, has authority to set aside the sale and order a new one, where it is for the interest of the infant, and may do this on its own motion. *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167; *Duncan v. Dodd*, 2 Paige (N. Y.) 99. And still more where there is any fraud in the transaction the court will interfere. *Howell v. Mills*, 53 N. Y. 322. And see *Winston v. Campbell*, 4 Hen. & M. (Va.) 477; *Rogers v. Clark*, 5 Sneed (Tenn.) 665; *Hendricks v. McLean*, 18 Mo. 32.

In *Duncan v. Dodd*, 2 Paige (N. Y.) 99, a sale in foreclosure was set aside upon security being given that the premises would produce fifty per cent. advance.

**2.** *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178; *Joyce v. McAvoy*, 31 Cal. 273; *Enos v. Capps*, 15 Ill. 277.

In *Price v. Carver*, 3 Myl. & C. 162, it was argued that the abolition of the demurrer of the parol, by the statute of 11 George IV. and 1 Wm. IV., p. 47, § 10, had altered the former practice of allowing an infant a day to show cause.

The Lord Chancellor said: "That statute only enacts that the parol shall not in future demur. If the parol demurring and the giving a day to an infant be synonymous terms, then this statute has prohibited the giving a day in future; but if the terms be not synonymous, then the statute does not affect the practice in question in this case. I have always conceived that the parol demurred in equity in those cases only in which it would have demurred at law. The origin and limits of this course at law are well explained in *Plasket v. Beeby*, 4 East 485, and the cases there put of the parol demurring have no reference to the cases in equity in which a day is given to an infant to show cause; indeed, the shape of the decree in the two cases is perfectly different. When the parol demurs in equity, nothing is done to affect the infant; but when a day is given the decree is complete; but the infant has a day given to show cause against it, and if he do not show good cause within the time specified, he is bound. In some cases, indeed, the distinction is most apparent, the court deciding that the parol did not demur, and therefore making the decree, but giving the infant a day to show cause. In *Uvedale v. Uvedale*, 3 Atk. 117, Lord Hardwicke puts a case in which the parol could not have demurred, but the infant would have had a day given. So in *Chaplin v. Chaplin*, 3 P. Wms. 368, it was held that the parol did not demur; but the legal estate being in the son, could not have been got from him till twenty-one, and the decree must have given him a day to show cause." After citing many other cases the Lord Chancellor said: "All cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at law, are cases in which a day is given, but the parol does not demur. Of all such cases the statute takes no notice, and affords no remedy for them. \* \* \*

When the parol demurs, either at law or in chancery, nothing is done to affect the infant; but when a day is given, the decree is complete, but the infant has a day given to show cause against it, and if he does not show good cause within the time allowed he is bound.<sup>1</sup>

**Abolition of Plea.** — Accordingly, the abolition by statute of the demurrer of the parol does not affect an infant's right to show cause against a decree after coming of age.<sup>2</sup>

**e. RESERVATION OF DAY IN DECREE** — (1) *When Necessary.* — In General, where an infant defendant is entitled to his day in court after majority to show cause, the right must be expressly reserved to him in the decree, or the decree will be erroneous,<sup>3</sup> and, inde-

In all other cases in which a conveyance is required from an infant, the law remains as before, and the practice, therefore, must remain the same. There must be a decree for the infant to convey at twenty-one, and he must have a day."

1. Price v. Carver, 3 Myl. & C. 160; Ruby v. Strother, 11 Mo. 417.

2. Ruby v. Strother, 11 Mo. 417; Coffin v. Heath, 6 Met. (Mass.) 80; Price v. Carver, 3 Myl. & C. 157.

A privilege of an infant to show cause after coming of age against a decree does not depend upon his right to have a parol demur. That right has been abolished in England and in many of the United States, but it has nevertheless since been held in those jurisdictions that the rule giving an infant a day to show cause is still in force. Coffin v. Heath, 6 Met. (Mass.) 81; Harris v. Youman, Hoffm. Ch. (N. Y.) 178.

3. Decree Must Allow Day to Show Cause — *Delaware.* — Lockwood v. Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97.

*Kentucky.* — Shields v. Bryant, 3 Bibb (Ky.) 525; Beeler v. Bullitt, 4 Bibb (Ky.) 11; Searcey v. Morgan, 4 Bibb (Ky.) 96; Hanna v. Spotts, 5 B. Mon. (Ky.) 362; Anderson v. Irvine, 11 B. Mon. (Ky.) 343; Jameson v. Moseley, 4 T. B. Mon. (Ky.) 417; Pope v. Lemaster, 5 Litt. (Ky.) 77; Heiatt v. Barnes, 5 Dana (Ky.) 223; Passmore v. Moore, 1 J. J. Marsh. (Ky.) 593; Col-lard v. Groom, 2 J. J. Marsh. (Ky.) 487; Ewing v. Armstrong, 4 J. J. Marsh. (Ky.) 68; Jones v. Adair, 4 J. J. Marsh. (Ky.) 220; Arnold v. Voorhies, 4 J. J. Marsh. (Ky.) 508.

*Massachusetts.* — Coffin v. Heath, 6 Met. (Mass.) 76; Whitney v. Stearns, 1 Met. (Mass.) 319.

*Mississippi.* — Williams v. Stratton, 10 Smed. & M. (Miss.) 418; McLemore v. Chicago, etc., R. Co., 58 Miss. 514.

*New Hampshire.* — Dow v. Jewell, 21 N. H. 470.

*New York.* — Wright v. Miller, 4 Barb. (N. Y.) 600; Harris v. Youman, Hoffm. Ch. (N. Y.) 178; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; Bushnell v. Harford, 4 Johns. Ch. (N. Y.) 302.

*Ohio.* — Long v. Mulford, 17 Ohio St. 506.

*South Carolina.* — Drayton v. Drayton, 1 Desaus. (S. Car.) 125; Wilkinson v. Wilkinson, 1 Desaus. (S. Car.) 202.

*Tennessee.* — Simpson v. Alexander, 6 Coldw. (Tenn.) 629.

*Virginia.* — Braxton v. Lee, 4 Hen. & M. (Va.) 376; Lee v. Braxton, 5 Call (Va.) 459; Parker v. McCoy, 10 Gratt. (Va.) 594; Jackson v. Turner, 5 Leigh (Va.) 119; Tennent v. Pattons, 6 Leigh (Va.) 196; Pickett v. Chilton, 5 Munf. (Va.) 467; Morriss v. Virginia Ins. Co., 85 Va. 588.

*England.* — Kelsall v. Kelsall, 2 Myl. & K. 409; Price v. Carver, 3 Myl. & C. 157; Mair v. Kerr, 2 Grant's Ch. (U. C.) 223.

A decree of the Chancery Court in relation to the realty of minors, which contains no saving clause as to their rights on arrival at age, is erroneous; but the decree being regular in other particulars, the High Court of Errors and Appeals will protect the minors' rights by decree in that court. Williams v. Stratton, 10 Smed. & M. (Miss.) 418.

**The Form of a Decree Giving an Infant a Day** to show cause will be found in Hendricks v. McLean, 18 Mo. 39; McLemore v. Chicago, etc., R. Co., 58 Miss. 514; Price v. Carver, 3 Myl. & C. 163; Ruby v. Strother, 11 Mo. 417. The reservation clause is as follows: "And this decree is to be binding on

pendent of statute, an infant can show cause against a decree only in pursuance of such a reservation; for, as has been seen, an infant is bound even by an erroneous decree to the same extent as an adult.<sup>1</sup>

**The Omission of Such a Reservation** from the decree, however, may constitute error apparent, for which the decree may be impeached by bill of review, supplemental, or original bill.<sup>2</sup>

the defendants unless on being served with subpoena they shall, within six months after they shall attain the age of twenty-one, show unto this court good cause to the contrary."

**Error Not Cured by Limitation.** — Error in not giving a day to show cause is not cured by limitation, because the infant must be subpoenaed to show cause. *Creath v. Smith*, 20 Mo. 113. See also *infra*, IV. 4. *f. Showing Cause Under Reservation*.

**Interlocutory Decrees.** — It is not sufficient ground for reversing an interlocutory decree, that no day was given to an infant defendant to show cause against it, after he should come of age, because such omission may be corrected in the final decree. *Pickett v. Chilton*, 5 Munf. (Va.) 467.

**Upon a Bill to Marshal Assets**, it is error to decree a sale of the lands descended, without giving the infant heirs a day after their attainment to full age, to show cause against it. *Tennent v. Pattons*, 6 Leigh (Va.) 196.

1. See *supra*, IV. 1. *In General*. See also *Braxton v. Lee*, 4 Hen. & M. (Va.) 376, 5 Call (Va.) 459; *Pickett v. Chilton*, 5 Munf. (Va.) 467; *Brown v. Armistead*, 6 Rand. (Va.) 602; *Jackson v. Turner*, 5 Leigh (Va.) 119; *Tennent v. Pattons*, 6 Leigh (Va.) 196. But see cases cited *infra*, this section, to the effect that an infant is entitled to show cause whether the right is reserved to him in the decree or not.

**Partition.** — In *Virginia*, under Code 1873, p. 120, § 3, it is held that where lands are sold in partition by decree of chancery, the infant is not entitled to a day to show cause. *Parker v. McCoy*, 10 Gratt. (Va.) 594.

2. *Lee v. Braxton*, 5 Call (Va.) 459; *Ruby v. Strother*, 11 Mo. 417; *Bennett v. Hamill*, 2 Sch. & Lef. 566; *Richmond v. Tayleur*, 1 P. Wms. 736; 1 Dan. Ch. Pr. 164. See *supra*, IV. 3. *Bill to Impeach Decree*.

If this clause is omitted, the decree may be set aside. *Beeler v. Bullitt*, 4 Bibb (Ky.) 11; *Wright v. Miller*, 4

*Barb.* (N. Y.) 600; *Townsend v. Cox*, 45 Mo. 401; *Coffin v. Heath*, 6 Met. (Mass.) 76.

A decree against infants, setting aside a conveyance made in trust for them, without giving them a day to show cause after they become of age, is erroneous, and the infants on an original bill may be relieved against such decree. *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103.

**The Effect of a Decree Failing to Reserve a Day** to the infant to show cause was considered in *Ruby v. Strother*, 11 Mo. 417. The court said: "Now, the difficulty in this case grows out of the omission in the decree of a requisition on the complainant to serve the infants with process within six months from their attaining the age of twenty-one years to show cause against it. How is this decree to be construed? Are we to take it literally and compel the infants to take the initiative in setting it aside, or to construe the decree as though it had been entered in due form, and throw the burden of bringing the infants into court on the complainant? If a decree is formally entered and a complainant omits to serve process within the six months on the infant, what is the effect of such neglect? Does the decree thereby become null as to him as the condition has not been complied with, or is he at liberty after that time to come in and show error? There is no warrant in the usage and practice of the courts of chancery in England for giving a literal construction to the decree entered in this cause. It must either be regarded as regular or as a decree giving no time to the infants. In that event, it is not a decree in conformity to the practice of courts of equity, and is therefore erroneous. *Kelsall v. Kelsall*, 2 Myl. & K. 409."

But this case, in so far as it holds that infants are entitled to a day to show cause, has been overruled by later Missouri decisions. See cases cited *supra*, IV. 4. *a. Statement of Rule*.

**Collateral Attack.** — But the decree will be merely erroneous, and not absolutely void, and therefore it is not subject to collateral attack.<sup>1</sup>

(2) *When Not Necessary.* — Under the statutes of some states an infant is entitled to his day in court, to show cause against the decree, whether the right is expressly reserved to him or not; and in such cases, therefore, the failure to reserve the right is not even error.<sup>2</sup> The clause reserving to an infant defendant the

**Omission to Reserve Day Not Equivalent to Fraud.** — "It is urged that the decree in the case of *Martin v. Castro* does not give a day to the infants, after arriving at age, to show cause against the decree, and that this omission makes it fraudulent. This position is untenable. It would not be any ground of objection to the decree, so far as the adults are concerned, that this omission occurred as to the minors. The minors either were or were not entitled by law to this privilege; if entitled, the omission to recite it in the decree would not deprive them of it; if not entitled, no injury was done by the omission. But in no event could a mere irregularity or omission of this sort in a decree be construed as a fraud, or as conclusive evidence of a fraud, annulling the decree; for if this were so, it is impossible to see why any other irregularity or error would not avoid a judgment for this cause, and thus appeals would become useless." *Regla v. Martin*, 19 Cal. 476.

1. **Voidable, Not Void.** — "If the infant is entitled under the law to have a day given in the judgment, and the judgment is absolute giving no day, it is erroneous and will be reversed or modified on appeal; or if properly attacked by a direct proceeding, will be vacated for the error and irregularity. But no case has been called to our attention which holds the judgment to be a nullity on its face. It is only voidable, not void. It is valid until reversed or set aside. Says Daniell: 'An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error.' Dan. Ch. Pr. 205. See also *Ralston v. Lahee*, 8 Iowa 23. Daniell then shows the proper mode of impeaching a decree upon any sufficient

ground, including error or irregularity in entering it without giving a day in those cases in which the infant is entitled to it, to be by bill of review, supplemental bill, or original bill. He further says: 'The insertion of this clause (giving day) in a decree for a conveyance by an infant of his estate was so strictly insisted upon in all cases that the omission of it has been considered as error in the decree.' Dan. Ch. Pr. 207; *Richmond v. Tayleur*, 1 P. Wms. 737. The omission, then, makes it erroneous, not void." *Joyce v. McAvoy*, 31 Cal. 283.

In *Bennett v. Hamill*, 2 Sch. & Lef. 566, it was held in a direct proceeding to impeach a decree for failure to reserve a day, that while the decree was erroneous as to the original parties it was valid as to a purchaser under it. The court said: "The purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale." This case was cited with approval on this point in *Joyce v. McAvoy*, 31 Cal. 283. See also *Regla v. Martin*, 19 Cal. 463; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 254.

2. *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Gooch v. Green*, 102 Ill. 507; *Hess v. Voss*, 52 Ill. 472; *Haines v. Hewitt*, 129 Ill. 347; *Morris v. Virginia Ins. Co.*, 85 Va. 588. See also *Regla v. Martin*, 19 Cal. 476.

"If the not giving a minor a day after attaining his majority was error, we do not distinguish it from any other error for which a decree might be reversed. Perhaps in such cases, as a minor was entitled to it, he would be allowed the benefit of it, whether it was granted him or not." *Shields v. Powers*, 29 Mo. 315, holding, however, that in *Missouri* a minor has no right to show cause in any case.

In *Illinois*, under the well-established chancery practice, decrees against infants are absolute in form in the first

right to show cause against a decree after majority should not, of course, be inserted in a decree, in cases where the infant is not entitled to that right under any circumstances.<sup>1</sup> So, also, the decree need not reserve such right where it is expressly declared by statute.<sup>2</sup>

*f. SHOWING CAUSE UNDER RESERVATION — (1) Manner of Proceeding.* — Where an infant seeks to show cause against a decree, on the ground of fraud or error, he is not bound to proceed by way of rehearing, or by bill of review, but, as has been seen, he may proceed by original bill in the manner already considered.<sup>3</sup> But where the infant is merely dissatisfied with the original defense, and wishes to make a new one, he may proceed by motion or petition.<sup>4</sup>

instance, and no day is given to show cause after the infant becomes of age; instead thereof the statute gives to a minor five years after attaining full age to bring his writ of error. *Barnes v. Hazleton*, 50 Ill. 430; *Gooch v. Green*, 102 Ill. 507; *Kuchenbeiser v. Beckert*, 41 Ill. 177; *Wadhams v. Gay*, 73 Ill. 415; *Hess v. Voss*, 52 Ill. 472; *Lloyd v. Kirkwood*, 112 Ill. 330; *Enos v. Capps*, 15 Ill. 277; *Kingsbury v. Buckner*, 134 U. S. 674.

Whether the decree gives a day or not, a minor may file a bill to impeach it for fraud or for error apparent, even during his minority, or within the period after majority allowed by law, for the prosecution of a writ of error for the reversal of a decree. *Haines v. Hewitt*, 129 Ill. 347; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Hess v. Voss*, 52 Ill. 472; *Gooch v. Green*, 102 Ill. 507; *Lloyd v. Kirkwood*, 112 Ill. 329, 330; *Haines v. Hewitt*, 129 Ill. 347. See also *supra*, IV. 3. *Bill to Impeach Decree.*

**1. Decree Need Not Give Day to Show Cause** — *Alabama*. — *Cato v. Easley*, 2 Stew. (Ala.) 214; *Kennedy v. Kennedy*, 2 Ala. 574.

*California*. — *Regla v. Martin*, 19 Cal. 476; *Joyce v. McAvoy*, 31 Cal. 273.

*Maryland*. — *Gregory v. Lenning*, 54 Md. 51.

*Mississippi*. — *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485 (foreclosure of mortgage).

*Missouri*. — *Shields v. Powers*, 29 Mo. 315; *Heath v. Ashley*, 15 Mo. 393; *Hendricks v. McLean*, 18 Mo. 32; *Creath v. Smith*, 20 Mo. 113, *overruling* *Ruby v. Strother*, 11 Mo. 417.

**2. A decree against infants need not prescribe the time within which they may impeach it after attaining their**

majority; the statute does that. *Cato v. Easley*, 2 Stew. (Ala.) 214; *Kennedy v. Kennedy*, 2 Ala. 574.

**3. See *supra*, IV. 3. *Bill to Impeach Decree.*** See also 1 Dan. Ch. Pr. 173.

**4.** "In *Kelsall v. Kelsall*, 2 Myl. & K. 409, Lord Chancellor Brougham, after stating the question before him to be 'whether an infant defendant has a right, on attaining his majority, to make a new case by answer and evidence, after publication has passed and a decree has been made in the cause,' said: 'This is a question of some importance, and certainly of rare occurrence,' etc.; and he proceeded to discuss the proper limits of the right which he declared to exist, and exhibited hesitation as to the proper practice in such cases. He declared his readiness to follow 'any trace of a precedent' to obviate the injustice, as he called it, arising from permitting the late infant to mend his case. Long before this Lord Hardwicke had struggled with the difficulties of the question, and delivered one of his most elaborate judgments in *Bennet v. Lee*, 2 Atk. 529, holding that after infants come of age they have a right to put in a new answer and make a better defense, and that before they come of age they may have leave to do so, upon a showing of special circumstances sufficient in the opinion of the chancellor to justify such leave. The hesitation to permit the infant to make a new defense before he arrived at his majority arose from the suggestion of the inconvenience of such a privilege; since, as often as a decree was made against the infant, he might with as much reason 'make similar applications, and so occasion infinite vexation.' In *Savage v. Carrol*, 1 B. & B.



The Usual Practice was for the complainant to serve the late infant with a subpoena to show good cause,<sup>1</sup> and if he failed to appear, or to show good cause against the decree, it was made absolute.<sup>2</sup>

(2) *Notice to Parties in Interest.* — Proceedings by infants upon coming of age to set aside the decree against them can only be had on notice to the other parties to the decree.<sup>3</sup>

548, the infant, before he attained his majority, was allowed to amend the answer filed in his behalf to the original bill, or to put in a new answer thereto, with liberty to both parties 'to proceed on such amended or new answer, as they may be advised.' Lord Chancellor Brougham, in *Kelsall v. Kelsall*, 2 Myl. & K. 409, said that the doctrine was carried in this case 'two steps further than the authorities in strictness warrant.' In the same case, *Savage v. Carroll*, as reported in 2 B. & B. 445, which was not adverted to by Lord Brougham in *Kelsall v. Kelsall*, 2 Myl. & K. 409, it was declared that the infant, having been allowed to go into a new defense before he became twenty-one years of age, should not have a day to show cause against such decree as might be rendered in that proceeding, but in it should be considered as a plaintiff, and, as such, as much bound by the decree as if he were adult. And thus the doctrine was left by the cases in chancery in England and Ireland. See also 1 Dan. Ch. Pr. 165 *et seq.* A summary of it is, that if the infant defendant is dissatisfied with the defense which has been made for him, and wishes to make a new one, he must, in general, wait till he has attained twenty-one before he applies; but upon special circumstances shown he may obtain leave to make a new defense during his infancy, and in such case, in order to bind him by the decree to be made, he will be treated as a plaintiff and be bound accordingly, without a right to show cause against the second decree." *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

In *Kentucky*, under Code of Pr., § 397, providing for opening decrees against infants within twelve months after majority, the proceeding is by petition, and is in lieu of the bill of review under the old practice. *Park v. Bolinger*, (Ky. 1888) 8 S. W. Rep. 914, 9 S. W. Rep. 295.

1. *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514; *Creath v. Smith*, 20 Mo. 113; *Ruby v. Strother*, 11 Mo. 417;

*Bushnell v. Hartford*, 4 Johns. Ch. (N. Y.) 301; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 368; *Wilkinson v. Wilkinson*, 1 Desaus. (S. Car.) 201; 1 Dan. Ch. Pr. 171.

2. *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

**Decree Becomes Absolute on Failure to Show Cause.** — In ordinary cases where an infant is allowed time after his arrival at majority to show cause against a decree, the decree is deemed complete, but the infant has the time allowed to show cause against it, and if cause is shown within the time specified the infant is bound.

*Illinois.* — *Kuchenbeiser v. Beckert*, 41 Ill. 172.

*Iowa.* — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 291.

*Indiana.* — *Seward v. Clark*, 67 Ind. 289.

*Kentucky.* — *Waring v. Reynolds*, 3 B. Mon. (Ky.) 59; *Moss v. Hall*, 79 Ky. 40; *Cox v. Story*, 80 Ky. 64.

*Massachusetts.* — *Coffin v. Heath*, 6 Met. (Mass.) 76.

*New Hampshire.* — *Dow v. Jewell*, 21 N. H. 470.

*New York.* — *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Harris v. Youman*, Hoffm. Ch. (N. Y.) 178.

*Ohio.* — *Long v. Mulford*, 17 Ohio St. 484.

*Tennessee.* — *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619.

*Virginia.* — *Wilkinson v. Oliver*, 4 Hen. & M. (Va.) 450.

*Canada.* — *Mair v. Kerr*, 2 Grant's Ch. (U. C.) 223; *Scottish Manitoba Invest., etc., Co. v. Blanchard*, 2 Manitoba 154.

3. *Ruby v. Strother*, 11 Mo. 417; *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

"Independent of the Statute, it was the doctrine that the infant desiring to impeach the decree for fraud, collusion, or error, might proceed by bill of review, or supplemental bill in the nature of a bill of review, or by original bill; and in case of a decree *nisi causa* against an infant, on his coming of age

(3) *What May Be Gone Into.*—In order to show cause why revision and reconsideration of the decree should take place, the party who was an infant may examine the proofs for the decree and resort to any error on its face.<sup>1</sup> Or he may show fraud or collusion between the plaintiff and his guardian.<sup>2</sup> He may also show that he had grounds of defense which were not before the

and applying to the court for leave to put in a new answer, it was granted on his *ex parte* application." *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514. See also *Fountain v. Caine*, 1 P. Wms. 504; *Napier v. Effingham*, 2 P. Wms. 401.

**Necessary Parties.**—In *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514, the court said: "We are, like Lord Chancellor Brougham in *Kelsall v. Kelsall*, 2 Myl. & K. 409, in quest of a 'trace of a precedent' for obviating the injustice which may arise from permitting a late infant to exercise his right under our statute to show cause to the contrary of a decree which has been carried into effect according to its terms, without making a party to his proceeding one who has acquired and holds the real estate decreed to be sold or conveyed. In *Pope v. Lemaster*, 5 Litt. (Ky.) 77, a case strongly resembling that made by Goode's bill and the bill of the widow and children to set aside the decree made in favor of Goode, the decree was executed by the conveyance of commissioners to the complainant in pursuance of the decree, and the purchaser from the grantee in that conveyance was made a party defendant to the proceeding to vacate the decree. The case is valuable as showing the nature of a decree against infants with a saving in their favor, and the principles on which the court will proceed in setting aside the decree when the late infant shows cause against it, and as illustrating the propriety of making the holder of title under the original decree a party to the proceeding to vacate it. In *Walker v. Page*, 21 Gratt. (Va.) 636, land of infants was sold in pursuance of a decree with respect to which there was a saving in favor of the infants, who, having attained majority, exhibited their bill to vacate the decree, and the purchaser under the decree was made defendant. In *Field v. Williamson*, 4 Sandf. Ch. (N. Y.) 613, it is said that the provision in a decree in favor of an infant's right to show cause against it does not confer on him the right to

assail the decree in any mode that he pleases without regard to the course of practice pursued by adult defendants. He cannot show cause except in some regular proceeding adapted to the nature of the case, and in order to institute such proceeding he must first obtain the leave and direction of the court. Not that the court, in a case of any doubt, would refuse leave, but that there is a sound judgment and discretion to be exercised in each instance, both as to the probable cause for granting leave and the most expedient mode of effecting the object." In *Ruby v. Strother*, 11 Mo. 417, where a decree had been rendered against infants, who, on coming of age, instituted proceedings to set it aside, it was held that notice to the other parties to the decree was necessary. The court said: "As the parties, appellees, were all out of court, proceedings against them without notice could not be had without violating the first principles of justice." To this we agree, and we hold that when a decree has been made for the sale or conveyance of the real estate of an infant in those cases in which he has the right to show cause against the decree, and a sale or conveyance is made under it, and the infant proceeds to impeach it, he must make a party to his proceeding him who holds the real estate under the decree. It is a primary rule as to parties, that one interested in the subject-matter and the object of the suit is a necessary party defendant." *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

1. *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 77; *Ralston v. Lahec*, 8 Iowa 17.

In *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485, it is held that an infant defendant, after coming of age, can avoid a decree against him, only by showing errors in the decree, and that he cannot reinvestigate the subject-matter of the suit, nor redeem mortgaged premises which have been sold.

2. See *supra*, IV. 3. *Bill to Impeach Decree.*

court, or which were not insisted upon at the hearing,<sup>1</sup> but the cause must be one existing at the rendition of the decree, and not such as arose afterwards.<sup>2</sup>

(4) *How Resisted*. — The original decree cannot be pleaded in bar of the proceeding to show cause.<sup>3</sup> But the allegations of the petition may be controverted by answer.<sup>4</sup>

**5. Necessity of Basing on Full Proof** — *a*. STATEMENT OF RULE. — The rule of practice is well settled, both in actions at law and suits in equity, that in proceedings against minors, even where there is a guardian, strict proof is required, and a judgment or decree not based upon full proof of every material allegation is erroneous.<sup>5</sup>

1. *Ralston v. Lahee*, 8 Iowa 17; 1 Dan. Ch. Pr. 173.

"The petitioner is not confined to the former proceedings only, but may by further proceedings show himself entitled to relief." *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 77.

The infant may make whatever defense to the original action he may have had, and is entitled to such relief as if no judgment had ever been rendered against him. *Booker v. Kennerly*, 96 Ky. 415.

"The distinction taken by, and which runs through, all the authorities cited and examined, is this: In cases of foreclosure, whether by sale or otherwise, the infant, on arriving at full age, on showing cause, can only allege error on the face of the decree; whereas, in other cases, he will be permitted to file a new answer, and to litigate the merits of the case." *McClay v. Norris*, 9 Ill. 381.

2. *Walker v. Page*, 21 Gratt. (Va.) 636, in which case lands of infants had been sold under a decree, and the proceeds reinvested in Confederate bonds. After the infants came of age they sought to set aside the sale on the ground that it was not for their interests; but it was held that as against a *bona fide* purchaser the former infants could not go out of the record and show that upon facts and events arising subsequent to the rendition of the decree their interests were not promoted by the sale.

**3. Pleading Original Decree in Bar.** — "His opinion is, that in order to show cause the party who was an infant may, under this act, examine the proofs for the said decree, and resort to any error on the face of the decree tending to show that the conveyance therein decreed ought not to have been ordered or directed, and therefore that the decree and proceedings therein cannot

be pleaded in bar of the present relief prayed, as is contended by the plea put in with the answer of the defendants. Such a plea would entirely frustrate the intent and object of the act, and would be, as is expressed in the case of *Fountain v. Caine*, 1 P. Wms. 504, at the same time that the court gave him liberty to show cause, to tie up his hands from showing cause. In a case where such a plea was allowed (*Gregory v. Molesworth*, 3 Atk. 626), the bill had been brought by an infant, by his *prochein ami*, and of course the complainant could not have the benefit of a proviso similar to the one in the present decree; and in *Napier v. Effingham*, 2 P. Wms. 401, an infant complainant was allowed to show cause after he came of age." *Prutzman v. Pitesell*, 3 Har. & J. (Md.) 78.

**4. Answer.** — In *Park v. Bolinger*, (Ky. 1888) 8 S. W. Rep. 914, 9 S. W. Rep. 295, it was held that the party opposing the proceedings to open the decree is not limited, as under the old practice, to a demurrer or plea of release of error; but may by answer controvert the allegations of such petition as the matters of fact considered by the court at the time of rendering judgment.

**5. Full Proof Necessary** — *Alabama*. — *Matthews v. Dowling*, 54 Ala. 202; *Stammers v. McNaughten*, 57 Ala. 277. *Arkansas*. — *Carnall v. Wilson*, 14 Ark. 482; *Evans v. Davies*, 39 Ark. 235; *Driver v. Evans*, 47 Ark. 297; *Boyd v. Roane*, 49 Ark. 397.

*Georgia*. — *Groce v. Field*, 13 Ga. 24. *Kentucky*. — *Chalfant v. Monroe*, 3 Dana (Ky.) 35; *Hanna v. Spotts*, 5 B. Mon. (Ky.) 364; *Chambers v. Warren*, 6 B. Mon. (Ky.) 246.

*Illinois*. — *McClay v. Norris*, 9 Ill. 370; *Hitt v. Ormsbee*, 12 Ill. 166; *Enos v. Capps*, 12 Ill. 255; *Hamilton v.*

**Guardian's Admissions or Waivers.** — And this is true notwithstanding any admissions or waivers in the answer of their guardian *ad litem*, or even though he confess the whole ground of the action.<sup>1</sup>

Gilman, 12 Ill. 260; Cochran v. McDowell, 15 Ill. 10; Tuttle v. Garrett, 16 Ill. 354; Cost v. Rose, 17 Ill. 276; Greenough v. Taylor, 17 Ill. 602; Reavis v. Fielden, 18 Ill. 77; Masterson v. Wiswould, 18 Ill. 48; Chaffin v. Kimball, 23 Ill. 36; Tibbs v. Allen, 27 Ill. 129; Reddick v. State Bank, 27 Ill. 148; Cox v. Reed, 27 Ill. 434; Waugh v. Robbins, 33 Ill. 182; Rhoads v. Rhoads, 43 Ill. 239; Quigley v. Roberts, 44 Ill. 503; Wilhite v. Pearce 47 Ill. 413; Preston v. Hodgen, 50 Ill. 56; Barnes v. Hazleton, 50 Ill. 429; Thomas v. Adams, 59 Ill. 223; Campbell v. Campbell, 63 Ill. 462, 502; Kennedy v. Merriam, 70 Ill. 228; Gooch v. Green, 102 Ill. 507; Bennett v. Bradford, 132 Ill. 269; Jeffers v. Jeffers, 139 Ill. 368; Allison v. Drake, 145 Ill. 517; Hale v. Hale, 146 Ill. 247; Atchison, etc., R. Co. v. Elder, 149 Ill. 173.

**Indiana.** — Hough v. Doyle, 8 Blackf. (Ind.) 300; Hough v. Canby, 8 Blackf. (Ind.) 301; Taylor v. Parker, Smith (Ind.) 225; Crain v. Parker, 1 Ind. 374; Knox v. Coffey, 2 Ind. 161; Driver v. Driver, 6 Ind. 286; Wells v. Wells, 6 Ind. 447; Martin v. Starr, 7 Ind. 224; Alexander v. Frary, 9 Ind. 481.

**Iowa.** — Ralston v. Lahee, 8 Iowa 26.

**Maryland.** — Benson v. Wright, 4 Md. Ch. 278.

**Michigan.** — Thayer v. Lane, Walk. (Mich.) 200; Chandler v. McKinney, 6 Mich. 219; Smith v. Smith, 13 Mich. 262; Ballentine v. Clark, 38 Mich. 396; State Tax Law Cases, 54 Mich. 415; Claxton v. Claxton, 56 Mich. 557.

**Mississippi.** — Ingersoll v. Ingersoll, 42 Miss. 163; Johnson v. McCabe, 42 Miss. 255; Wells v. Smith, 44 Miss. 296; McIlvoy v. Alsop, 45 Miss. 365; Gregory v. Orr, 61 Miss. 307; Gusdofer v. Gundy, 72 Miss. 313.

**Missouri.** — Heath v. Ashley, 15 Mo. 393; Revelly v. Skinner, 33 Mo. 100; Collins v. Trotter, 81 Mo. 276.

**New York.** — Litchfield v. Burwell, 5 How. Pr. (N. Y. Supreme Ct.) 341; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; James v. James, 4 Paige (N. Y.) 119; Stephenson v. Stephenson, 6 Paige (N. Y.) 353; Barker v. Woods, 1 Sandf. Ch. (N. Y.) 129; Wright v. Miller, 1 Sandf. Ch. (N. Y.) 103.

**Ohio.** — Massie v. Donaldson, 8 Ohio 377.

**Rhode Island.** — Eaton v. Tillinghast, 4 R. I. 284.

**Virginia.** — Hite v. Hite, 2 Rand. (Va.) 409; Lee v. Braxton, 5 Call (Va.) 459; Tennent v. Pattons, 6 Leigh (Va.) 196.

**United States.** — Walton v. Coulson, 1 McLean (U. S.) 120; White v. Joyce, 158 U. S. 128.

Where infants have been brought into court by *scire facias*, under the statute, to show cause why they should not be made parties to the judgment, it is necessary to prove up the case *de novo* against them. Cox v. Reed, 27 Ill. 434.

**Whether the Guardian Answers or Not,** strict proof is nevertheless required. Masterson v. Wiswould, 18 Ill. 48; Chaffin v. Kimball, 23 Ill. 36; Tibbs v. Allen, 27 Ill. 129.

**Reference to Master.** — Where infants are defendants in chancery proceedings, the proper and convenient practice is for the court to refer the matter which requires to be proved to the master in chancery, that he may take the evidence and report the facts to the court for its final determination. McClay v. Norris, 9 Ill. 370.

**Though Guardian Ad Litem Be Irregularly Appointed,** yet if his answer require proof of complainant, and it be not made, it is error to decree without it. Chambers v. Warren, 6 B. Mon. (Ky.) 246.

**Failure to Assign or Notice Error.** — Where answers of infant defendants are put in by their guardian *ad litem* denying the averments of the bill affecting their interests, the material averment of the bill must be proved, and if it is not, there can be no decree against the infant, and this though there is no special assignment or notice in argument of such error. Stammers v. McNaughten, 57 Ala. 277.

**Partition on Application of Infant.** — Where partition of lands in which an infant has an interest is prayed for, the facts must be inquired into as fully when the infant is a complainant as when he is a defendant. Claxton v. Claxton, 56 Mich. 557.

**1. Full Proof Notwithstanding Admissions or Waivers in Pleadings.** — **Alabama.** — Matthews v. Dowling, 54 Ala. 202; Mitchel v. Hardie, 84 Ala. 349.

The judgment or decree cannot be based upon admissions, but for the infant's protection everything must be proved.<sup>1</sup>

*Illinois*. — Thornton v. Vaughan, 3 Ill. 218; McClay v. Norris, 9 Ill. 370; Enos v. Capps, 12 Ill. 255; Hitt v. Ormsbee, 12 Ill. 166; Hamilton v. Gilman, 12 Ill. 260; Tuttle v. Garrett, 16 Ill. 354; Cost v. Rose, 17 Ill. 276; Reavis v. Fielden, 18 Ill. 77; Master-son v. Wiswold, 18 Ill. 48; Peak v. Pricer, 21 Ill. 164; Chaffin v. Kimball, 23 Ill. 36; Fridley v. Murphy, 25 Ill. 146; Tibbs v. Allen, 27 Ill. 119; Reddick v. State Bank, 27 Ill. 148; Waugh v. Robbins, 33 Ill. 183; Rhoads v. Rhoads, 43 Ill. 239; Quigley v. Roberts, 44 Ill. 503; Barnes v. Hazleton, 50 Ill. 429; Thomas v. Adams, 59 Ill. 223; Campbell v. Campbell, 63 Ill. 502; Jeffers v. Jeffers, 139 Ill. 368.

*Indiana*. — Hough v. Canby, 8 Blatchf. (Ind.) 301; Thompson v. Doe, 8 Blatchf. (Ind.) 336; Hough v. Doyle, 8 Blatchf. (Ind.) 300; Crain v. Parker, 1 Ind. 374; Driver v. Driver, 6 Ind. 286; Martin v. Starr, 7 Ind. 224; Alexander v. Frary, 9 Ind. 481; McEndree v. McEndree, 12 Ind. 97; Abdil v. Abdil, 26 Ind. 287; Hawkins v. Hawkins, 28 Ind. 66.

*Iowa*. — Ralston v. Lahee, 8 Iowa 17.

*Kentucky*. — Chalfant v. Monroe, 3 Dana (Ky.) 35; Isert v. Davis, (Ky. 1895) 32 S. W. Rep. 294.

*Maine*. — Stinson v. Pickering, 70 Me. 273.

*Maryland*. — Kent v. Taneyhill, 6 Gill & J. (Md.) 1; Stewart v. Duvall, 7 Gill & J. (Md.) 179.

*Michigan*. — Thayer v. Lane, Walk. (Mich.) 200; Chandler v. McKinney, 6 Mich. 217; Smith v. Smith, 13 Mich. 258.

*Mississippi*. — Johnson v. McCabe, 42 Miss. 255; Ingersoll v. Ingersoll, 42 Miss. 155.

*Missouri*. — Collins v. Trotter, 81 Mo. 276.

*New York*. — Wright v. Miller, 1 Sandf. Ch. (N. Y.) 103; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; James v. James, 4 Paige (N. Y.) 115; Stephenson v. Stephenson, 6 Paige (N. Y.) 353.

*Oregon*. — English v. Savage, 5 Oregon 518.

*Tennessee*. — Crabtree v. Niblett, 11 Humph. (Tenn.) 488.

*Virginia*. — Hite v. Hite, 2 Rand. (Va.) 409.

*United States*. — Lenox v. Notrebe, Hempst. (U. S.) 251; U. S. Bank v.

Ritchie, 8 Pet. (U. S.) 128; Walton v. Coulson, 1 McLean (U. S.) 134.

*England*. — Holden v. Hearn, 1 Beav. 445.

Full proof is necessary in equity proceedings against infants, no matter what answer may be made for them by their guardian *ad litem*. Reavis v. Fielden, 18 Ill. 77; Rhoads v. Rhoads, 43 Ill. 239; Chaffin v. Kimball, 23 Ill. 36.

**A Decree on an Unsworn Answer** admitting plaintiff's case is erroneous. U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128.

**Prejudicial Admissions in Pleading Permitted**. — Guardians of infant heirs may, when acting in good faith, admit in their pleadings in partition proceedings that certain land in controversy is the community property of the parents of their wards, although the admission may be prejudicial to formerly asserted claims. (Stiles, J., dissents.) Kromer v. Friday, 10 Wash. 621.

Though the defendant is a minor and answers by a guardian *ad litem*, the execution of written instruments averred in the petition is admitted, unless denied under oath. McLean v. Webster, 45 Kan. 644.

**A Stipulation Waiving Proof** made by a guardian *ad litem* of an infant in a partition suit has been held binding. Le Bourgeoise v. McNamara, 82 Mo. 189.

**1. Judgment on Decree Cannot Be Based on Admissions** — *Alabama*. — Matthews v. Dowling, 54 Ala. 202; Ashford v. Patton, 70 Ala. 479.

*Arkansas*. — Driver v. Evans, 47 Ark. 297; McCoy v. Arnett, 47 Ark. 445.

*California*. — Waterman v. Lawrence, 19 Cal. 210.

*Illinois*. — Hitt v. Ormsbee, 12 Ill. 166; Hamilton v. Gilman, 12 Ill. 260; Cochran v. McDowell, 15 Ill. 10; Tuttle v. Garrett, 16 Ill. 354; Reddick v. State Bank, 27 Ill. 148; Rhoads v. Rhoads, 43 Ill. 239; Quigley v. Roberts, 44 Ill. 503; Jeffers v. Jeffers, 139 Ill. 368; Hale v. Hale, 146 Ill. 227; Atchison, etc., R. Co. v. Elder, 50 Ill. App. 276.

*Indiana*. — Crain v. Parker, 1 Ind. 374; McEndree v. McEndree, 12 Ind. 97.

*Iowa*. — Ralston v. Lahee, 8 Iowa 17.

*Maine*. — Tucker v. Bean, 65 Me. 353.

*Michigan*. — Thayer v. Lane, Walk. (Mich.) 200; Smith v. Smith, 13 Mich.

*b.* PRESERVING EVIDENCE IN RECORD. — In chancery cases a decree against infants can be supported only where it appears from a finding in the decree, or from the evidence preserved in the record, that the material allegations of the bill were proved;<sup>1</sup> for in such cases it will not be presumed on appeal that any evidence was given to the court below, except what appears in the record.<sup>2</sup> But in proceedings under the code, or in actions at law, if the evidence is not made part of the record the appellate court will presume in favor of the court below that the decree was made upon proper proof, and not in favor of the infants that no proof was made because none appears.<sup>3</sup>

258; *Dragoo v. Dragoo*, 50 Mich. 573; *Claxton v. Claxton*, 56 Mich. 557.

*Mississippi*. — *Ingersoll v. Ingersoll*, 42 Miss. 163.

*New Jersey*. — *Shultz v. Sanders*, 38 N. J. Eq. 156.

*New York*. — *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 118; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

*Ohio*. — *Massie v. Matthews*, 12 Ohio 351.

*United States*. — *White v. Joyce*, 158 U. S. 128.

*England*. — *Holden v. Hearn*, 1 Beav. 445.

When the rights of infants are in question the facts cannot be established by admissions. Judgment must not be passed as of course, but the facts must be proved, and the court upon examination of them must determine for itself what the interest of the infant demands. *Claxton v. Claxton*, 56 Mich. 557.

**Contra in Oregon** by statute. *English v. Savage*, 5 Oregon 518.

**Guardians Ad Litem Have No Power** to admit away by their answer the rights of the infants, and the court has no power to give effect to such admission as to a matter and for a purpose not within the scope of their appointment or the purview of the complaint. *Waterman v. Lawrence*, 19 Cal. 210.

Where the record contains nothing which would seem to empower a guardian to admit a case against his infant ward, a decree founded upon such an admission will not be sustained. *McEndree v. McEndree*, 12 Ind. 97.

**Generally as to Admissions by Guardians Ad Litem**, see *supra*, III. 3. *f.* (3) *Admissions and Waivers*.

**Admissions of Codefendants.** — A decree cannot be entered upon the admissions or concessions of adult codefendants; a decree so entered is invalid *inter*

*partes*. *Hale v. Hale*, 146 Ill. 227. *Compare Jeffers v. Jeffers*, 139 Ill. 368.

1. *Campbell v. Campbell*, 63 Ill. 502; *Tibbs v. Allen*, 27 Ill. 119; *Chaffin v. Kimball*, 23 Ill. 36; *Masterson v. Wisconsin*, 18 Ill. 48; *Reavis v. Fielden*, 18 Ill. 77; *Fridley v. Murphy*, 25 Ill. 146; *McClay v. Norris*, 9 Ill. 370; *Rhoads v. Rhoads*, 43 Ill. 239; *Quigley v. Roberts*, 44 Ill. 503; *Waugh v. Robins*, 33 Ill. 182; *Reddick v. State Bank*, 27 Ill. 145; *Ingersoll v. Ingersoll*, 42 Miss. 163; *Johnson v. McCabe*, 42 Miss. 255.

Proof in partition should be preserved in the record. *Chambers v. Jones*, 72 Ill. 276.

The proof must appear to be made either by the finding in the decree or by evidence preserved in the record. *Campbell v. Campbell*, 63 Ill. 462.

**Decree in Foreclosure.** — Where minor heirs are made parties defendant to a bill to foreclose, the decree must show that the material allegations of the bill were proved, or the decree will be reversed. *Preston v. Hodgen*, 50 Ill. 56.

2. *Reddick v. State Bank*, 27 Ill. 145.

3. *Alexander v. Frary*, 9 Ind. 481.

Where an agreement of parties would seem to dispense with the necessity of evidence, and the record contains none, it may be inferred there was none. *McEndree v. McEndree*, 12 Ind. 97.

For a case where it was held that the recitals in the decree repelled the presumption that it was made on evidence, see *Mitchell v. Hardie*, 84 Ala. 349.

**Statement of Distinction.** — In *Alexander v. Frary*, 9 Ind. 483, the court said: "It is true, the proceeding at bar would have been a chancery case under the old practice, and thus analogous to those cited. But the new practice has done away with the distinctive features of the chancery practice, in the only particulars in which it is to be distinguished

c. READING ANSWER AGAINST INFANT. — In chancery, an answer of an infant by his guardian *ad litem* is considered a pleading merely, and not an examination for the purpose of discovery.<sup>1</sup> It is not evidence, and cannot be read either for or against him;<sup>2</sup>

from a suit at law. Instead of a hearing by the chancellor, it is a trial by jury, or by the court acting as a jury. In such cases the verdict, or finding, as the case may be, has always been presumed in this court to be upon sufficient evidence. Nor are we aware of any case in our own or any other reports where the record showed the infant properly in court, on a question triable by the course of the common law, the issues made, tried, and determined against the infant, in which the courts have reversed the judgment because the evidence against him was not in the record. \* \* \* The case of *Ward v. Kelly*, 1 Ind. 101, declaring that because there were infant defendants, therefore the record must show the evidence on which the decree passed, is not sustained by the authorities. The true position of that and all the other cases is, that because they were chancery cases, therefore the evidence must appear in the record. The same error was committed by the judge who delivered the opinion in *Driver v. Driver*, 6 Ind. 286, by following what he supposed to be the rule, without looking into the authorities or stopping to consider the reason of the thing."

1. *Johnson v. McCabe*, 42 Miss. 255; *Thayer v. Lane*, Walk. (Mich.) 200; *Smith v. Smith*, 13 Mich. 258; *Chandler v. McKinney*, 6 Mich. 217; *Collins v. Trotter*, 81 Mo. 275; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536.

A bill against an infant while he remains a minor is a bill for relief merely, as the answer of the guardian *ad litem* cannot be used as evidence either for or against the infant. *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353.

2. **Reading Answer Against Infant — Alabama.** — *Matthews v. Dowling*, 54 Ala. 202.

**Arkansas.** — *Evans v. Davies*, 39 Ark. 235.

**Illinois.** — *Enos v. Capps*, 12 Ill. 255; *Cost v. Rose*, 17 Ill. 276; *Chaffin v. Kimball*, 23 Ill. 36; *Tibbs v. Allen*, 27 Ill. 119; *Barnes v. Hazleton*, 50 Ill. 429.

**Indiana.** — *Campbell v. Campbell*, 1 Ind. 220.

**Iowa.** — *Ralston v. Lahee*, 8 Iowa 17, 74 Am. Dec. 295.

**Kentucky.** — *Chalfant v. Monroe*, 3 Dana (Ky.) 36.

**Maryland.** — *Kent v. Taneyhill*, 6 Gill & J. (Md.) 1; *Stewart v. Duvall*, 7 Gill & J. (Md.) 179; *Higgins v. Horwitz*, 9 Gill (Md.) 341; *Benson v. Wright*, 4 Md. Ch. 278.

**Massachusetts.** — *Coffin v. Heath*, 6 Met. (Mass.) 76; *Walsh v. Walsh*, 116 Mass. 382.

**Michigan.** — *Thayer v. Lane*, Walk. (Mich.) 200; *Chandler v. McKinney*, 6 Mich. 217; *Smith v. Smith*, 13 Mich. 258; *Burt v. McBain*, 29 Mich. 260.

**Mississippi.** — *Johnson v. McCabe*, 42 Miss. 255; *Ingersoll v. Ingersoll*, 42 Miss. 163.

**Missouri.** — *Collins v. Trotter*, 81 Mo. 275.

**New York.** — *Bulkley v. Van Wyck*, 5 Paige (N. Y.) 536; *Stephenson v. Stephenson*, 6 Paige (N. Y.) 353; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

**Ohio.** — *French v. French*, 8 Ohio 214; *Massie v. Donaldson*, 8 Ohio 377.

**South Carolina.** — *Bulow v. Witte*, 3 S. Car. 323.

**Tennessee.** — *McGavock v. Bell*, 3 Coldw. (Tenn.) 520; *Davidson v. Bowden*, 5 Sneed (Tenn.) 129.

**Virginia.** — *Alexandria Bank v. Patton*, 1 Rob. (Va.) 565.

**United States.** — *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128; *Walton v. Coulson*, 1 McLean (U. S.) 125.

**England.** — *Wrottesley v. Bendish*, 3 P. Wms. 235; *Carew v. Johnston*, 2 Sch. & Lef. 292; *Leigh v. Ward*, 2 Vent. 72.

**Reason for Rule.** — Regularly an infant's answer by his guardian is not evidence against him, because he is not sworn, and it is only for the purpose of making proper parties. It is not in reality the answer of the infant, but of the guardian only, who is sworn. *Kent v. Taneyhill*, 6 Gill & J. (Md.) 1.

In chancery the answer of an infant could not be read against him, because it was not his answer, but that of his guardian who is sworn, and the infant may know nothing of the contents of the answer put in for him by his guard-

but the allegations of the bill must be established by legal proof.<sup>1</sup>

*d. JUDGMENTS UPON THE PLEADINGS.*—A judgment or decree against minors, upon the pleadings, without proof of every material allegation prejudicial to their interests, is erroneous.<sup>2</sup> This is a corollary of the rule above stated requiring full proof in all cases to sustain a judgment or decree against infants.<sup>3</sup>

*c. JUDGMENTS BY DEFAULT OR DECREES PRO CONFESSO.*—It is a necessary consequence of the rule requiring full proof in all cases where the rights of infants are involved, that a judgment against an infant cannot be rendered by default and without proof;<sup>4</sup> and if such a judgment is rendered it is erroneous and

ian, or may be of such tender years as not to be able to judge of it. *Wrottesley v. Bendish*, 3 P. Wms. 235.

1. Where an infant is defendant, and it is not expressly provided by law that his answer by guardian shall be considered an admission of the facts alleged in the bill, it is proper to put the plaintiff to proof of all his material allegations. *Kent v. Taneyhill*, 6 Gill & J. (Md.) 1.

**The Answer of a Complainant to a Cross-bill** of adult defendants is not evidence against infant defendants. *Campbell v. Campbell*, 1 Ind. 220.

2. *Illinois.*—*McClay v. Norris*, 9 Ill. 370.

*Iowa.*—*Ralston v. Lahee*, 8 Iowa 17.

*Maine.*—*Tucker v. Bean*, 65 Me. 353.

*Michigan.*—*Thayer v. Lane*, Walk. (Mich.) 200.

*Mississippi.*—*Ingersoll v. Ingersoll*, 42 Miss. 163; *Gusdofer v. Gundy*, 72 Miss. 313.

*New York.*—*James v. James*, 4 Paige (N. Y.) 115; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

*South Carolina.*—*Bulow v. Witte*, 3 S. Car. 323.

**"A Decree upon an Answer** of a guardian *ad litem* will not bind an infant. He can open it or set it aside when he comes of age." *McClay v. Norris*, 9 Ill. 370.

In a direct proceeding the answer of the guardian *ad litem* alone is not a sufficient foundation for an order of sale; the record should show further that the court heard proof that satisfied it of the truth of the allegations of the petition. *Fridley v. Murphy*, 25 Ill. 146.

3. See cases cited in the last note but one.

4. **Default Cannot Be Taken**—*Arkansas.*—*Evans v. Davies*, 39 Ark. 235; *Mor-*

*ris v. Edmonds*, 43 Ark. 427; *Woodall v. Delatour*, 43 Ark. 521.

*California.*—*Joyce v. McAvoy*, 31 Cal. 273.

*Florida.*—*Gibbons v. McDermott*, 19 Fla. 852.

*Georgia.*—*Groce v. Field*, 13 Ga. 24.

*Illinois.*—*McClay v. Norris*, 9 Ill. 370; *Hamilton v. Gilman*, 12 Ill. 260; *Enos v. Capps*, 12 Ill. 255; *Cost v. Rose*, 17 Ill. 276; *Peak v. Pricer*, 21 Ill. 164; *Peak v. Shasted*, 21 Ill. 137; *Chaffin v. Kimball*, 23 Ill. 36; *Rhoads v. Rhoads*, 43 Ill. 239; *Quigley v. Roberts*, 44 Ill. 503.

*Indiana.*—*Driver v. Driver*, 6 Ind. 286; *Blake v. Douglass*, 27 Ind. 416.

*Iowa.*—*Ralston v. Lahee*, 8 Iowa 17.

*Kansas.*—*Watts v. Cook*, 24 Kan. 280.

*Kentucky.*—*Simmons v. McKay*, 5 Bush (Ky.) 25; *Chalfant v. Monroe*, 3 Dana (Ky.) 35; *Pond v. Doneghy*, 18 B. Mon. (Ky.) 558; *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 400; *Smith v. Ferguson*, 3 Metc. (Ky.) 424; *Rowland v. Cock*, 1 J. J. Marsh. (Ky.) 453.

*Louisiana.*—*Metcalfe v. Alter*, 31 La. Ann. 389.

*Massachusetts.*—*Knapp v. Crosby*, 1 Mass. 479; *Swan v. Horton*, 14 Gray (Mass.) 179.

*Mississippi.*—*Ingersoll v. Ingersoll*, 42 Miss. 163.

*New Hampshire.*—*Dow v. Jewell*, 21 N. H. 470.

*New York.*—*McMurray v. McMurray*, 66 N. Y. 175; *Kellog v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 28; *Barker v. Woods*, 1 Sandf. Ch. (N. Y.) 129; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Arnold v. Sandford*, 14 Johns. (N. Y.) 417.

*Ohio.*—*Massie v. Donaldson*, 8 Ohio 377.



may be opened or vacated on motion, either with or without terms, within the discretion of the court.<sup>1</sup> Cases are to be found, however, in which judgments by default have been sustained.<sup>2</sup> Nevertheless, the general rule is applicable in equity as well as at law, and it is error to render a decree *pro confesso* against an infant.<sup>3</sup>

*Texas.* — *Martin v. Weyman*, 26 Tex. 460.

*Virginia.* — *Lee v. Braxton*, 5 Call (Va.) 459.

Taking judgment against an infant as for want of an answer without appointing a guardian *ad litem* is an irregularity. *Kellog v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 28. See N. Y. Code Civ. Pro., § 1218.

**Remedy by Writ of Error.** — In actions at law, before the New York code of procedure, where an infant appeared by an attorney, or suffered a default, and judgment was entered against him, his remedy was by writ of error to reverse the judgment, and infancy was assigned as error in fact. *Arnold v. Sandford*, 14 Johns. (N. Y.) 417.

**Withdrawing Plea.** — It is error for the court to allow a plea which has been filed by a guardian to be withdrawn by him, and to render judgment by default against the infant. *Peak v. Pricer*, 21 Ill. 164.

**Where There Is No Appearance or Defense** by guardian for the infant a judgment will be erroneous, *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 400; *Chalfant v. Monroe*, 3 Dana (Ky.) 35; *Rhoads v. Rhoads*, 43 Ill. 239; if not void. *Dohms v. Mann*, 76 Iowa 723.

Judgment cannot be taken by default, even when a regular guardian has been summoned and failed to appear. *Woodall v. Delatour*, 43 Ark. 521.

**1. Opening Default Against Infant.** — It is within the discretion of the court to impose terms as a condition of opening judgment taken by default against an infant. *Jackson v. Brunor*, 16 Misc. Rep. (N. Y. City Ct.) 204. But see *Kellog v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 28, where it was held that a judgment against an infant by default and without the appointment of a guardian *ad litem* would be set aside on motion and without terms.

"In *Graham v. Pinckney*, 7 Robt. (N. Y.) 147, the defendant, who had appeared by guardian, was in default in interposing an answer. The court refused to let him in on the defense of infancy, and denied a motion to set

aside the judgment entered against him by default for want of an answer. I do not approve of this decision, as I think the motion, having been in the action against the infant, and the default excused, should have been granted on terms covering the expense of the default and motion." *Phillips v. Dusenberry*, 8 Hun (N. Y.) 349.

When full opportunity is given to set aside a default for irregularity, it must be presumed the court below offered ample protection to the rights of the defendant under the law. *Filmore v. Russell*, 6 Colo. 171.

**Opening Without Vacating Decree.** — When a defendant in chancery, who is served by publication, and has been defaulted, and a decree rendered against him, petitions the court to be allowed to come in and answer, it is erroneous to vacate the decree on such application. The statute simply requires that, notwithstanding the decree, the defendant thus situated shall be heard. *Mulford v. Stalzenback*, 46 Ill. 303.

**2. Judgment by Default Allowed.** — Sand & H. Dig., § 1119, which empowers a minor to transact business with the same force and effect as if he were an adult, will authorize him to defend without a guardian *ad litem* so as to bind him by a judgment by default where no such guardian is appointed. *Merriman v. Sarlo*, 63 Ark. 151.

As by appearing a guardian engages to faithfully manage the cause, and as the court cannot be presumed to know whether any, and if any what, defense ought to be made, and as an action against an infant should not be delayed on account of his infancy, judgment may, after appearance of the guardian, be taken against the infant for a default in failing to plead. *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398.

**3. Decree Pro Confesso Without Proof Erroneous** — *Alabama.* — *Tabor v. Lorraine*, 53 Ala. 543; *Jones v. Jones*, 56 Ala. 612; *Daily v. Reid*, 74 Ala. 415; *Hooper v. Hardie*, 80 Ala. 114; *Griffith v. Ventress*, 91 Ala. 366.

*Arkansas.* — *Morris v. Edmonds*, 43 Ark. 427.

**Void or Voidable.** — Where, however, a judgment by default or decree *pro confesso* is in fact rendered, it is merely erroneous and not absolutely void.<sup>1</sup>

*Colorado.* — *Barker v. Hamilton*, 3 Colo. 291.

*Florida.* — *Gibbons v. McDermott*, 19 Fla. 852.

*Georgia.* — *Groce v. Field*, 13 Ga. 24.

*Kentucky.* — *Young v. Whitaker*, 1 A. K. Marsh. (Ky.) 398; *Carneal v. Sthreshley*, 1 A. K. Marsh. (Ky.) 471; *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362.

*Illinois.* — *McClay v. Norris*, 9 Ill. 370; *Enos v. Capps*, 12 Ill. 255; *Hamilton v. Gilman*, 12 Ill. 260; *Sconce v. Whitney*, 12 Ill. 150; *Cost v. Rose*, 17 Ill. 276; *Chaffin v. Kimball*, 23 Ill. 36; *Tibbs v. Allen*, 27 Ill. 119; *Rhoads v. Rhoads*, 43 Ill. 239; *Quigley v. Roberts*, 44 Ill. 503; *Barnes v. Hazleton*, 50 Ill. 429; *Turner v. Jenkins*, 79 Ill. 228.

*Indiana.* — *Knox v. Coffey*, 2 Ind. 161; *Driver v. Driver*, 6 Ind. 286.

*Iowa.* — *Ralston v. Lahee*, 8 Iowa 26.

*Louisiana.* — *Greenwood v. New Orleans*, 12 La. Ann. 426.

*Maine.* — *Tucker v. Bean*, 65 Me. 352.

*Massachusetts.* — *Walsh v. Walsh*, 116 Mass. 382.

*Michigan.* — *Thayer v. Lane*, Walk. (Mich.) 200; *Chandler v. McKinney*, 6 Mich. 217; *Smith v. Smith*, 13 Mich. 258; *Burt v. McBain*, 29 Mich. 260; *Ballentine v. Clark*, 38 Mich. 395.

*Mississippi.* — *Johnson v. McCabe*, 42 Miss. 255; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Wells v. Smith*, 44 Miss. 296; *McIlvoy v. Alsop*, 45 Miss. 365; *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

*Missouri.* — *Heath v. Ashley*, 15 Mo. 393.

*New Hampshire.* — *Dow v. Jewell*, 21 N. H. 486.

*New York.* — *Barker v. Woods*, 1 Sandf. Ch. (N. Y.) 129; *Wright v. Miller*, 1 Sandf. Ch. (N. Y.) 103; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Wright v. Miller*, 8 N. Y. 9.

*Oregon.* — *English v. Savage*, 5 Oregon 518.

*Ohio.* — *Massie v. Donaldson*, 8 Ohio 377.

*South Carolina.* — *Bailey v. Whaley*, 14 Rich. Eq. (S. Car.) 81; *Bulow v. Witte*, 3 S. Car. 323.

*Tennessee.* — *McKnight v. Hughes*, 4

*Lea* (Tenn.) 526; *Rutherford v. Richardson*, 1 Sneed (Tenn.) 609; *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

*Virginia.* — *Lee v. Braxton*, 5 Call (Va.) 459.

*United States.* — *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128; *Walton v. Coulson*, 1 McLean (U. S.) 120.

*England.* — *Lane v. Hardwicke*, 9 Beav. 148.

**Service by Publication — Construction of Statute.** — Statutes authorizing decrees *pro confesso* against absent defendants upon failure to appear and defend within a time limited in a notice by publication do not authorize decrees *pro confesso* against infant defendants. *Bailey v. Whaley*, 14 Rich. Eq. (S. Car.) 81. See also *supra*, III. 1. *Service of Process.*

**Effect of Reversal on Codefendants.** — Where a decree has been rendered in the Chancery Court against adults and infants, on *pro confesso* against the former, without proof, and the High Court of Errors and Appeals on that account reverses the decree, the *pro confesso* as to the adults will not thereby be set aside. The cause will proceed in the Chancery Court as if no decree had been pronounced against the infants, leaving to its legal discretion whether the *pro confesso* will be set aside or not. *Ingersoll v. Ingersoll*, 42 Miss. 155.

**Counterclaims.** — Where in a suit on behalf of an infant by his next friend, the answer is made a counterclaim and the case is transferred to the equity side of the docket, the counterclaim cannot be taken as confessed, but a guardian *ad litem* should be appointed for the infant plaintiffs who became defendants to the counterclaim, and a reply interposed by him for them. *Morris v. Edmonds*, 43 Ark. 427.

**An Interlocutory Decree** taking the bill *pro confesso* may be entered against infants, but the cause should then be referred to a master for proof as against the infants. See *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 368, for a form of decree containing a reference to the master.

**1. Default on Pro Confesso Erroneous, Not Void** — *Alabama.* — *Daily v. Reid*, 74 Ala. 415.

*f.* JUDGMENTS BY CONFESSION, AGREEMENT, OR CONSENT.—An infant cannot in his own name confess judgment;<sup>1</sup> and it is a general rule that neither a general guardian, nor a guardian *ad litem*, can consent to a judgment or decree against his ward,<sup>2</sup>

*Arkansas.* — *Boyd v. Roane*, 49 Ark. 397.

*Indiana.* — *Blake v. Douglass*, 27 Ind. 416; *Jones v. Levi*, 72 Ind. 593.

*Minnesota.* — *Eisenmenger v. Murphy*, 42 Minn. 84.

*Mississippi.* — *McLemore v. Chicago, etc., R. Co.*, 58 Miss. 514.

*Missouri.* — *Shields v. Powers*, 29 Mo. 317.

*New York.* — *Jackson v. Brunor*, 17 Misc. Rep. (N. Y. Supreme Ct.) 339.

*North Carolina.* — *White v. Albertson*, 3 Dev. L. (N. Car.) 242.

A judgment against an infant by default, without the appointment of a guardian *ad litem*, is erroneous but not void. *Blake v. Douglass*, 27 Ind. 416.

**Judgment on Decree Held Void.** — A decree rendered against an infant on default of his guardian, who was alone served with a summons, is void. *Fanning v. Foley*, 99 Cal. 336.

Judgment by default against an infant is void when there is nothing in the record showing an acceptance by a guardian *ad litem* of his trust, or notice to him thereof. *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

**Collateral Attack Permitted.** — Where an infant *feme covert* gave a mortgage to secure the payment of a note against her husband, and a bill in chancery was filed to foreclose it, and a guardian *ad litem* was appointed for the mortgagor in the foreclosure suit, who accepted the appointment but neglected to answer, and was defaulted, and decree of foreclosure and sale made on such default, giving the infant no day in court after coming of age, and the infant did not come of age until after the time for appealing from the decree had expired, it was held that the decree, as against the mortgagor, was absolutely void, and she might recover possession of the premises in ejectment against persons who derived title through the sale made under the decree. *Chandler v. McKinney*, 6 Mich. 217.

1. *Soper v. Fry*, 37 Mich. 236.

A warrant of attorney by an infant to confess judgment is void; and a judg-

ment entered in virtue of it will be set aside on motion. *Bennett v. Davis*, 6 Cow. (N. Y.) 393.

In *Oregon* it is held, under the provisions of the Code, that a guardian *ad litem* can confess judgment against his ward. *English v. Savage*, 5 Oregon 518.

2. *Florida.* — *Braswell v. Downs*, 11 Fla. 62.

*Illinois.* — *Bennett v. Bradford*, 132 Ill. 269; *Gooch v. Green*, 102 Ill. 507; *Allison v. Drake*, 145 Ill. 517; *Reddick v. State Bank*, 27 Ill. 145; *Cochran v. McDowell*, 15 Ill. 10; *Hitt v. Ormsbee*, 12 Ill. 169; *Hamilton v. Gilman*, 12 Ill. 260; *Tuttle v. Garrett*, 16 Ill. 354; *Greenough v. Taylor*, 17 Ill. 602.

*Indiana.* — *Martin v. Starr*, 7 Ind. 226.

*Louisiana.* — *Aiken v. Gatlin*, 48 La. Ann. 877.

*Maine.* — *Tucker v. Bean*, 65 Me. 352.

*Michigan.* — *Burt v. McBain*, 29 Mich. 260; *Wood v. Truax*, 39 Mich. 628; *Claxton v. Claxton*, 56 Mich. 557; *Bearinger v. Pelton*, 78 Mich. 114.

*Mississippi.* — *Johnson v. McCabe*, 42 Miss. 255.

*New York.* — *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341.

*United States.* — *Walton v. Coulson*, 1 McLean (U. S.) 120; *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 128.

A decree should not be entered on a consent by a guardian to a waiver of benefit to the infant. *Hite v. Hite*, 2 Rand. (Va.) 409.

A guardian who is personally interested cannot insist upon a partition agreed to by him by which his ward will get less than his share. *McLarty v. Broom*, 67 N. Car. 311.

**Consent Not Equivalent to Fraud.** — The mere fact that a guardian consents to a decree of foreclosure of the ward's land for a certain amount will not of itself show fraud or collusion on the part of the guardian. *Swift v. Yanaway*, 153 Ill. 197.

**The Attorney for the Guardian of infant defendants cannot consent to a judgment or decree.** *Litchfield v. Burwell*, 5 How. Pr. (N. Y. Supreme Ct.) 341; *White v. Joyce*, 158 U. S. 128.

and a judgment so rendered may be set aside<sup>1</sup> on bill of review.<sup>2</sup>

**Exceptions.** — There are cases, however, in which it has been held that the guardian may consent to judgment or decree against the infant.<sup>3</sup> Thus, it has been held that a decree made upon the consent of the guardian *ad litem*, and upon representations of

1. *Allison v. Drake*, 145 Ill. 500; *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173; *Bent v. Maxwell Land Grant, etc., Co.*, 3 N. Mex. 158.

**When Decree Will Not Be Set Aside.** — Where a decree in a will contest was entered by consent of the infants interested, that fact was considered insufficient to set the decree aside, their interests being left the same as before, merely because they were incapable of giving a valid consent. *Cox v. Lynn*, 138 Ill. 195.

In *Syme v. Trice*, 96 N. Car. 243, it was held that a sale under a decree by consent, the infancy of some of the defendants not appearing at the time, would not be set aside on that ground alone three years afterwards, upon the application of a defendant who was eighteen years at the time of service on him, and whose mother was a co-defendant.

**2. Bill of Review.** — The fact that a decree against an infant defendant was rendered by agreement of his guardian will not preclude the infant from bringing a bill to impeach it. *Gooch v. Green*, 102 Ill. 507.

A decree against an infant by agreement of the parties, without evidence heard sustaining the bill, is erroneous, and it may be set aside on bill of review, but not as against a *bona fide* purchaser for value without notice of the error. *Allison v. Drake*, 145 Ill. 501.

Where one of two infant defendants to a suit is statute barred, upon a bill of review filed by the other, it is error to annul a conveyance under a consent decree as to both defendants; it should be annulled only in respect to the interests of the infant not statute barred. *Mitchel v. Hardie*, 84 Ala. 349.

**Error Apparent.** — "Notwithstanding the guardian *ad litem* of an infant defendant may admit the allegations of a bill, or consent to a decree, the complainant is still bound to prove, by independent evidence, every material fact essential to relief; and, if it appears from the decree that it is rendered only on the admissions or by the consent of the guardian *ad litem*, it consti-

tutes error apparent, which will support a bill of review. On the former appeal, we held that if a decree is rendered on a bill to sell real estate to pay the debts of a decedent, only by consent of the guardian *ad litem*, or on his admissions of the facts of debts against the estate, and the insufficiency of the personal assets to pay them, this was error apparent, for which the decree should be reversed back to the pleadings, that there may be a further and fuller trial on legal and independent testimony. *Hooper v. Hardie*, 80 Ala. 114." *Mitchel v. Hardie*, 84 Ala. 349.

**3. Partition.** — In *North Carolina* it has been held that a guardian may concur in a decree of partition on behalf of his ward, if the partition be equal. *McLarty v. Broom*, 67 N. Car. 311. So, under the *Missouri* statute relative to partition, a guardian *ad litem*, if convinced that no available defense can be made for the infant, may stipulate for judgment of partition in accordance with the prayer of the partition. *Le Bourgeoise v. McNamara*, 10 Mo. App. 116, affirmed 82 Mo. 189.

Where, in a partition suit, the court has passed on the partition made, and approved it, the guardians of the infant defendants may consent to the judgment as entered. *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81.

**Sale of Infant's Real Estate.** — Under a statute providing that all parties must consent in writing to the sale of real estate, the consent of infants by a guardian *ad litem* is sufficient. *Sharp v. Findley*, 71 Ga. 654.

On a proceeding to sell infants' real estate the testamentary guardian and guardian *ad litem* are competent to consent to a decree of sale, as well as in other respects touching the proceeding. *Southern Marble Co. v. Stegall*, 90 Ga. 236. See also *Jones v. Levi*, 72 Ind. 592.

**Probate of Will.** — *Certiorari* will not lie on the application of a minor to quash proceedings on the probate of a will which he assented to by a guardian *ad litem* duly appointed. *Peters v. Peters*, 8 Cush. (Mass.) 529.

counsel and the adjudication of the court, that it was a decree fit and proper to be made as against the infant, is binding upon him.<sup>1</sup>

**Beneficial Decrees.** — So where it clearly appears that a decree is beneficial to the infant it may be pronounced on the consent of the guardian and all other parties.<sup>2</sup> But it is usual to refer the matter to a master to inquire and report whether the decree will be really for the infant's benefit.<sup>3</sup>

**Judgment Not Void.** — A judgment by consent is at most erroneous and not absolutely void.<sup>4</sup>

**V. APPELLATE REVIEW — 1. Taking the Appeal.** — An infant cannot prosecute an appeal or writ of error in his own name,<sup>5</sup> though, if he does so, a joinder in error waives his disability.<sup>6</sup>

**By Guardian Ad Litem.** — It has been held that a guardian *ad litem* may appeal from a judgment against his ward.<sup>7</sup>

1. *Walsh v. Walsh*, 116 Mass. 377.

2. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174; *Pulliam v. Pulliam*, 4 Dana (Ky.) 123.

A consent decree will not be set aside where it appears that it was beneficial to the infants. *Morris v. Virginia Ins. Co.*, 85 Va. 588; *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854.

3. **Reference to Ascertain Whether Decree Is Beneficial.** — *Dow v. Jewell*, 21 N. H. 470; *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

But if the court decrees against an infant by consent without a reference to ascertain whether it be for his benefit or not, he is, nevertheless, bound by it. *Dow v. Jewell*, 21 N. H. 470; *Wall v. Bushby*, 1 Bro. C. C. 484.

A decree, if beneficial to the infant, will not be set aside merely because made without a reference. *Milly v. Harrison*, 7 Coldw. (Tenn.) 191.

An agreement made in the progress of a cause, clearly for the benefit of infants, may be the basis of a decree, without a reference to report whether it is beneficial. *Allen v. McCullough*, 2 Heisk. (Tenn.) 175.

4. *San Fernando Farm Homestead Assoc. v. Porter*, 58 Cal. 81; *Hollis v. Dashiell*, 52 Tex. 187; *Gunter v. Fox*, 51 Tex. 383; *Bloom v. Burdick*, 1 Hill (N. Y.) 143; *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253; *Barber v. Graves*, 18 Vt. 290; *White v. Albertson*, 3 Dev. L. (N. Car.) 241.

5. **Dismissal of Appeal.** — When the appellant is an infant, the appeal must be sued out by his guardian, or next friend, who may either give bond to supersede the judgment or security for

the costs of the appeal; and where (as in this case) the appeal is sued out by the infant in his own name, and errors are assigned by attorney, on the fact of such infancy being brought to the knowledge of the court by affidavits, the appeal will be dismissed on motion. *Cook v. Adams*, 27 Ala. 294.

**Curing Defect in Appellate Court.** — The failure to have a guardian *ad litem* appointed for an infant beneficiary on the accounting of an executor is no reason for dismissing an appeal by the infants; but the informality may be cured by appointment of a guardian in the appellate court. *In re Sanborn's Estate*, (Mich. 1896) 67 N. W. Rep. 128. But see *Cook v. Adams*, 27 Ala. 294, holding that the appeal must be dismissed. See also *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 169.

6. *McClay v. Norris*, 9 Ill. 370.

7. A guardian *ad litem* continues to act through all stages of the case unless discharged, and may appeal from a judgment against the minor without permission of the court. *Tyson v. Tyson*, (Wis. 1896) 68 N. W. Rep. 1015. And see *Thomas v. Safe Deposit, etc.*, Co., 73 Md. 451; *Sprague v. Beamer*, 45 Ill. App. 17. See also *supra*, III. 3. j. *Powers and Duties of Guardians Ad Litem*. But a guardian *ad litem* cannot appeal in his own name. *Harlan v. Watson*, 39 Ind. 393.

**Dismissal of Appeal by Guardian Ad Litem.** — An appeal taken by an infant from a justice's judgment may be dismissed on motion of a guardian *ad litem* appointed for him after the appeal. *Robbins v. Cutler*, 26 N. H. 173.

A motion by a guardian to dismiss an

**By Next Friend.** — And any person who will give the bond required by law may sue out a writ of error for an infant as his next friend.<sup>1</sup>

**Before or After Majority.** — Statutes authorizing infants to prosecute writs of error within a limited time after coming of age merely extend the time for suing out the writ, and the writ may be sued out at any time within the extended period, whether the disability exists or has been removed.<sup>2</sup>

**An Appeal Bond is usually required.**<sup>3</sup>

appeal taken by his ward, made at the next term after his appointment, was held to have been seasonably made, where it appeared that at the term at which he was appointed he had not had an opportunity to consider the rights of his ward. *Robbins v. Cutler*, 26 N. H. 173.

**Stipulations as to Hearing.** — Appeals and writs of error may be taken to the Supreme Court of *Illinois*, held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division. A guardian *ad litem* or next friend of an infant may consent that the case, in which the infant is a party, be heard in some other grand division than the one in which it was decided, or at a term of the Supreme Court earlier than such appeal or writ of error would be ordinarily heard, and may waive the execution of an appeal bond by the opposite party. *Kingsbury v. Buckner*, 134 U. S. 651.

1. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206; *Ames v. Ames*, 148 Ill. 321; *McClay v. Norris*, 9 Ill. 370; *Cook v. Adams*, 27 Ala. 294.

**Next Friend to Bring Writ of Error.** — A writ of error being the beginning of a new suit may be prosecuted by a person as next friend, other than the person by whom the suit was originally brought. The infant may make a new selection at pleasure. *Ames v. Ames*, 148 Ill. 321.

Where a guardian *ad litem* neglects for years to take an appeal in the case in which judgment was rendered, the appeal may be taken by a next friend. *Carlton v. Miller*, 2 Tex. Civ. App. 619.

**Where the Minority of a Party Disables Him from Appealing** from a judgment rendered by a justice of the peace against him, he may have error. *Valier v. Hart*, 11 Mass. 300.

**In Alabama**, section 2526 of the Revised Code, which provides that infants must sue by their next friend, and be defended by a guardian to be ap-

pointed by the court, has reference only to suits in the common-law courts of original jurisdiction, and does not apply to appeals, which must, therefore, be governed by the rules of the common law. *Cook v. Adams*, 27 Ala. 294.

2. *Ridgely v. Bennett*, 13 Lea (Tenn.) 206.

Infancy of the plaintiffs in error in such case saves their writ from the bar of the statute of limitations, and a plea of the statute in such cases must show that the infants have arrived at full age and been barred by time since elapsed. *McKee v. Hann*, 9 Dana (Ky.) 526.

**Where an Infant Is Coupled in a Judgment with Others of Full Age**, and error is brought by all after the expiration of a year from the judgment rendered, but within a year from the time the impediment of infancy is removed, the writ of error is not barred by the statute of limitations, but is within the purview of the saving clause. *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

**In Kentucky**, under Code, § 745, providing that an infant can appeal from a judgment within twelve months after coming of age, for errors appearing in the record, construed in connection with section 518, providing for the vacation of judgments against minors, where minority does not appear in the record, the remedy of an infant against a decree sustaining a conveyance as being for his best interest, is by appeal on coming of age, and not by application to vacate. *Ogden v. Stevens*, 98 Ky. 564.

3. Where an appeal has not been perfected by the guardian *ad litem* by giving an undertaking for costs, the Supreme Court may retain the record for the purpose of allowing perfection of the appeal in that particular in the court below. *Tyson v. Tyson*, (Wis. 1896) 68 N. W. Rep. 1015.

**Appeal Bond Unnecessary.** — In *Texas* a guardian *ad litem* is within Rev.

Although No Exception Is Taken, a decree against infants will be reversed for prejudicial error.<sup>1</sup>

**Certiorari.** — An infant may verify a petition for a writ of certiorari.<sup>2</sup>

**2. Parties.** — All persons who appear by the record to be interested should be made parties to the appeal or writ of error.<sup>3</sup>

**Joinder in Error.** — Where there is a judgment against infants and adults jointly, it seems that they must join in error, and the judgment cannot be reversed as to the infants without also reversing it as to the adults.<sup>4</sup>

**3. Questions as to Appointment of Guardian Ad Litem.** — Error in

Stat. 1895, art. 1408, providing that guardians shall not be required to give bond to perfect appeal or writ of error taken by them in their fiduciary capacity. *Simon v. Blanchett*, (Tex. Civ. App. 1896) 37 S. W. Rep. 346; *Schonfield v. Turner*, 75 Tex. 324. But see *Daniels v. Mason*, (Tex. 1896) 37 S. W. Rep. 1061, holding that the section in question applies only to appeals and writs of error to the Court of Civil Appeals, and not to proceedings on error from the Court of Civil Appeals to the Supreme Court.

1. *Smith v. Smith*, 13 Mich. 258. But see *Emeric v. Alvarado*, 64 Cal. 529, where it was held that the failure to appoint a guardian *ad litem* must be called to the attention of the court below. And see also *Morrison v. Beckham*, 96 Ky. 72, holding that under the *Kentucky* statute error in rendering a judgment against infants without a defense, and without a report of the guardian stating that he was unable to make a defense, will not be considered on appeal unless called to the attention of the court below.

2. *Bowers v. Kanaday*, 94 Ga. 209; provided, of course, he understands the nature of an oath.

3. *McKee v. Hann*, 9 Dana (Ky.) 526, holding that where an estate was sold on the petition of the infant owners by their father, a natural guardian, they are after his death the only proper plaintiffs; the devisee of purchaser, he being dead, and the commissioner who sold the estate and holds the proceeds, being the only necessary defendants.

Under the provisions of the *New York Code of Civil Procedure*, § 2573, which provides that every person who, on the face of special proceedings before a surrogate, appears to be a necessary party, if not already a party, shall

be made so, and that all parties and persons interested shall be made parties to an appeal, unless legally represented, on appeal by the father of an infant from the appointment of a stranger as guardian *ad litem*, the infant is not a necessary party. *In re Van Vranken*, (Supreme Ct.) 3 N. Y. Supp. 445.

4. See *Priest v. Hamilton*, 2 Tyler (Vt.) 49.

**In Assumpsit** against an infant and another jointly there may be a severance before judgment, and a recovery against the adult; yet after judgment against both there can be no severance on writ of error. *Cruikshank v. Gardner*, 2 Hill (N. Y.) 333.

**In Trespass** there may be such severance as to an infant or any other co-defendant; but if the infant appear by attorney, and judgment pass against him and the other defendants, it will be reversed as to all. *Cruikshank v. Gardner*, 2 Hill (N. Y.) 333.

**Reversal as to Infants — Pro Confesso as to Adults.** — Where the court reverses a final decree in chancery against infant and adult defendants, upon their joint appeal, for the reason that the record fails to present the proper showing of service of process as to the infants, if the decree as to the adults be based upon *pro confesso*, it will be left to the discretion of the chancellor to whose court the case is remanded whether to set aside such *pro confesso*. *Moody v. McDuff*, 58 Miss. 751, *approving* *Ingersoll v. Ingersoll*, 42 Miss. 155, and *restricting* *Hamilton v. Lockhart*, 41 Miss. 460.

*Generally*, to the effect that all parties against whom a joint judgment has been rendered must join in error, see article ERROR, WRIT OF, vol. 7, p. 860; also APPEALS, vol. 2, p. 182.

Regard to the Appointment of a guardian *ad litem* may be considered on appeal.<sup>1</sup>

**What Record Must Show.** — But where the record does not contain the evidence upon which the appointment of a guardian *ad litem* was made, the appointment will not be reviewed.<sup>2</sup> As a general rule, the record must affirmatively show the appointment of a guardian *ad litem*, or the decree cannot be supported,<sup>3</sup> as an

1. Failure to appoint a guardian *ad litem* may be raised on appeal from the judgment. *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167.

**Who May Appeal from Appointment.** — Persons having no right to petition for the appointment of a guardian *ad litem* have consequently no right to appeal from the decision on the application. *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299.

**Failure to Appoint Guardian Ad Litem Below — Appointment to Raise Question on Appeal.** — “It is a question of some difficulty whether the defendant is in a position to raise the question upon appeal until she has obtained the

appointment of the guardian *ad litem* to represent her in this court. In *Kellog v. Klock*, 2 Code Rep. (N. Y. Supreme Ct.) 29, an action in a court of record, the defendant procured the appointment of the special guardian before applying to set the judgment aside. In *Fairweather v. Satterly*, 7 Robt. (N. Y.) 547, also an action in a court of record, a guardian *ad litem* was appointed subsequent to the judgment; but in all the other cases I have examined wherein error was alleged in obtaining judgment without the appointment of the guardian *ad litem*, the appeal or other method of review seems to have been directly presented by the infant. I know of no provision relative to appeals from justices' judgments authorizing the appointment of a guardian *ad litem* subsequent to judgment. Certainly there are no provisions in justice's court, and there the appeal must be taken before the county court would have any authority to act. It would also seem to be analogous to the case of one improperly served with process as being inveigled into the jurisdiction of the court, or otherwise improperly brought into court, appearing to set aside the summons. The appellant says, as emphatically as possible, ‘I am improperly in court, and I am trying to get out as speedily as possible. It doesn't lie with you who brought me into court to say that I am not here at least for

the purpose of setting this judgment aside.’ It also seems that an appeal is the only remedy presented. See *Jessurun v. Mackie*, 24 Hun (N. Y.) 624. And the fact, if conceded, that the judgment is void, does not prevent an appeal. *Striker v. Mott*, 6 Wend. N. Y.) 465.” *Frost v. Frost*, 15 N. Y. Misc. Rep. (Onondaga County Ct.) 167.

**In a Bastardy Proceeding.** — An objection that no guardian *ad litem* was appointed for an infant defendant cannot be made for the first time in the court of last resort. *De Priest v. State*, 68 Ind. 569.

2. *Fowler v. Young*, 19 Kan. 150.

3. *McIntosh v. Atkinson*, 63 Ala. 241; *Rowland v. Jones*, 62 Ala. 322; *Darrington v. Borland*, 3 Port. (Ala.) 10; *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Rhett v. Mastin*, 43 Ala. 86; *Ewing v. Armstrong*, 4 J. J. Marsh. (Ky.) 69; *Abdil v. Abdil*, 26 Ind. 289; *Stinson v. Pickering*, 70 Me. 273; *Fuller v. Smith*, 49 Vt. 253; *Myers v. Myers*, 6 W. Va. 369; *McDonald v. McDonald*, 3 W. Va. 676; *Treiber v. Shafer*, 18 Iowa 29.

**Harmless Error.** — A sale of infant's real estate made under a decree will not be set aside where a guardian has filed an answer, if no exception were taken to the answer or to the report of the sale, though the record fails to show the appointment, if it does not appear that the minors were prejudiced. *Louisville Bank v. Leftwick*, 9 Heisk. (Tenn.) 471.

**Recognition of Guardian.** — The failure of the record to show the appointment of a guardian *ad litem* is not fatal upon a direct appeal, if it is shown by the court, by its subsequent action, that it recognized the guardian as the proper representative of the infants. *Ridgely v. Bennett*, 13 Lea (Tenn.) 210; *Louisville Bank v. Leftwick*, 9 Heisk. (Tenn.) 471.

**If, Because of the Misprision of the Clerk Below,** a record be brought up against infants, in which no guardian *ad litem* appears, the decree must be reversed;



appellate court will not look outside the judgment roll to determine whether or not a guardian *ad litem* was appointed.<sup>1</sup>

4. **Presumptions.** — In many respects, where the record is silent, the presumption on appeal will be in favor of the action of the court below.<sup>2</sup>

**VI. SALE OF INFANT'S REAL ESTATE** — 1. **Power of Court to Authorize Sale** — a. **INHERENT CHANCERY JURISDICTION.** — At common law the guardian or trustee of an infant had no right to change the nature of an infant's property from realty to personality, or *vice versa*;<sup>3</sup> and it is still a disputed question, upon

but when remanded, if the misprision appears, the court may proceed to decree on the answer of the guardian formerly appointed. *Shield v. Bryant*, 2 A. K. Marsh. (Ky.) 342.

1. *Batchelder v. Baker*, 79 Cal. 266.

Neither the petition for the appointment of a guardian *ad litem* of a minor, nor the order of appointment, forms part of the judgment roll. *Brady v. Page*, 66 Cal. 232; *Emeric v. Alvarado*, 64 Cal. 592; *Batchelder v. Baker*, 79 Cal. 266.

2. **Presumption as to Answer.** — Where the answer of a guardian *ad litem* has been acted upon by the court, it will be presumed that the answer was sworn to as required by statute, although the record fails to show that fact. *Durrett v. Davis*, 24 Gratt. (Va.) 302.

Though a record does not contain the answer of infants by their guardian *ad litem*, yet if it shows that the infants did appear and answer, and that there was a replication, the presumption is that the answer was regularly filed. *Smith v. Henkel*, 81 Va. 524.

It will be presumed that matters set up by a guardian *ad litem* of an infant are for the latter's benefit, as otherwise the court below would not allow them to be set up. *Aldrich v. Willis*, 55 Cal. 81.

**Service of Process upon Infants** in the manner prescribed by the statute and rules of court must be affirmatively shown by the record. *Abdil v. Abdil*, 26 Ind. 287; *Winston v. McLendon*, 43 Miss. 254; *Martin v. Starr*, 7 Ind. 224; *Woods v. Montevallo Coal, etc., Co.*, 107 Ala. 364; *Rowland v. Jones*, 62 Ala. 322.

A decree in chancery against an infant upon service of process on him alone, without any service as to his father or guardian, is erroneous, under Miss. Code of 1871, where the record fails to show that the infant had no father or guardian in the state. *Moody*

*v. McDuff*, 58 Miss. 751, citing with approval *Erwin v. Carson*, 54 Miss. 284.

**Presumption as to Age of Infant.** — Nothing appearing of record to show the age of an infant defendant, or whether he had a guardian or not, if the return show service by delivery of a copy to the infant, the presumption is that he was over fourteen years of age, and that no service on parent or guardian was required. *Webber v. Webber*, 1 Metc. (Ky.) 21. To the same effect, see *Emeric v. Alvarado*, 64 Cal. 530. But compare *Johnston v. Hainesworth*, 6 Ala. 451, where no service was had on the infant, and it was urged that, the age of the infant not appearing, it should be presumed that he was under fourteen years of age, in which case the statute did not require service upon him; but the court said that no presumption or inferences could be made against infants.

**Defendants Will Not Be Presumed to Be Minors**, so as to support an order entered appointing an attorney for nonresident minor defendants, where the record fails to show that fact. *Hodges v. Frazier*, 31 Ark. 58.

**Generally.** — See also the various specific sections of this article for presumptions on appeal.

3. *Alabama.* — *Robinson v. Pebworth*, 71 Ala. 240.

*Connecticut.* — *Holbrook v. Brooks*, 33 Conn. 347.

*Georgia.* — *Skeahan v. Ordinary*, 32 Ga. 266; *Collins v. Dixon*, 72 Ga. 475.

*Illinois.* — *Attridge v. Billings*, 57 Ill. 489.

*Iowa.* — *McReynolds v. Anderson*, 69 Iowa 208.

*Kentucky.* — *Moore v. Moore*, 12 B. Mon. (Ky.) 662.

*Michigan.* — *Matter of Dorr*, Walk. (Mich.) 145.

*Mississippi.* — *Gully v. Dunlap*, 24 Miss. 410.

which the authorities are conflicting, whether even a court of equity can authorize such a conversion <sup>1</sup> in the absence of statu-

*Missouri.* — *Woods v. Boots*, 60 Mo. 546; *West v. West*, 75 Mo. 204.

*New Jersey.* — *Rockwell v. Morgan*, 13 N. J. Eq. 384.

*New York.* — *White v. Parker*, 8 Barb. (N. Y.) 48.

*Pennsylvania.* — *Royer's Appeal*, 11 Pa. St. 36; *Davis's Appeal*, 60 Pa. St. 118.

*Tennessee.* — *Ex p. Crutchfield*, 3 Yerg. (Tenn.) 336.

*Virginia.* — *Boisseau v. Boisseau*, 79 Va. 73.

*England.* — *Ex p. Phillips*, 19 Ves. Jr. 118; *Ware v. Polhill*, 11 Ves. Jr. 278.

1. *Garmstone v. Gaunt*, 1 Colly. 577; *Calvert v. Godfrey*, 6 Beav. 107; *De Witt v. Palin*, L. R. 14 Eq. 251; *In re Howarth*, L. R. 8 Ch. 415.

In *Ex p. Jewett*, 16 Ala. 409, *Dargan*, J., said: "I confess I have not been able to find a case in any of the English books where a sale of real estate of an infant has been ordered on the ground alone that it would be for the interest of the infant, unless connected with the further reason of paying debts, or providing a maintenance for the infant."

**Selling Timber and Minerals.** — But there are cases in which that which is ordinarily and technically considered as part of the real estate of an infant may be converted into personality; that is, the timber or mineral part of the inheritance may be sold and converted into personality. *Williams's Case*, 3 Bland (Md.) 186; *Rook v. Worth*, 1 Ves. 461; *Anandale v. Anandale*, 2 Ves. 383; *Tullit v. Tullit*, Amb. 370; *Ex p. Ludlow*, 2 Atk. 407; *Ex p. Bromfield*, 1 Ves. Jr. 462, 3 Bro. C. C. 510; *Oxenden v. Compton*, 2 Ves. Jr. 70, 4 Bro. C. C. 231.

But in many respects these are more properly regarded as the mere products of the land, to be gathered as a portion of the rents and profits of the inheritance, as much so as corn and the other industrial fruits of the earth, the taking of which timber and mineral product, not being properly a conversion, but only a mode of enjoyment and perception of the profits of the estate, *Williams's Case*, 3 Bland (Md.) 186; *Chandos v. Talbot*, 2 P. Wms. 606; *Story v. Windsor*, 2 Atk. 630; *Pulteney v. Warren*, 6 Ves. Jr. 89; *Rook v. Worth*, 1 Ves. 461; *Tullit v. Tullit*, Amb. 370; *Oxenden v. Compton*, 2 Ves. Jr. 70, 4

Bro. C. C. 231; *Ex p. Phillips*, 19 Ves. Jr. 119; *Stoughton v. Leigh*, 1 Taunt. 402, and like all rents and profits derived from the inheritance, when taken must be regarded as personality. *Williams's Case*, 3 Bland (Md.) 186; *Bertie v. Abingdon*, 3 Meriv. 568.

**Mortgage Cases.** — In mortgage cases, it is said, the court will order an infant's real estate, regarding his equity of redemption as such, to be sold for his peculiar benefit and advantage. But the advantage of the sale of realty in such cases is most manifest, for if, instead of ordering a sale, the court were to pass a decree of foreclosure, the whole estate would be lost to the infant, whereas, if it should be worth more than the mortgage debt, by a sale the surplus would be saved and returned to him. Hence it is obvious that in all such cases the infant may gain by a sale, but cannot lose, and therefore the sale or conversion of such real estate into personality for the payment of the debt must be advantageous to him. *Williams's Case*, 3 Bland (Md.) 186; *Kearney v. Vaughan*, 50 Mo. 285; *Williams v. Harrington*, 11 Ired. L. (N. Car.) 620; *Snover v. Snover*, 17 N. J. Eq. 85; *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347; *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 154; *Goodier v. Ashton*, 18 Ves. Jr. 83; *Ashburton v. Ashburton*, 6 Ves. Jr. 6; *Mondey v. Mondey*, 1 Ves. & B. 223.

**Sale to Pay Debts of Ancestor.** — Real estate in the hands of an infant heir or devisee may, in various modes of judicial proceeding, be converted into personality for the payment of debts of the ancestor or devisor. In all such cases the surplus, if any, goes as a residuum of the realty to the heir or devisee from whom the body of the realty was taken. *Jones v. Jones*, 1 Bland (Md.) 452; *Williams's Case*, 3 Bland (Md.) 186; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Oxenden v. Compton*, 2 Ves. Jr. 73; *Maughan v. Mason*, 1 Ves. & B. 415. As to probate sales see article PROBATE AND ADMINISTRATION.

**Sales in Partition.** — Upon like grounds of necessity to satisfy the just claims of others, in partition cases where it is impracticable to make any just partition of the real estate, or where the partition cannot be made without much dis-

tory authority, and by virtue of its general jurisdiction over the estates of infants, except for the purpose of paying debts and for the maintenance of the infant. The jurisdiction has been claimed and exercised in many cases,<sup>1</sup> the rule being broadly declared to

advantage, there, as well by the long-established power of the court as by positive legislative enactment, real estate in which an infant has an interest in common with others may be sold, and a share of the proceeds of the sale, consisting of personalty, may be awarded to the infant. *Corse v. Polk*, 1 Bland (Md.) 233, note; *Williams's Case*, 3 Bland (Md.) 186.

**Sales on Execution.** — The lands of an infant may be sold on execution against him. *Shaffner v. Briggs*, 36 Ind. 55.

**Summary Statement of English Rule.** — "And therefore it is that the English Court of Chancery has never, except in the cases above mentioned, undertaken to dispose of an infant's land or inheritance in real estate; and that, although many cases have arisen in which the income of an infant's estate has been found to be entirely insufficient for his support, yet it has rarely occurred that the court has broken in upon the capital of even his personal estate for the mere purpose of maintenance, though it has frequently done so for his education and putting him out in life." *Williams's Case*, 3 Bland (Md.) 186.

1. *Alabama.* — *Gassenheimer v. Gassenheimer*, 108 Ala. 651; *Goodman v. Winter*, 64 Ala. 410; *Rivers v. Durr*, 46 Ala. 418; *Ex p. Jewett*, 16 Ala. 410; *Thorington v. Thorington*, 82 Ala. 489.

*Georgia.* — See *Sharp v. Findley*, 71 Ga. 654.

*Illinois.* — *Cowls v. Cowls*, 8 Ill. 435; *Smith v. Sackett*, 10 Ill. 534; *Grattan v. Grattan*, 18 Ill. 167; *Lynch v. Rotan*, 39 Ill. 14; *Hartmann v. Hartmann*, 59 Ill. 103; *Dodge v. Cole*, 97 Ill. 338; *Allman v. Taylor*, 101 Ill. 185; *Hale v. Hale*, 146 Ill. 227; *Ames v. Ames*, 148 Ill. 322. But see *Whitman v. Fisher*, 74 Ill. 154; *Donlin v. Hettinger*, 57 Ill. 348; *Dodge v. Cole*, 97 Ill. 338.

*Maryland.* — *Downin v. Sprecher*, 35 Md. 475; *Dorsey v. Gilbert*, 11 Gill & J. (Md.) 87. But see *Williams's Case*, 3 Bland (Md.) 186.

*New Jersey.* — *Snowhill v. Snowhill*, 3 N. J. Eq. 20.

*North Carolina.* — *Williams v. Harrington*, 11 Ired. L. (N. Car.) 616; *Sutton v. Schonwald*, 86 N. Car. 198;

*Rowland v. Thompson*, 73 N. Car. 504, where the court said that the question was no longer an open one.

*South Carolina.* — *Bulow v. Buckner*, Rich. Eq. Cas. (S. Car.) 401; *Bulow v. Witte*, 3 S. Car. 321; *Huger v. Huger*, 3 Desaus. (S. Car.) 18; *Stapleton v. Langstaff*, 3 Desaus. (S. Car.) 22.

*Tennessee.* — *Martin v. Keeton*, 10 Humph. (Tenn.) 536; *Thompson v. Mebane*, 4 Heisk. (Tenn.) 370; *Hurt v. Long*, 90 Tenn. 445; *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435; *Simpson v. Alexander*, 6 Coldw. (Tenn.) 619; *Talbot v. Provine*, 7 Baxt. (Tenn.) 502.

And the power of the Court of Chancery in this state to validate a void or voidable sale when it is for the interest of an infant to do so is well settled. *Ex p. Kirkman*, 3 Head (Tenn.) 518; *Bryant v. McCollum*, 4 Heisk. (Tenn.) 521; *Elliott v. Blair*, 5 Coldw. (Tenn.) 185; *Lancaster v. Lancaster*, 13 Lea (Tenn.) 132.

In *Hale v. Hale*, 146 Ill. 227, after an able review of the authorities in Illinois and elsewhere, the court reached the conclusion that "the power of courts of chancery, by virtue of their general jurisdiction over the estates of infants, to authorize the conversion of their real estate into personal, where it is clearly for their interest that such conversion should be made, is not only supported by the general current of authority in this country, but is so thoroughly settled by the former decisions of this court as to be no longer an open question in this state."

Equity may order the sale or mortgage of the whole or a part of either the legal or equitable estate of an infant whenever his interest requires it. *Smith v. Sackett*, 10 Ill. 534, cited with approval in *Allman v. Taylor*, 101 Ill. 191.

In *North Carolina*, doubts having arisen concerning the power in question, it was expressly confined to the courts of equity by statute. *Williams v. Harrington*, 11 Ired. L. (N. Car.) 620.

In *Huger v. Huger*, 3 Desaus. (S. Car.) 18, the court authorized a charge upon lands devised to a minor to be settled by an allotment of part of the tract devised, it clearly appearing that it would be highly oppressive upon the minor to

be that chancery has jurisdiction to order a conversion of realty into personalty whenever it clearly appears to be for the infant's interest to make such a conversion. But in *England*, and in many *American* courts, a contrary doctrine prevails,<sup>1</sup> and it is held

raise money to pay the charge in any other way.

In *Bulow v. Witte*, 3 S. Car. 321, the court said: "It is not disputed that the Court of Chancery has the power to sell and convey the estate of an infant. However doubtful it may at one time have been considered, 'it is now too firmly established to be shaken.'" Citing *Bulow v. Buckner*, Rich. Eq. Cas. (S. Car.) 401.

**Mortgage to Raise Money for Repairs.** — In *In re Jackson*, 21 Ch. Div. 786, the court authorized the mortgage of an infant's lands to raise money to make necessary repairs, although the English doctrine is that there is no inherent jurisdiction in chancery to direct the sale of an infant's lands. See cases cited in the following note.

**Estate of Infant Not in Esse.** — A court of equity, with its general powers, cannot decree the sale of the estate of an infant not *in esse*. *Downin v. Sprecher*, 35 Md. 474.

1. *Indiana*. — *Indiana*, etc., R. Co. v. *Brittingham*, 98 Ind. 299.

*Kentucky*. — *Walker v. Smyser*, 80 Ky. 620; *Henning v. Harrison*, 13 Bush (Ky.) 723; *Vowless v. Buckman*, 6 Dana (Ky.) 466.

*Minnesota*. — *Montour v. Purdy*, 11 Minn. 384.

*Missouri*. — *Kearney v. Vaughan*, 50 Mo. 284.

*New York*. — *Rogers v. Dill*, 6 Hill (N. Y.) 415; *O'Reilly v. King*, 2 Robt. (N. Y.) 587; *Matter of Turner*, 10 Barb. (N. Y.) 552; *Baker v. Lorillard*, 4 N. Y. 257; *Forman v. Marsh*, 11 N. Y. 544; *Horton v. McCoy*, 47 N. Y. 21; *Dodge v. St. John*, 96 N. Y. 263; *Losey v. Stanley*, 147 N. Y. 560, *disapproving* *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347; *Wood v. Mather*, 38 Barb. (N. Y.) 484.

*Rhode Island*. — *Thurston v. Thurston*, 6 R. I. 296.

*Tennessee*. — *Rogers v. Clark*, 5 Sneed (Tenn.) 665. But see cases *contra*, cited in the preceding note.

*Texas*. — *Messner v. Giddings*, 65 Tex. 310, *reviewing* many cases.

*Virginia*. — *Faulkner v. Davis*, 18 Gratt. (Va.) 651; *Pierce v. Trigg*, 10 Leigh (Va.) 423.

*United States*. — *Williamson v. Berry*, 8 How. (U. S.) 556.

*England*. — *Inwood v. Twyne*, AmbL. 417, 2 Eden 148; *In re Howarth*, L. R. 8 Ch. 415; *Lee v. Brown*, 4 Ves. Jr. 368; *Witter v. Witter*, 3 P. Wms. 99; *Calvert v. Godfrey*, 6 Beav. 97; *Kirk v. Webb*, Prec. Ch. 84; *Terry v. Terry*, Prec. Ch. 273; *Mason v. Day*, Prec. Ch. 319; *Fentiman v. Fentiman*, 13 Sim. 171; *Pierson v. Shore*, 1 Atk. 480; *Sergeson v. Sealey*, 2 Atk. 413; *Maynwarding v. Maynwarding*, 3 Atk. 414; *Rook v. Worth*, 1 Ves. 461; *Gibson v. Scudamore*, Dick 45; *Oxenden v. Compton*, 2 Ves. Jr. 73; *Ashburton v. Ashburton*, 6 Ves. Jr. 6; *Russell v. Russell*, 1 Moll. 525; *Ware v. Polhill*, 11 Ves. Jr. 278; *Webb v. Shaftsbury*, 6 Madd. 100; *Ex p. Phillips*, 19 Ves. Jr. 120; *Taylor v. Phillips*, 2 Ves. 23.

But even in *England* cases are to be found where the power to authorize a change in the nature of the estate of minors has been exercised and upheld where such changes were manifestly for the infant's benefit. See *Inwood v. Twyne*, AmbL. 417; *Winchelsea v. Worcliffe*, 1 Vern. 435; *In re Jackson*, 21 Ch. Div. 786.

In *Whitman v. Fisher*, 74 Ill. 154, although the exact question was not involved, the court said: "The proposition, a court of equity has no original jurisdiction to order the sale of real estate to pay debts or for any other purpose, so as to bind the infant's legal estate, is certainly the law, and has for its support the best authorities. The power is derived from legislative authority, and does not exist except in cases where the statute expressly confers it." See also *Donlin v. Hettinger*, 57 Ill. 348. But this is certainly not the law of *Illinois*. See cases cited in the preceding note.

In *Walker v. Smyser*, 80 Ky. 627, it was said to be the settled law of *Kentucky* that the powers of the courts of equity simply to sell and reinvest infants' real estate are statutory and not inherent.

In *Sharp v. Findley*, 59 Ga. 727, the inherent power of chancery to order a sale of an infant's property was considered and left undecided.

that a court of equity has no inherent jurisdiction to direct a sale or mortgage of the real property of infants. The principal reason for denying this jurisdiction in England appears to have been that by changing the nature of the minor's estate from real to personal, or from personal to real, the rights of third persons who would be entitled in case of the minor's death would be materially affected, as in that country real and personal property descend in different channels,<sup>1</sup> and also because it would formerly have changed the infant's power to make testamentary disposition of his property. Both reasons have ceased to exist in England, and never had much application in this country,<sup>2</sup> but the rule has nevertheless remained. The importance of the rule is greatly diminished by the fact that the whole subject of the sale of infants' property is now almost universally regulated by statute.

**Equitable Estates.** — It is well settled, however, that chancery has inherent jurisdiction to sell a minor's equitable estates.<sup>3</sup>

**b. STATUTORY REGULATION** — (1) *In General.* — At common law the power and control over the persons and property of infants belonged to the king, as *parens patriæ*, and were exercised by him through the lord chancellor. Upon the organization of

Some of the sources of light as to the power of chancery over the estates of infants are 2 Story's Eq. Jur., § 1357; 2 White and Tudor's Leading Cases in Equity, pt. 1, p. 719; Tyler on Infancy, 296; 1 Fonbl. Eq. 88; 1 Daniell's Ch. Prac., p. 228; Rogers v. Dill, 6 Hill (N. Y.) 415; McKee v. Hann, 9 Dana (Ky.) 526.

1. Hale v. Hale, 146 Ill. 249.

"This doctrine seems to be a relic of the English doctrine of primogeniture, and was born of the desire to preserve for the infant the integrity of the *corpus* of the real estate." Northwestern Guaranty Loan Co. v. Smith, 15 Mont. 101.

2. Hale v. Hale, 146 Ill. 249.

Under the doctrine of equitable conversion the proceeds of an infant's real estate which has been sold are usually still treated as realty. But independently of this doctrine, in the United States both species of property usually go to the same persons. Hale v. Hale, 146 Ill. 249.

3. *Ex p. Jewett*, 16 Ala. 410; Allman v. Taylor, 101 Ill. 191; Smith v. Sackett, 10 Ill. 545; Kearney v. Vaughan, 50 Mo. 285; Northwestern Guaranty Loan Co. v. Smith, 15 Mont. 101; Anderson v. Mather, 44 N. Y. 249; Pitcher v. Carter, 4 Sandf. Ch. (N. Y.) 1; Cochran v. Van Surlay, 20 Wend. (N. Y.) 375; Wood v. Mather, 38 Barb. (N. Y.) 473;

Mills v. Dennis, 3 Johns. Ch. (N. Y.) 370; Huger v. Huger, 3 Desaus. (S. Car.) 18; Bent v. Miranda, (N. Mex. 1895) 42 Pac. Rep. 91; Inwood v. Twyne, 2 Eden 153.

**Order of Sale in Vacation.** — "A judge of the Superior Court may, in term or vacation, remove or appoint trustees. Code Ga., § 2320. He may also authorize the sale of the *corpus* of a trust estate in vacation. Code Ga., § 2327. But it is the *corpus* of a trust estate which he may direct to be sold in vacation or in chambers. Then, in the present case, under the deed of Griffin to Mrs. Pace and her children, the only trust estate created was the life estate of Mrs. Pace; this was to be held by Griffin in trust for the use and benefit of Mrs. Pace during her life, but at her death the title to the property vested absolutely in her children, who took a vested remainder in this land. There is no trust connected with their interest in the land; hence the chancellor had no jurisdiction, at chambers in vacation, to direct the sale of the land by the trustee, so as to divest their title; all that could have been sold by the trustee under this decree was the life estate of Mrs. Pace, and the purchaser could not acquire anything more than the trustee was authorized to sell." Rogers v. Pace, 75 Ga. 438.

the state governments in this country, the state, as a political sovereignty, succeeded to all the rights and duties of the king in this regard, and as *parens patriæ* may rightfully exercise the same power and control over the persons and property of infants as was exercised by the Crown of England at the period referred to.<sup>1</sup> This power has been exercised in the several states by the enactment of general statutes regulating the whole subject of the sale of an infant's property. These statutes vary in their details and must always be consulted in investigating the law of any particular state.<sup>2</sup>

(2) *Sales Under Private or Special Acts.* — In many states the legislature has undertaken to authorize or confirm the sale of an infant's property by private or special acts. These laws have been sustained as constitutional in a number of states,<sup>3</sup> but in a number of other states they have been held unconstitutional, and the sales under them void, on the ground that such acts are an assumption of judicial power by the legislature.<sup>4</sup> Special legislation is now very generally prohibited by constitutional provisions, and when this is true the question cannot, of course, arise.

1. *Dequindre v. Williams*, 31 Ind. 444.

2. Acts authorizing the sale of real estates of infants considered as to their true construction, their practical utility, and their constitutionality. *Williams's Case*, 3 Bland (Md.) 200.

There can be no good objection to the validity of a statute authorizing the sale of lands descended to an infant, when applied to estates descended since its passage. *Singleton v. Cogar*, 7 Dana (Ky.) 479.

3. *Alabama.* — *Holman v. Norfolk Bank*, 12 Ala. 369.

*California.* — *Paty v. Smith*, 50 Cal. 153; *Brenham v. Davidson*, 51 Cal. 352. But see *Lincoln v. Alexander*, 52 Cal. 482; *Pryor v. Downey*, 50 Cal. 388.

*Connecticut.* — *De Mill v. Lockwood*, 3 Blatchf. (U. S.) 56.

*Illinois.* — *Mason v. Wait*, 5 Ill. 127. But see *Rozier v. Fagan*, 46 Ill. 404; *Dubois v. McLean*, 4 McLean (U. S.) 486; *Lane v. Dorman*, 4 Ill. 238.

*Indiana.* — *Davidson v. Koehler*, 76 Ind. 398.

*Kentucky.* — *Nelson v. Lee*, 10 B. Mon. (Ky.) 495.

*Maryland.* — *Dorsey v. Gilbert*, 11 Gill & J. (Md.) 87; *Davis v. Helbig*, 27 Md. 462. See also *Williams's Case*, 3 Bland (Md.) 186.

*Massachusetts.* — *Davidson v. Johonnot*, 7 Met. (Mass.) 388; *Rice v. Parkman*, 16 Mass. 326.

*Mississippi.* — *Boon v. Bowers*, 30

Miss. 246; *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 744; *McComb v. Gilkey*, 29 Miss. 146; *Burrus v. Burrus*, 56 Miss. 92.

*Missouri.* — *Stewart v. Griffith*, 33 Mo. 13; *Thomas v. Pullis*, 56 Mo. 211. *New York.* — *Clark v. Van Surlay*, 15 Wend. (N. Y.) 436; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365; *Brevoort v. Grace*, 53 N. Y. 245.

*Pennsylvania.* — *Estep v. Hutchman*, 14 S. & R. (Pa.) 435.

*Rhode Island.* — *Thurston v. Thurston*, 6 R. I. 296.

*United States.* — *Hoyt v. Sprague*, 103 U. S. 635; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 565; *De Mill v. Lockwood*, 3 Blatchf. (U. S.) 56; *Florentine v. Barton*, 2 Wall. (U. S.) 210. See also *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Watkins v. Holman*, 16 Pet. (U. S.) 25.

4. See *Jones v. Perry*, 10 Yerg. (Tenn.) 59; *Culbertson v. Coleman*, 47 Wis. 193; *Powers v. Bergen*, 6 N. Y. 358; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Lincoln v. Alexander*, 52 Cal. 482.

In *Paty v. Smith*, 50 Cal. 153, the court expressed grave doubts whether the legislature has power to authorize or direct the sale, by a stranger, of the real estate of an infant, and whether the matter of the appointment of guardians of infants, and the disposition of their estates, is not exclusively of judicial cognizance; but does not decide the question.

(3) *Courts Exercising Jurisdiction.* — In most of the states the power to order a sale or lease of an infant's lands under general statutes is vested in probate or orphans' courts.<sup>1</sup> In others it is vested in the courts of chancery or in courts of general jurisdiction, such as circuit or district courts. In a few states different courts have concurrent jurisdiction to order a sale.<sup>2</sup>

(4) *Strict Conformity to Statute.* — Where the court ordering the sale of an infant's property derives its power to make the order solely from statute, the provisions of the statute must be strictly complied with or the sale will be void<sup>3</sup> for want of juris-

1. See *Winch v. Tobin*, 107 Ill. 212; *Phelps v. Buck*, 40 Ark. 219; *Shumard v. Phillips*, 53 Ark. 37. Compare *Summers v. Howard*, 33 Ark. 490. And see the statutes of the various states.

**New Jersey.** — The Act of 1799, § 6, gave the Orphans' Court no jurisdiction to order the sale of lands of minors who were not orphans. *Graham v. Haughtalin*, 30 N. J. L. 552.

**District of Columbia.** — Under the Maryland statute of 1798, c. 101, sub-c. 12, § 10, the Orphans' Court of the District of Columbia had authority to order a sale by a guardian, of real estate of his infant wards, for their maintenance and education, provided that before the sale its order was approved by the Circuit Court of the United States sitting in chancery. The statute of Maryland of 1798, c. 101, sub-c. 12, § 10, is not repealed by the Act of Congress of March 3, 1843, c. 87. *Thaw v. Ritchie*, 136 U. S. 519.

**Arkansas.** — The Act of Dec. 23, 1846 (Gould's Dig., § 34), giving the Probate Court jurisdiction to order the sale of a ward's lands for purposes of investment, did not deprive the Circuit Court of its jurisdiction, as a court of chancery, to order the sale of an infant's lands. *Shumard v. Phillips*, 53 Ark. 37. Compare *Messner v. Giddings*, 65 Tex. 302.

2. In Arkansas the general jurisdiction over the persons and property of minors belongs to the chancery court. Courts of probate have, by statute, limited powers over the estates of minors in the hands of administrators and guardians, but the statute is the limit of their powers, and their orders not authorized by the statute are void. They have no authority to direct an investment of a minor's funds in land. *Myrick v. Jacks*, 33 Ark. 425.

Ever since 1846 the jurisdiction of the Probate Court for the sale of a

minor's lands, upon application of his guardian, has been in the court of the county in which the land lay; but whether exclusive, *quare*. Section 4998, Mansfield's Digest, has no application to sales by guardians. *Reid v. Hart*, 45 Ark. 41.

In Ohio, under the Act of Feb. 9, 1824 (2 Chase 1317; Swan Rev. Stat. 44), the only power to authorize a guardian to sell the real estate of his ward, prior to the creation of the Probate Court, was vested in the Court of Common Pleas. *Foresman v. Haag*, 36 Ohio St. 102.

The concurrent jurisdiction conferred upon probate courts, in the sale of lands on petition by executors, administrators, and guardians, by section 3 of the Act of March 14, 1853 (3 Curwin 2041; S. & C. 1213), vests in the Probate Courts of the several counties only such jurisdiction in regard to ordering such sales as was possessed by the Courts of Common Pleas in such counties respectively. Hence, where, at the time of the passage of said Act, the Court of Common Pleas in a particular county was not authorized to order the sale of the lands of a ward, on the application of his guardian, the Probate Court of such county could not order such sale. *Foresman v. Haag*, 36 Ohio St. 103.

**Equity Superseding Probate Court.** — A court of equity will not take upon itself the administration of estates of deceased persons, or the management of the estates of wards, after the grant of letters, and thus supersede the Probate Court, except in extraordinary cases and for special reasons. *Ames v. Ames*, 148 Ill. 322.

3. **Alabama.** — *Hudson v. Helmes*, 23 Ala. 585.

**Arkansas.** — *Myrick v. Jacks*, 33 Ark. 425.

**Colorado.** — *Filmore v. Reithman*, 6 Colo. 120.

diction to make the order. This is the case where the power is conferred on probate courts or other inferior tribunals, and in

*Florida*. — *Coy v. Downie*, 14 Fla. 544; *Price v. Winter*, 15 Fla. 66.

*Illinois*. — *Mason v. Wait*, 5 Ill. 127.

*Indiana*. — *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 299; *Morris v. Goodwin*, 1 Ind. App. 481.

*Iowa*. — *Cooper v. Sunderland*, 3 Iowa 114; *Frazier v. Steenrod*, 7 Iowa 339; *Shanks v. Seamonds*, 24 Iowa 131.

*Kentucky*. — *Vowles v. Buckman*, 6 Dana (Ky.) 456; *Singleton v. Cogar*, 7 Dana (Ky.) 479; *Thornton v. McGrath*, 1 Duv. (Ky.) 350; *Wells v. Cowherd*, 2 Metc. (Ky.) 514; *Bell v. Clark*, 2 Metc. (Ky.) 573; *Mattingly v. Read*, 3 Metc. (Ky.) 524; *Watts v. Pond*, 4 Metc. (Ky.) 61; *Carpenter v. Strother*, 16 B. Mon. (Ky.) 289; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 387; *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 779; *Barber v. Hopewell*, 1 Metc. (Ky.) 260; *Megowan v. Way*, 1 Metc. (Ky.) 418; *Paul v. Paul*, 3 Bush (Ky.) 484; *Peyton v. Alcorn*, 7 J. J. Marsh. (Ky.) 502; *Woodcock v. Bowman*, 4 Metc. (Ky.) 40.

*Louisiana*. — *Dumestre's Succession*, 40 La. Ann. 571; *James v. Meyer*, 41 La. Ann. 1100; *Lanaux's Succession*, 46 La. Ann. 1071.

*New York*. — *Ellwood v. Northrup*, 106 N. Y. 172; *Battell v. Torrey*, 65 N. Y. 294; *Matter of Valentine*, 72 N. Y. 184.

*North Carolina*. — *Pate v. Kennedy*, 104 N. Car. 234; *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259; *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431; *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42; *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Sutton v. Schonwald*, 86 N. Car. 200.

*Pennsylvania*. — *Johns v. Tiers*, 114 Pa. St. 611.

*Virginia*. — *Snively v. Harkrader*, 29 Gratt. (Va.) 112.

*United States*. — *Mathewson v. Sprague*, 1 Curt. (U. S.) 457.

But see *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 436.

**A Private Act Authorizing a Sale** must be strictly complied with. *Exendine v. Morris*, 8 Mo. App. 383.

**Private Sale when Public Sale Is Required.** — Where, under the statute, the Probate Court can only authorize a public sale, a private sale, though sanctioned by the court, passes no title as against the ward. *Hudson v. Helmes*,

23 Ala. 585. See *infra*, VI, 7, f. (2) *Public or Private*.

**Disposal by Mode Not Authorized.** — When, by procurement and with the consent of his guardian, a minor's title is divested by any other mode than that prescribed by law, the purchaser taking title with knowledge of the facts cannot claim to be a *bona fide* holder thereof in his own right, unless the minor after attaining his majority has ratified the sale, in default of which ratification the purchaser holds the property in trust for the minor. The powers of the guardian in respect to the sale of his ward's realty are purely statutory, and by the express terms of the statutes relating thereto can only be exercised under and subject to the authority and supervision of the Orphans' Court. Therefore, where a guardian permits his ward's lands to be sold for taxes, and allows the time for redemption to go by in pursuance of an agreement with the purchaser at the tax sale, and for the purpose of passing title without the statutory proceedings in the Orphans' Court, the ward's beneficial title does not pass. *Johns v. Tiers*, 114 Pa. St. 611.

**Substantial Conformity to Statute.** — In reference to the exercise of a statutory power by a court the rule respecting the duty to follow the statute "closely," "strictly," "rigidly," "exactly," when stripped of its peculiar verbiage and divested of expletives is that when special authority or power is given, and the manner of its exercise is pointed out, the power or authority must be pursued substantially in the manner prescribed. *Morrow v. Weed*, 4 Iowa 77; *Kindell v. Titus*, 9 Heisk. (Tenn.) 727; *Dulles v. Read*, 6 Yerg. (Tenn.) 53; *Mulford v. Stalzenback*, 46 Ill. 303.

**Sale Without Approval of Probate Judge.** — Where the legislature authorizes a guardian to sell under the direction and approval of the judge of probate, a sale made without his consent and direction is void. *Mason v. Wait*, 5 Ill. 127.

**Statutes in Derogation of Common Law.** — Such statutes are in derogation of the common law. *Ellwood v. Northrup*, 106 N. Y. 172; *Battell v. Torrey*, 65 N. Y. 299.

Every requisite of the statute having



jurisdictions where it is held that chancery courts have no inherent power to order such sale.<sup>1</sup> But where it is held that the court has, independently of statute, inherent jurisdiction to make, ratify, or consent to the sale of infants' lands for their benefit, such sales are not necessarily invalid by reason of failure to comply with the statutory requirements on that subject.<sup>2</sup>

(5) *Exchange of Lands*.—It has been held, under a statute authorizing a sale of a minor's lands whenever a better investment of the value thereof can be made, that the court has jurisdiction to order the lands of a minor to be exchanged for other lands,<sup>3</sup>

a semblance of benefit to the infant must be strictly complied with, or the title will not pass. *Atkins v. Kinnan*, 20 Wend. (N. Y.) 249; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Striker v. Kelly*, 2 Den. (N. Y.) 323; *Battell v. Torrey*, 65 N. Y. 299; *Stilwell v. Swarthout*, 81 N. Y. 109.

Where the statute says that a title to land may be transferred in a particular way, it must be done in the way prescribed or it receives no sanction from the statute and is void. *Young v. Dowling*, 15 Ill. 482.

**Compliance with Rules of Practice.**—In *Moscowitz v. Homberger*, 19 Misc. Rep. (N. Y. City Ct.) 429, it was held that the rules of practice relating to the sale of an infant's lands have the force of statutory requirements and cannot be waived by the court. But see, *contra*, *O'Reilly v. King*, 28 How. Pr. (N. Y. Super Ct.) 409; *Cole v. Gourlay*, 79 N. Y. 528; *Aldrich v. Funk*, 48 Hun (N. Y.) 367.

1. As to the inherent power of chancery courts, see *supra*, VI. 1. a. *Inherent Chancery Jurisdiction*. See also *Hudson v. Helms*, 23 Ala. 585; *Donlin v. Hettinger*, 57 Ill. 348; *Whitman v. Fisher*, 74 Ill. 154; *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 299; *Morris v. Goodwin*, 1 Ind. App. 481; *Walker v. Smyser*, 80 Ky. 627; *Baker v. Lorillard*, 4 N. Y. 257; *Rogers v. Dill*, 6 Hill (N. Y.) 415; *Onderdonk v. Mott*, 34 Barb. (N. Y.) 106; *Matter of Turner*, 10 Barb. (N. Y.) 552; *Dodge v. St. John*, 96 N. Y. 263; *Johns v. Tiers*, 19 W. N. C. (Pa.) 13, 114 Pa. St. 611; *Messner v. Giddings*, 65 Tex. 302; *Snively v. Harkrader*, 29 Gratt. (V.) 112.

"The Court of Probate had such jurisdiction as the statute gave it—no more and no less." *Dequindre v. Williams*, 31 Ind. 444. See also *In re Camp*, 126 N. Y. 377; and see cases cited in the preceding note.

2. *Shumard v. Phillips*, 53 Ark. 43; *Campbell v. Baker*, 6 Jones L. (N. Car.) 255; *Sutton v. Schonwald*, 86 N. Car. 202; *Hurt v. Long*, 90 Tenn. 445. See also *Allman v. Taylor*, 101 Ill. 192; *Gully v. Dunlap*, 24 Miss. 410.

In *Hurt v. Long*, 90 Tenn. 445, the Chancery Court, in a suit brought by the testamentary guardian against his ward, confirmed a sale made by such guardian without authority, although the statute authorizing sales of infants' lands enumerated chancery courts among others which might exercise such jurisdiction, and provided that the application for the sale should be made by the regular guardian. The court said that the statute added nothing to the jurisdiction of the court, citing *Thompson v. Mebane*, 4 Heisk. (Tenn.) 370; *Talbot v. Provine*, 7 Baxt. (Tenn.) 509; *Porter v. Porter*, 1 Baxt. (Tenn.) 301; and approved the intimation in *Porter v. Porter*, 1 Baxt. (Tenn.) 301, that a court of chancery, by virtue of its inherent power, might, in a proper case, even decree a sale contrary to the provisions of the statute.

In *Shumard v. Phillips*, 53 Ark. 43, the court said: "It does not appear expressly whether the guardian invoked the aid of the common-law or equity powers of the court in presenting her petition for the sale. But that is immaterial if the Circuit Court had jurisdiction to grant the relief sought, for the court being clothed with general jurisdiction at law and in equity, the question is not one of proper procedure but of power."

3. *Decker v. Fessler*, (Ind. 1896) 44 N. E. Rep. 658, relying upon *Nesbit v. Miller*, 125 Ind. 106. But in this latter case the point was not directly decided. The application was for leave to exchange lands, but the court ordered a sale to be made for cash. It was held that the application was

but upon a strict construction of a similar statute a contrary conclusion has been reached.<sup>1</sup>

(6) *Conveyance to Railroad*.—Statutes exist in some states regulating the mode in which lands of minors may be acquired for railroad purposes.<sup>2</sup> These statutes authorize the guardian to sell and convey the lands of his ward to the railway company, with the consent and approval of the Probate Court,<sup>3</sup> but they do not authorize him to donate it either with or without an order of the court;<sup>4</sup> and, except as authorized by statute, a guardian

sufficient to give the court jurisdiction to act, and although the court might have erred in holding the application sufficient, the error did not deprive the court of jurisdiction and was not available collaterally.

1. *Meyer v. Rousseau*, 47 Ark. 460.

Where it was claimed that the sale of a ward's land was not made for cash, as ordered by the court, but the transaction was merely barter or exchange, by which the guardian received other land in his own name, it was held that as against a subsequent purchaser in good faith this evidence was not admissible, *Worthington v. Dunkin*, 41 Ind. 515; and where the guardian reported the sale as made for cash, and it was confirmed, in an action on the bond the guardian and sureties will be estopped to dispute the truth of the report. *State v. Weaver*, 92 Mo. 673.

2. *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642; *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 299; *Burrell v. Chicago, etc., R. Co.*, 43 Minn. 363; *Louisville, etc., R. Co. v. Blythe*, 69 Miss. 939; *Matter of New York Bridge Co.*, 67 Barb. (N. Y.) 295.

3. See cases cited in preceding note.

**Constitutionality of Statute.**—Acts of this character are constitutional. *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642.

**Necessity of Approval.**—The approval of the court is essential to the validity of the conveyance. *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 299.

**Effect of Approval.**—The approval of a conveyance to a railway company is not an adjudication that the person who executed it was in fact the guardian. *Burrell v. Chicago, etc., R. Co.*, 43 Minn. 363, following *Dawson v. Helmes*, 30 Minn. 107.

**Sufficiency of Approval.**—A certificate of the probate judge to the deed of the guardian which recites that he, as judge, has examined the deed and the

sale of the land described therein, that the land is necessary for the purposes of the railroad company, that the consideration paid is fair and equivalent for the land, and that the sale is just and proper, and which thereupon approves and confirms the sale and deed, is a sufficient approval within the requirements of section 23 of the General Railroad Act of 1861. *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642.

**Order Dispensing with Approval.**—"The court possesses no power to divest itself of its duty, imposed by the statute, to examine and approve, if proper, the agreement of the guardian with the company, fixing the price to be paid for such right of way; nor can the court make an order, in advance of such agreement, by which such supervisory power and approval by the court shall be dispensed with. To sanction this we must ignore, which we would not be justified in doing, the plain provisions of the statute, and thereby invest a guardian with powers not conferred upon him. The court had no authority to authorize the guardian to convey his ward's estate 'upon such terms and conditions as he shall deem most advisable,' and thus delegate to the guardian the power with which the court alone was clothed. In this case the agreement fixing the price for the right of way over the land of the infant was not submitted to the court for its approval, and hence was never approved by the court. Its approval by the court was essential, and absolutely necessary to give validity to the deed. In the absence of such approval the guardian possessed no power to make the deed, and therefore it is void, and for that reason it was properly excluded by the court as evidence." *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 300.

4. *Indiana, etc., R. Co. v. Brittingham*, 98 Ind. 299.

**Dedication to Public Use.**—A guard-

cannot grant to a railroad company a right of way upon lands of his infant ward.<sup>1</sup>

(7) *Prohibition of Sale in Conveyance or Devise.* — In some states the statutes authorizing the sale of an infant's lands limit the authority granted to cases in which the sale will not be in violation of the terms of a will or conveyance under which the minor claims title.<sup>2</sup> Under such a statute, a sale in disregard of the prohibition will be void<sup>3</sup> for want of jurisdiction in the court to make the order. But where it is impossible to carry out the provisions of a will, the court may decree a sale although the will itself directs that no sale shall take place,<sup>4</sup> and it has been held that a prohibition of sale without any reservation or limitation over does not prevent the Probate Court from ordering a sale of the property for the infant's benefit when necessary.<sup>5</sup>

(8) *Sale of Expectant and Contingent Interests.* — In the absence of a statutory provision to the contrary, expectant and con-

ian cannot dedicate the lands of his ward to a public use. *State v. Commissioners*, 39 Ohio St. 61.

1. *Indiana*, etc., R. Co. *v.* *Allen*, 100 Ind. 409; *State v. Commissioners*, 39 Ohio St. 59; *Watkins v. Peck*, 13 N. H. 377; *Johnson v. Carter*, 16 Mass. 443.

**Strict Construction of Statute.** — The statute should be strictly complied with. *Indiana*, etc., R. Co. *v.* *Brittingham*, 98 Ind. 299; *Hotchkiss v. Auburn*, etc., R. Co., 36 Barb. (N. Y.) 600.

2. See, for example, 2 Rev. Stat. N. Y. 195, §§ 175, 176, in force in 1870; Rev. Code Iowa 1888, p. 817, § 2257.

3. *Rogers v. Dill*, 6 Hill (N. Y.) 415; *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3. See also *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854; *Cole v. Gourlay*, 79 N. Y. 528; *Davidson v. Koehler*, 76 Ind. 398; *Farris v. Rogers*, (Ky. 1888) 7 S. W. Rep. 543; *Crawford v. Creswell*, 55 Ala. 497.

In *Shipp v. Wheelless*, 33 Miss. 646, it was held that a provision in a will restricting a division and sale until the youngest child became of age vested a valuable right in minor co-devisees which could not be disregarded by the Probate Court, and that a sale on application of a guardian was therefore void.

"The statute respecting the sale of infants' estates, above referred to, has no reference to lands held by infant trustees, and the provision declaring void every sale and conveyance in con-

travention of the trust expressed in the instrument by which the trust was created (1 Rev. Stat. 730, § 65), it is believed has reference to the unauthorized acts of trustees, and does not divest the court of its power over the legal estates of infant trustees, so expressly conferred by the section of the Revised Statutes before referred to. (2 Rev. Stat. 194, § 167.)" Where there is no provision in the trust deed forbidding a disposition of the land or restraining the authority of the court, a court of equity may direct a conveyance of an infant's equitable interest. *Anderson v. Mather*, 44 N. Y. 260.

In *Baxter v. Baxter*, 62 Me. 540, the testator, after devising his farm to his children, requested that it should be kept as a place of refuge for all his children and their children, and that if possible it should never be disposed of, but it was held that the Probate Court might nevertheless license the children's guardians to sell their interests in such farm.

**Sale in Partition.** — In an action for partition, an order directing the sale of land devised to an infant contrary to the provisions of the devise is void, and the purchaser acquires no title. *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3; *Muller v. Struppmann*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 343.

4. *Southern Marble Co. v. Stegall*, 90 Ga. 237 [citing Code Ga., § 4214; *Rakestraw v. Rakestraw*, 70 Ga. 806; *Sharp v. Findley*, 71 Ga. 654].

5. *Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 133.

tingent interests of an infant in lands may be sold;<sup>1</sup> and a statute merely authorizing the sale of lands of which infants are "seized" will not be construed to forbid the sale of future and contingent interests.<sup>2</sup> Sales of an infant's reversion,<sup>3</sup> vested remainder,<sup>4</sup> contingent remainder,<sup>5</sup> and executory

1. *Alabama*. — *Goodman v. Winter*, 64 Ala. 411; *Thorington v. Thorington*, 82 Ala. 489; *Gassenheimer v. Gassenheimer*, 108 Ala. 651.

*Iowa*. — *Foster v. Young*, 35 Iowa 27.

*Kentucky*. — *Paul v. Paul*, 3 Bush (Ky.) 484; *Nutter v. Russell*, 3 Metc. (Ky.) 163; *Craig v. Wilcox*, 94 Ky. 484.

*Maryland*. — *Harris v. Harris*, 6 Gill & J. (Md.) 111.

*Massachusetts*. — *Forster v. Forster*, 129 Mass. 564.

*Mississippi*. — *McCaleb v. Burnett*, 55 Miss. 83; *Morton v. McCanless*, 68 Miss. 810.

*New York*. — *Brevoort v. Grace*, 53 N. Y. 245; *Jenkins v. Fahey*, 73 N. Y. 355; *Matter of Haight*, 14 Hun (N. Y.) 176; *Leggett v. Hunter*, 19 N. Y. 446; *Matter of Dodge*, 105 N. Y. 585.

*Rhode Island*. — *Lyman's Petition*, 11 R. I. 159.

*Virginia*. — *Garland v. Loving*, 1 Rand. (Va.) 396.

The authority of the Orphans' Court of the District of Columbia under the statute of Maryland 1798, c. 701, sub-c. 12, § 10, to order a sale of an infant's real estate for his maintenance and education, is not restricted to legal estates or to estates in possession. *Thaw v. Ritchie*, 136 U. S. 519.

2. In *Jenkins v. Fahey*, 73 N. Y. 355, it was held under the New York statute that the court had no authority to decree the sale of expectant interests or interests in remainder because in such case the infant was not "seized." The interest sought to be sold was a vested remainder. This case was reversed on appeal, and it was held that a remainderman was to be deemed "seized in law." See also *Matter of Haight*, 14 Hun (N. Y.) 176; *Ex p. Igglesden*, 3 Redf. (N. Y.) 375; *Baker v. Lorillard*, 4 N. Y. 257.

In the *Matter of Dodge*, 40 Hun (N. Y.) 443, it was held that a contingent remainder could not be sold, but this case was also reversed on appeal, *Matter of Dodge*, 105 N. Y. 591; and it was there held that the word "seized" in the New York statute was used synonymously with the word "owned."

See also *Dodge v. Stevens*, 94 N. Y.

215; *Ellwood v. Northrup*, 106 N. Y. 181.

3. *Foster v. Young*, 35 Iowa 27. For jurisdiction to decree a sale of a reversionary interest of an infant, see *De Witte v. Palin*, L. R. 14 Eq. 251; *Nunn v. Hancock*, L. R. 6 Ch. 850. See also *Gill v. Wells*, 59 Md. 492.

In *Tennessee*, under Act of 1827, a remainder or reversionary interest in land could not be sold for the purpose of partition. *Robertson v. Robertson*, 2 Swan (Tenn.) 197; *Kindell v. Titus*, 9 Heisk. (Tenn.) 728. But this has been changed by the Act of 1854, Code, § 3262.

4. *Jenkins v. Fahey*, 73 N. Y. 355; *Baker v. Lorillard*, 4 N. Y. 257; *Matter of Haight*, 14 Hun (N. Y.) 176; *Wallace v. Jones*, 93 Ga. 420.

5. *Matter of Dodge*, 105 N. Y. 585, reversing 40 Hun (N. Y.) 443; *Nutter v. Russell*, 3 Metc. (Ky.) 163. See also *Dodge v. St. John*, 96 N. Y. 263, where the question was raised but not decided. But see *Matter of Ryder*, 11 Paige (N. Y.) 187, where the court said: "Nor can the court, in this case, even with the consent of their mother, appropriate any part of the capital of the fund to the support or maintenance of her children, as they have not an interest in any part of the estate. The children have only a contingent interest, even in the capital of the estate; and the extent even of that contingent interest cannot be ascertained while the mother is alive, and is capable of bearing children. For the after-born children are equally entitled with those who were *in esse* at the death of the testatrix. And such of the children as may happen to die in the lifetime of their mother will have no right to the estate, even if they should leave issue. For the estate, in that event, is given to the issue and not to them. It is impossible to say, therefore, that either of the six children now in existence will ever be entitled to any part of the capital of this estate. The case is different where a remainder in a fund is given to a class of infants absolutely, with a right of survivorship as between themselves merely. There,

devise,<sup>1</sup> have been sustained. But the power to sell will be more sparingly exercised in the case of expectant interests than when estates in possession are involved.<sup>2</sup>

**Unborn Infants.** — Chancery, however, cannot interfere with lands of infants unborn.<sup>3</sup>

**c. VENUE.** — The venue of an application for an order to sell the real estate of an infant is regulated by the statutes of the various states. A license to sell granted upon an application brought in a wrong county will be invalid, and the sale under it void.<sup>4</sup>

as the chances of survivorship are equal, the court, with the assent of the owner of the particular estate in the fund, may devote the capital of the fund to the support of all the infants equally, as it will produce no injustice to either. See *Ex p. Kebble*, 11 Ves. Jr. 604; *Errat v. Barlow*, 14 Ves. Jr. 202; *Turner v. Turner*, 4 Sim. 430; and *In re Davison*, 6 Paige (N. Y.) 136." See also *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 373.

1. *Nutter v. Russell*, 3 Metc. (Ky.) 163.

Under the 12th section of the Act of 1785, c. 72, the circumstance that certain infant defendants are entitled to executory devises in land sought to be sold as not susceptible of division presents no obstacle to a decree for a sale. The chancellor has full power to carry into effect the intention of the testator, by making such disposition or investment of that portion of the proceeds of sale affected by the executory devises as will preserve its subjection to the contingencies imposed on it by will. *Harris v. Harris*, 6 Gill & J. (Md.) 111.

2. *Goodman v. Winter*, 64 Ala. 411. Future interests will not be ordered sold except under very special circumstances. *Matter of Jones*, 2 Barb. Ch. (N. Y.) 22. See also *Gassenheimer v. Gassenheimer*, 108 Ala. 651.

3. *Downin v. Sprecher*, 35 Md. 474.

Whether a sale under order of court would bind after-born children, was raised but not decided in *Baker v. Lorillard*, 4 N. Y. 257; and *Wood v. Mather*, 38 Barb. (N. Y.) 486.

**Decree Binding Unborn Children.** — Where the legal title to land is held by a trustee for the benefit of a certain person and her children, born and to be born, a decree affecting the trust estate, rendered by a court of compe-

tent jurisdiction in a suit to which the trustee and all the living beneficiaries are parties, binds after-born beneficiaries also. *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854.

**Power of Legislature.** — The legislature may authorize a sale of contingent interests of persons not *in esse*. *Brevoort v. Grace*, 53 N. Y. 245. See also *Clarke v. Cordis*, 4 Allen (Mass.) 466. But see *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 373.

**Child En Ventre Sa Mere.** — Where the interest of the children then in being, or the enjoyment of the dower right of the widow, requires the conversion of such property into a personal fund, a child *en ventre sa mere* does not, until born, possess any estate therein which can affect the power of the court to pass a decree directing such conversion. Whatever estate devolves upon such child at his birth is an estate in the property in its then condition. *Knotts v. Stearns*, 91 U. S. 638.

**Doctrine of Representation.** — Under the laws of Virginia, parties in being, possessing an estate of inheritance in property, are regarded as so far representing all persons who, being afterwards born, may have interests therein, that a decree for the sale thereof binding them will also bind the latter persons. *Knotts v. Stearns*, 91 U. S. 638.

See also article PARTIES for a full presentation of the doctrine of parties by representation.

The legislature may enact a general law enabling guardians or other trustees to enter into agreements regarding property held by them, although the rights of persons remotely or contingently interested may be compromised without their consent. *Clarke v. Cordis*, 4 Allen (Mass.) 466.

4. *Spellman v. Dowse*, 79 Ill. 66; *Loyd v. Malone*, 23 Ill. 43; *Foresman v. Haag*, 36 Ohio St. 103.

In the Case of Resident Minors the application must usually be brought in the proper court of the county where the minor resides and the guardian was appointed<sup>1</sup> and such court has power to authorize the sale of lands situated in any county within the state.<sup>2</sup> It is not necessary for the guardian to institute separate proceedings in the several counties in which the property is situated.<sup>3</sup>

Where the Minor Is a Nonresiden of the state the application for an order to sell must be made in the county where the whole or a part of the real estate is situated.<sup>4</sup> An infant's land situated in

1. *Loyd v. Malone*, 23 Ill. 43; *R id. v. Morton*, 119 Ill. 118; *Spellman v. Dowse*, 79 Ill. 66; *McKeever v. Ball*, 71 Ind. 398; *Dequindre v. Williams*, 31 Ind. 444; *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24; *Maxsom v. Sawyer*, 12 Ohio 195; *Foresman v. Haag*, 36 Ohio St. 103; *Hubermann v. Evans*, 46 Neb. 784; *Matter of Seaman*, 2 Paige (N. Y.) 409.

But see, as to jurisdiction in case of division of territory pending proceedings, *McGale v. McGale*, 18 R. I. 676.

2. *Loyd v. Malone*, 23 Ill. 43; *Spellman v. Dowse*, 79 Ill. 66; *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24; *Dequindre v. Williams*, 31 Ind. 444; *Hubermann v. Evans*, 46 Neb. 788; *Maxsom v. Sawyer*, 12 Ohio 195; *Foresman v. Haag*, 36 Ohio St. 103.

In Illinois application must be brought in the county where the ward resides, without regard to the situation of the land. *Loyd v. Malone*, 23 Ill. 43. This requirement is jurisdictional, and any material deviation therefrom is fatal to the validity of the proceedings. *Spellman v. Dowse*, 79 Ill. 66.

Under § 10, c. 47 of the Revised Statutes of Illinois of 1845, a guardian's petition for leave to sell his ward's lands, filed in the Alton City Court in 1865, showing the requisite facts, and that the wards were residents of that city, and the publication of notice to all interested of the application, was held sufficient to give the court jurisdiction to order a sale of the ward's lands, though situated without that city and in different counties. *Reid v. Morton*, 119 Ill. 118.

In Ohio the guardian must be appointed in the county where the minor resides, and only the court appointing the guardian may empower him to sell land; and this power extends to lands situated in other counties in the state. *Maxsom v. Sawyer*, 12 Ohio 195; *Foresman v. Haag*, 36 Ohio St. 102.

der the act relating to guardians, passed February 9, 1824 (2 Chase 1317; Swan Rev. Stat. 44), the only power to authorize a guardian to sell the real estate of his ward, prior to the creation of the Probate Court, was vested in the Court of Common Pleas of the county in which the guardian was appointed. *Foresman v. Haag*, 36 Ohio St. 102.

The Probate Court of Pickaway county duly appointed, in 1853, guardians for certain minors residing in said county. On proceedings instituted by the guardians in the Probate Court of Cuyahoga county, certain real estate of the wards situated in the county last named was, in 1854, sold by order of that court, the sale confirmed, and deeds executed accordingly. It was held that the proceedings had in the Probate Court of Cuyahoga county were void for want of jurisdiction. *Foresman v. Haag*, 36 Ohio St. 103.

The provision in section 3 of the amendatory Act of February 23, 1846 (2 Corwin 1237; Swan Rev. Stat. 447), requiring guardians to be governed, "in the execution of any order of sale" of the real estate of their wards,

by the same regulations that may be prescribed and in force at the time such order is made for the sale" of lands by a ministrators, does not prescribe the court to which application may be made by the guardian to obtain such order of sale, but relates to the manner in which the order is to be executed after it has been granted by the proper court. *Foresman v. Haag*, 36 Ohio St. 103.

3. *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24.

4. *Spellman v. Dowse*, 79 Ill. 66; *Loyd v. Malone*, 23 Ill. 43; *Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 135; *Neal v. Bartleson*, 65 Tex. 473.

The Probate Court of the state in which land owned by minors is situ-

one state cannot be disposed of by a decree of a court of another state, nor by a guardian appointed there and acting under its laws.<sup>1</sup>

**2. Proceedings to Procure Order of Sale** — *a.* **NECESSITY FOR ORDER OF SALE.** — At common law, it has been seen, a guardian had no power to convert his ward's real estate into money, and it was doubtful whether even a court of equity could confer authority upon him to do so.<sup>2</sup> The powers of a guardian in respect of the sale of his ward's realty are purely statutory,<sup>3</sup> and without legal authority from a court of competent jurisdiction a guardian cannot sell the realty of his ward,<sup>4</sup> and if he attempts to

ated can order a sale for their support, though they are residents of another state. *Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 133.

A decree was rendered in the Circuit Court of Will county for the sale by a guardian of real estate of his wards, all of which was in Cook county, and it did not appear, from the evidence or decree, where the wards resided. The sale was made, and some seven or eight years afterwards report thereof was presented to the Circuit Court of Will county, and application was made to have the sale approved. The minors resisted the application, and, on the hearing, proved that at the time of filing the petition for the order of sale, and when the sale was made, they were not residing in that state. It was held that the Circuit Court of Will county had no jurisdiction to order the sale, and that the question of jurisdiction was properly raised on the motion for an approval of the sale, and that the sale ought not to be approved. *Spellman v. Dowse*, 79 Ill. 66.

The County Court has jurisdiction to appoint a guardian of nonresident minors who by the death of their parents have become vested with a land certificate of Texas, and a sale of such certificate under order of such court cannot be attacked collaterally. *Neal v. Bartleson*, 65 Tex. 478.

When immovable property situated within the jurisdiction of one of the parishes of Louisiana territorially forms the subject of a partition amongst co-proprietors, some of whom are minors domiciled in other states of the Union, the court possessing jurisdiction of the partition suit and proceedings is fully authorized to direct the proceedings of a family meeting to deliberate and advise touching the interest of minors

interested who reside abroad. *Allen's Succession*, 48 La. Ann. 1240.

1. *Musson v. Fall Back Planting, etc., Co.*, (Miss. 1891) 12 So. Rep. 587.

2. See *supra*, VI. 1. *a. Inherent Chancery Jurisdiction.*

3. *Johns v. Tiers*, 114 Pa. St. 611.

4. *Alabama*. — *Suddeth v. Knight*, (Ala. 1893) 14 So. Rep. 475.

*Delaware*. — *State v. Houston*, 3 Harr. (Del.) 15.

*Florida*. — *Osborne v. Van Horn*, 2 Fla. 360.

*Georgia*. — *Pughsley v. Pughsley*, 75 Ga. 95.

*Illinois*. — *Cooter v. Dearborn*, 115 Ill. 509.

*Kansas*. — *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 32.

*Louisiana*. — *Mallard v. Dejan*, 45 La. Ann. 1270.

*Maine*. — *Worth v. Curtis*, 15 Me. 228.

*Maryland*. — *State v. Bishop*, 24 Md. 310.

*Michigan*. — *Matter of Dorr*, Walk. (Mich.) 145.

*Mississippi*. — *Gully v. Dunlap*, 24 Miss. 410.

*New Jersey*. — *Jackson v. Todd*, 25 N. J. L. 121; *Antonidas v. Walling*, 4 N. J. Eq. 42.

*Nevada*. — *Henderson v. Coover*, 4 Nev. 429.

*Ohio*. — *State v. Commissioners*, 39 Ohio St. 61.

*Pennsylvania*. — *Johns v. Tiers*, 114 Pa. St. 611.

*South Carolina*. — *Moore v. Hood*, 9 Rich. Eq. (S. Car.) 311; *McDuffie v. McIntyre*, 11 S. C. R. 551.

*South Dakota*. — *Washabaugh v. Hall*, 4 S. Dak. 168.

*Vermont*. — *Doty v. Hubbard*, 55 Vt. 278.

*Virginia*. — *Cumming v. Simpsons*, (Va. 1887) 1 S. E. Rep. 657.

do so the sale will be absolutely void, and will not even constitute color of title.<sup>1</sup>

The Leave to Sell Should Be Obtained in Advance, and it is highly improper to first make an absolute sale, and then apply to the court to ratify such sale.<sup>2</sup>

A Guardian's Executory Contract to sell his ward's realty, made without authority, is likewise void.<sup>3</sup>

*b. WHO MAY APPLY FOR ORDER—(1) Legal Guardian.*—It is the almost universal rule that the application for an order of sale of an infant's lands must be made by the legally appointed

A sale of infants' land by their father and natural guardian will not be sustained where it does not appear that the circumstances were such that the court would have ordered the sale on a proper application, and that the proceeds were properly expended for the infants' benefit. *Suddeth v. Knight*, (Ala. 1893) 14 So. Rep. 475.

A sale of minors' property without an order from court and on the recommendation of a family meeting is null and void. *Mallard v. Dejan*, 45 La. Ann. 1270.

The adjudicatee at the sale of minors' property, without an order of court, cannot be compelled to accept the same on the deliberations of a family meeting called to ratify such illegal sale, since, under Rev. Civ. Code, art. 1794, his assent to the ratification is essential. *Mallard v. Dejan*, 45 La. Ann. 1270.

Where the guardian fails to secure an order of the court allowing him to sell the property of the ward, he cannot plead that the act requiring him to secure such an order is invalid. *State v. Bishop*, 24 Md. 310.

In South Carolina a guardian cannot sell or assign his ward's bond and mortgage of real estate without judicial sanction. *McDuffie v. McIntyre*, 11 S. Car. 551. See also *State v. Houston*, 3 Harr. (Del.) 15.

**Authority Conferred Exhausted by One Exercise.**—After the guardian has reported his sale to the court, and the court has approved his report giving effect to his sale and the conveyance made under it, his power is exhausted. His authority, to make the conveyance was derived from the order of the court; that order was his warrant of attorney; he was the agent of the law, and after he has exhausted the power conferred, all subsequent acts by him are void, he cannot make a confirma-

tory deed nor bind the estate by his covenants. *Young v. Lorain*, 11 Ill. 624.

1. *Cooter v. Dearborn*, 115 Ill. 509.

2. *Matter of Dorr*, Walk. (Mich.) 145; *Kinslow v. Grove*, 98 Ky. 266; *Bartee v. Tompkins*, 4 Sneed (Tenn.) 623.

"A private contract made with a guardian for the purchase of the ward's land for a stipulated price, at a future public sale, under a proper leave from the ordinary, is contrary to public policy." *Downing v. Peabody*, 56 Ga. 40; *Rome Land Co. v. Eastman*, 80 Ga. 683.

**Illinois**—*Application for Order Must Be Under Direction of County Court.*—A guardian cannot, of his own motion, apply for an order to sell his ward's land, but must follow the direction of the County Court; if, on an order being made by that court, he finds that he has no funds in his hands, he may then, but not sooner, apply for the sale. *Loyd v. Malone*, 23 Ill. 43. But see *Mulford v. Stalzenback*, 46 Ill. 303.

3. *Morrison v. Kinstra*, 55 Miss. 71; *Downing v. Peabody*, 56 Ga. 40; *Gaylord v. Stebbins*, 4 Kan. 42; *Worth v. Curtis*, 15 Me. 228; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271.

A bond by a father as the natural guardian of his minor children to make and in due course of law to deliver to the obligee a deed to the land of such children, and to perfect in due course of law such sale, is void. *Judson v. Sierra*, 22 Tex. 365.

No person has the right to intervene as a volunteer for a minor child and make a contract for the sale of his estate. Such contract, however, may become binding by subsequent assent of the parties on arriving at full age or through proper proceedings in a court of equity. *Livingston v. Jordan*, 10 Am. L. Reg. N. S. 53.



curator<sup>1</sup> or guardian of the ward,<sup>2</sup> and the court has no jurisdiction to authorize a sale upon the application of any one else. Therefore, sales on application of a father as natural guardian merely of his children,<sup>3</sup> and on application of the infant himself,

1. *Duncan v. Crook*, 49 Mo. 116.

**Misdescription of Petitioner.**—Where a person was in fact duly appointed curatrix of a minor, and qualified as such, an objection to proceedings by her for the sale of the minor's land, on the ground that she described herself in the petition as guardian, instead of curatrix, will not be sustained, the order of approval of sale reciting that "now comes said curator or guardian and submits her report of sale." *Mitchner v. Holmes*, 117 Mo. 185.

2. *Alabama*.—*Nelson v. Goree*, 34 Ala. 565; *Alston v. Alston*, 34 Ala. 15; *Huie v. Nixon*, 6 Port. (Ala.) 77; *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

*Arkansas*.—*Guynn v. McCauley*, 32 Ark. 97; *Shumard v. Phillips*, 53 Ark. 37; *Summers v. Howard*, 33 Ark. 490; *Meyer v. Rousseau*, 47 Ark. 460.

*California*.—*Kendall v. Miller*, 9 Cal. 591; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642.

*Georgia*.—*Prine v. Mapp*, 80 Ga. 137; *Cuyler v. Wayne*, 64 Ga. 78.

*Illinois*.—*Young v. Lorain*, 11 Ill. 625; *Spring v. Kane*, 86 Ill. 580; *Spellman v. Dowse*, 79 Ill. 66; *Campbell v. Harmon*, 43 Ill. 18; *Bostwick v. Skinner*, 80 Ill. 147.

*Indiana*.—*State v. McLaughlin*, 77 Ind. 335; *Coon v. Cook*, 6 Ind. 268; *Doe v. Wise*, 5 Blackf. (Ind.) 404.

*Iowa*.—*Shanks v. Seamonds*, 24 Iowa 131.

*Kansas*.—*Higinbotham v. Thomas*, 9 Kan. 328; *McKee v. Thomas*, 9 Kan. 343; *Hunt v. Insley*, 56 Kan. 215; *Watts v. Cook*, 24 Kan. 278; *Howbert v. Heyle*, 47 Kan. 58; *Higgins v. Reed*, 48 Kan. 272.

*Kentucky*.—*McKee v. Hann*, 9 Dana (Ky.) 526; *Vowles v. Buckman*, 6 Dana (Ky.) 469. But see *Lampton v. Usher*, 7 B. Mon. (Ky.) 61.

*Louisiana*.—*Keller's Succession*, 39 La. Ann. 579.

*Michigan*.—*Persinger v. Jubb*, 52 Mich. 304.

*Minnesota*.—*West Duluth Land Co. v. Kurtz*, 45 Minn. 380.

*Mississippi*.—*Fant v. McGowan*, 57 Miss. 779.

*Missouri*.—*Dutcher v. Hill*, 29 Mo. 271.

*Nebraska*.—*Myers v. McGavock*, 39

Neb. 845; *Wells v. Steckleberg*, (Neb. 1897) 70 N. W. Rep. 242.

*New Jersey*.—*Graham v. Haughtalin*, 30 N. J. L. 552.

*New York*.—*Matter of Thorne*, 1 Edw. Ch. (N. Y.) 507. But see *Matter of Whitlock*, 32 Barb. (N. Y.) 48.

*Ohio*.—*Perry v. Brainard*, 11 Ohio 442; *Maxsom v. Sawyer*, 12 Ohio 195; *Dengenhart v. Cracraft*, 36 Ohio St. 549.

*Pennsylvania*.—*Grier's Appeal*, 101 Pa. St. 412.

*Tennessee*.—See *Hurt v. Long*, 90 Tenn. 446.

*Texas*.—*Bouldin v. Miller*, 87 Tex. 359.

*Wisconsin*.—*Farrington v. Wilson*, 29 Wis. 383.

*United States*.—*Kellev v. Morrell*, 29 Fed. Rep. 736.

"It is only by the power conferred by the appointment of the guardian that he becomes invested with authority to ask for the sale of the minor's real estate, or for the court to pass such a decree." *Spellman v. Dowse*, 79 Ill. 66.

**Nonresident Minor—Sale by Local Guardian.**—Under Rev. Stat. *Texas*, art. 2515, the lands of nonresident minors may be sold by the local guardian under proceedings in guardianship to provide for education of the minors. *Bouldin v. Miller*, 87 Tex. 359.

**Record of Guardian's Appointment.**—Where real estate is sold by one purporting to be the guardian of an estate of a minor, the sale is void where it does not appear of record that the person so acting was ever appointed. *Higinbotham v. Thomas*, 9 Kan. 328, followed in *McKee v. Thomas*, 9 Kan. 343.

**Nunc Pro Tunc Appointment.**—A *nunc pro tunc* order of the Probate Court made on the 29th of December, 1869, appointing a person guardian of an estate of a minor, to take effect as of the 5th day of August, 1859, many years after such person had been removed from his guardianship of the person and estate of said minor in another state, and without notice to the former ward, is void. *Higinbotham v. Thomas*, 9 Kan. 328.

3. *Shanks v. Seamonds*, 24 Iowa 131; *Graham v. Haughtalin*, 30 N. J. L. 552; *Wells v. Steckleberg*, (Neb. 1897) 70 N.

by his next friend,<sup>1</sup> have been held void. But in some states the application may or should be made by next friend.<sup>2</sup>

Where the Appointment of the Guardian Is Void, a sale made on his application is likewise void.<sup>3</sup>

**False Description as Guardian.** — Where the person applying for an

W. Rep. 242; *Myers v. McGavock*, 39 Neb. 845.

But see *McKee v. Hann*, 9 Dana (Ky.) 526, where it was held that as a father is the natural guardian of his children and is the proper person to exercise the powers of guardian in relation to the real estate of his children, when he is competent, and they have no other guardian, and no other, it seems, can be appointed while he is living, he is within the meaning of the Act and may present a petition for the sale of the real estate of his children upon which the court may take jurisdiction and decree a sale. See also *Matter of Whitlock*, 32 Barb. (N. Y.) 48; *Pattee v. Thomas*, 58 Mo. 163.

1. *Vowles v. Buckman*, 6 Dana (Ky.) 467, where the court said: "The jurisdiction of the court does not attach under the statute unless the case is brought before it by the petition of the guardian of one or more of the infant heirs, stating that in his opinion the sale of their land will redound to their advantage and supported by his affidavit of the truth of the facts set forth in the petition. The propriety of this provision and its importance to the safety of infants require no comment. It is sufficient that the statute does not authorize the court to act upon the petition of the infants, either by themselves or by any person who may choose to interfere in their affairs in the character of a *prochein ami*, but only upon the application of their regularly appointed guardian, verifying by his oath the facts of the case, and suggesting his opinion as to the interest of his wards. This is the basis of the whole proceeding and of the power of the court to act in the particular case. The statute does not authorize the court to sell the inheritance of an infant whenever and because it may deem such sale advantageous to the infant, but authorizes the guardian, when he may deem the sale advantageous, to apply to the court for its sanction, and directs the mode in which that sanction may be obtained and a sale subsequently effected. There is, therefore, no case before the court in which it can

act under the statute until it is brought there by the guardian."

**Petition in Name of Ward by Guardian.** — A petition in the name of an infant ward by his guardian was held good under the *Kentucky* statute of 1813. *Richardson v. Parratt*, 7 B. Mon. (Ky.) 379. See also *Elrod v. Lancaster*, 2 Head (Tenn.) 572.

2. *McKinney v. Jones*, 55 Wis. 39; *Campbell v. Baker*, 6 Jones L. (N. Car.) 256; *Livingston v. Jordan*, 10 Am. L. Reg. N. S. 55; *Ex p. Daggett*, Petitioner, 3 Pick. (Mass.) 280; *Newbold v. Schlens*, 66 Md. 585. See also *Hurt v. Long*, 90 Tenn. 462; *Cole v. Gourlay*, 79 N. Y. 535.

**In New York**, under the statute providing for the sale or disposition of the real estate of infants, the petition may be presented by a natural guardian of the infants, as their "next friend," without an appointment by the court. The power and duty of such "next friend" is merely to bring the matter before the court, which then takes cognizance of the proceedings, and appoints a responsible guardian, authorized to act on behalf of the infants, and takes security for the faithful performance by such guardian of his duty. *Matter of Whitlock*, 19 How. Pr. (N. Y. Supreme Ct.) 380. See also *Aldrich v. Funk*, 48 Hun (N. Y.) 367; *O'Reilly v. King*, 28 How. Pr. (N. Y. Super. Ct.) 409.

3. *Sprague v. Litheberry*, 4 McLean (U. S.) 442.

**Unknown Heirs.** — Where the statute does not authorize the Court of Common Pleas to appoint guardians for unknown heirs, such an appointment is void, and a sale of real estate by such guardians is therefore also void. *State v. McLaughlin*, 77 Ind. 335.

**Bond.** — Appointment of a guardian is the first step in the jurisdiction of the court, but is not completed until his bond as guardian is filed. *Guyann v. McCauley*, 32 Ark. 97. See also *Campbell v. Harmon*, 43 Ill. 18; *Exendine v. Morris*, 8 Mo. App. 383; *Pursley v. Hayes*, 22 Iowa 11.

Where an exhibit filed with the bill by the guardian for leave to sell the

order of sale has not in fact been appointed guardian, false allegation of appointment in the petition will not confer jurisdiction upon the court to make the order.<sup>1</sup>

**Former Guardian.** — So also a sale under an application by a former guardian made after the termination of his guardianship is void.<sup>2</sup>

(2) *Foreign Guardian.* — While the authority of a guardian over both the person and the estate of his ward is now considered to be strictly territorial, not extending beyond the state or country of his appointment,<sup>3</sup> a foreign guardian is sometimes

real estate of his ward shows an order of appointment and contains a recital of the filing of a bond by the guardian, the court will presume that the bond was such as is required by law. *Campbell v. Harmon*, 43 Ill. 18.

An order that a guardian is removed if he fails to give a bond in a specified time is void, and a purchaser cannot avoid paying the price of lands subsequently sold by such guardian under decree of the court by pleading the order of removal. *Fant v. McGowan*, 57 Miss. 779. But it has been held that failure of the guardian to give a bond on his general appointment will not invalidate a sale subsequently made by him to a *bona fide* purchaser. *Cuyler v. Wayne*, 64 Ga. 78; *Hunt v. Insley*, 56 Kan. 213.

**Notice of Application for Appointment.** — In the absence of anything in the record to the contrary it will be presumed, in support of the validity of a guardian's sale, that the notice required by law was given to all persons interested, of the application for the appointment of a guardian. *Kelley v. Morrell*, 29 Fed. Rep. 736.

**Letters of Guardianship.** — A guardian derives all power to act from the appointment and bond. Letters of guardianship need not in fact issue. *Maxsom v. Sawyer*, 12 Ohio 196.

1. *Spellman v. Dowse*, 79 Ill. 66; *Grier's Appeal*, 101 Pa. St. 412; *Wells v. Steckleberg*, (Neb. 1897) 70 N. W. Rep. 242.

"An application to sell the property of a minor, by one who did not claim to act as guardian, would be an absolute nullity and could confer no jurisdiction to make such sale, or a conveyance thereunder; and on principle we cannot see that this is less the case when the applicant falsely describes himself as guardian, and thus perpetrates a fraud upon the court." *Wells v. Steckleberg*, (Neb. 1897) 70 N. W. Rep. 242.

2. *Livingston v. Jordan*, 10 Am. L.

Reg. N. S. 53; *Prine v. Mapp*, 80 Ga. 137; *Perry v. Brainard*, 11 Ohio 442; *Coon v. Cook*, 6 Ind. 268; *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96.

**Sale After Death of Ward.** — Where an order is obtained from the court by a guardian to sell the estate of his ward to pay debts, and, the ward having died before the sale, the proceedings are continued, the provisions of the statute being complied with, a sale made by the guardian under the order already obtained, and duly confirmed by the court, is a valid sale, or at all events cannot be impeached collaterally. *Wingate v. James*, 121 Ind. 69.

**Marriage of Female Guardian.** — The marriage of a female guardian operates as a revocation of her appointment without any order of the Probate Court. *Carr v. Spannagel*, 4 Mo. App. 284.

**Attaining of Majority by Idiot.** — A guardian appointed by the Probate Court on account of the infancy of his ward cannot, after the arrival of the ward at full age, under such appointment, continue as guardian by reason of the insanity of such ward; and therefore, where the guardian, without having received any other appointment, made an application to the Probate Court as guardian of an idiot to sell real estate, and, having procured an order, sold such real estate, the sale was a nullity. *Coon v. Cook*, 6 Ind. 268.

3. *Potter v. Hiscox*, 30 Conn. 508; *Kraft v. Wickey*, 4 Gill & J. (Md.) 332; *Burnet v. Burnet*, 12 B. Mon. (Ky.) 323; *Grist v. Forehand*, 36 Miss. 69; *Leonard v. Putnam*, 51 N. H. 247; *Weller v. Suggett*, 3 Redf. (N. Y.) 249; *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *McLoskey v. Reid*, 4 Bradf. (N. Y.) 334; *Ex p. Watkins*, 2 Ves. 470.

The consent of a foreign guardian to the sale of the realty of his ward on application of the local executor does not confer any jurisdiction to order

permitted to apply for an order of sale,<sup>1</sup> under proper regulations, and the proceeds may be transmitted to the domicile of the ward, though a special bond for their proper disposition may be required by the court ordering the sale.<sup>2</sup>

(3) *Collateral Attack*. — It is usually held that the validity of a guardian's sale cannot be attacked in a collateral action upon the ground that the petitioner for the sale of the land of the ward was not the latter's guardian, and therefore had no authority to institute the proceedings;<sup>3</sup> but there are cases in which a col-

the sale. *Wilson v. Hastings*, 66 Cal. 243.

Under a special act authorizing the guardian of a named minor to convey the latter's lands, a guardian appointed in another state cannot, by virtue of such appointment, make the conveyance. *McNeil v. First Congregational Soc.*, 66 Cal. 106.

1. *Johnson v. Avery*, 11 Me. 99; *Menage v. Jones*, 40 Minn. 254; *Jordan v. Secombe*, 33 Minn. 220; *Shelby v. Harrison*, 84 Ky. 144; *Myers v. McGavock*, 39 Neb. 844; *Hickman v. Dudley*, 2 Lea (Tenn.) 375; *McClelland v. McClelland*, 7 Baxt. (Tenn.) 210; *Farrington v. Wilson*, 29 Wis. 383.

A Special Act of the Legislature may authorize a foreign guardian to sell lands in the state. *Boon v. Bowers*, 30 Miss. 246; *Nelson v. Lee*, 10 B. Mon. (Ky.) 495.

*Showing Jurisdiction*. — There being real estate of the ward in the county, and the record of the Probate Court showing a petition by the guardian from another state asking for license to sell the real estate, and notice and opportunity to be heard, the jurisdiction in the matter appears. *Menage v. Jones*, 40 Minn. 254.

On such hearing it is for the Probate Court to determine whether the guardian was duly appointed in such other state, and whether he has complied with the law of this state by filing an authenticated copy of his appointment; and its decision, except on appeal, is final. *Menage v. Jones*, 40 Minn. 254.

The Probate Court of a county in the state in which there is real estate of a ward residing out of this state, under guardianship by virtue of an appointment of a guardian in another state, is the "Probate Court having jurisdiction," upon an application by the guardian for license to sell such real estate of the ward. *Menage v. Jones*, 40 Minn. 254.

*The Burden of Showing* that such foreign letters of guardianship were void rests upon the party who attacks the sale on that ground. *Farrington v. Wilson*, 29 Wis. 383.

2. A foreign guardian may file a bill in the courts of *Tennessee* for the sale of real estate belonging to his wards, but he cannot receive the proceeds until he has given a bond to the court for their proper disposition. *McClelland v. McClelland*, 7 Baxt. (Tenn.) 210.

One who has been appointed by the Supreme Judicial Court of *Maine* to sell real estate in *Maine* belonging to a minor resident of another state, on the petition of a guardian residing in the same state, and receiving his appointment there, was held bound to pay over to such guardian the proceeds of sale. *Johnson v. Avery*, 11 Me. 99.

In *Maryland*, where the realty of a nonresident has been sold under the provision of art. 16 of the Code, on application of the resident guardian, the proceeds will not be transmitted to the nonresident guardian. *Clay v. Brittingham*, 34 Md. 675.

3. *Shumard v. Phillips*, 50 Ark. 37; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642; *Duncanson v. Manson*, 3 App. Cas. (D. C.) 271; *Fitzgibbon v. Lake*, 29 Ill. 165; *Spring v. Kane*, 86 Ill. 580; *Bostwick v. Skinner*, 80 Ill. 147; *Young v. Lorain*, 11 Ill. 625; *Bannon v. People*, 1 Ill. App. 502; *Worthington v. Dunkin*, 41 Ind. 515; *Keller's Succession*, 39 La. Ann. 579; *Dutcher v. Hill*, 29 Mo. 271; *Williams v. Harrington*, 11 Ired. L. (N. Car.) 616; *Farrington v. Wilson*, 29 Wis. 383. See also *Boody v. Emerson*, 17 N. H. 577. But see *Scobey v. Gano*, 35 Ohio St. 553.

"In *Fitzgibbon v. Lake*, 29 Ill. 165, ejectment was brought for certain lands, and the defendant claimed under a guardian's sale. One of the objections made to the record of the

lateral attack has been permitted on this ground.<sup>1</sup>

c. NOTICE OF APPLICATION — (1) *Necessity of Notice — In General.* — It is a provision common to the statutes of nearly all

guardian's sale was that the petitioner was not guardian, and had no authority to institute the proceedings; but the court said: 'Whether the petitioner was the guardian, and had authority to institute the proceeding, was for that court to determine when it heard the petition. It decided he was, by granting the order, and we cannot reverse that decision here.'" *Bostwick v. Skinner*, 80 Ill. 147.

If a sale of real estate is made under a decree, one of the defendants, sued as an infant, cannot successfully, in a subsequent proceeding, collaterally attack the validity of the decree on the ground that he was not a minor when his answer was taken, especially when he was present in person before the commissioners and did not question their right to appoint a guardian *ad litem* for him or the guardian's right to act for him. *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

"The court, acting upon the proof before it, concluded that the appellee was a minor, and no proof now offered as to that fact can affect the validity of the decree by way of collateral attack upon it." *Duncanson v. Manson*, 3 App. Cas. (D. C.) 271 [citing *Thompson v. Tolmie*, 2 Pet. (U. S.) 163; *Day v. Kerr*, 7 Mo. 426].

The validity of a sale cannot be called in question in a collateral proceeding on the ground that the guardian was not regularly and properly appointed. *Dutcher v. Hill*, 29 Mo. 271.

**Married Guardian.** — A female guardian applied to the Probate Court for an order of sale of the realty of the minors. The proceedings were regular and in strict compliance with the law, and the sale was made in the name of the guardian as an unmarried woman, and confirmed. After confirmation of the sale, her marriage was suggested, and a successor duly appointed, who, as guardian, in due form executed a deed to the purchaser. It was held that, in a collateral proceeding attacking the sale, it was incompetent to show that the guardian was married prior to the order confirming the sale. *Carr v. Spannagel*, 4 Mo. App. 284.

1. *Wells v. Steckleberg*, (Neb. 1897)

10 Encyc. Pl. & Pr. —

70 N. W. Rep. 242; *Maxsom v. Sawyer*, 12 Ohio 196.

"It is also said that Niles was not, in fact, guardian, because the plaintiff's lessor was not, at the time of the appointment, a minor, within the county of Ashtabula; and that the Court of Common Pleas had, therefore, no jurisdiction to make the appointment. This is, perhaps, the most difficult question, and the most important, in the case; and if the fact be as supposed, the proceedings of the Court of Common Pleas, and of the guardian under them, are a nullity, and the defendant consequently has no title to the land in question. Every court, that its proceedings may be of any validity, must have jurisdiction over the subject-matter; and to have jurisdiction over the subject-matter in this case, the Court of Common Pleas must also have acquired jurisdiction over the person of the minor for whom the guardian was appointed, at the time when the appointment was made, by his being within the county of Ashtabula. And if the plaintiff's lessor was not so within the county, the court had no jurisdiction; and the fact may be shown and the proceedings impeached, in this collateral way. *Ludlow v. McBride*, 3 Ohio 240; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Borden v. Fitch*, 15 Johns. (N. Y.) 123; *Smith v. Rice*, 11 Mass. 507; *Perry v. Brainard*, 11 Ohio 442; *Hall v. Williams*, 6 Pick. (Mass.) 232; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227; *Snyder v. Snyder*, 6 Binn. (Pa.) 483. The statute enacts that the Court of Common Pleas shall have power, whenever they consider it necessary, to appoint a guardian or guardians to all minors within their county, etc. *Swan's Stat.* 430, § 1. It is, therefore, essential, at the time of the appointment, that the minor should be within the county, to confer jurisdiction. If the record found the fact, it could not be disproved in a collateral proceeding; but, as it does not, it is open to inquiry." *Maxsom v. Sawyer*, 12 Ohio 207.

The jurisdiction of the *Pennsylvania* Orphans' Court to order a sale or mortgage of real estate is based on some preceding relation of the person apply-

the states, that notice of an application for an order of sale of an infant's lands shall be given actually or constructively to the infant himself, or some one interested in his welfare. By the great weight of authority a sale made without giving the notice required by statute is absolutely void,<sup>1</sup> the proceeding being regarded as one adversary to the ward.<sup>2</sup>

ing for such order to the property thus to be disposed of, as guardian, executor, etc. But if there is no such relation, such an order is without jurisdiction and invalid, and may be impeached collaterally. *Grier's Appeal*, 101 Pa. St. 412.

**False Allegation.**—In a case where A. presented a petition to the Orphans' Court, falsely alleging her previous appointment as guardian of certain minors, and praying for authority to mortgage their real estate, it was held that an order of court empowering her to make such a mortgage was of no effect, and that its validity could be impeached in a suit in equity for the cancellation and satisfaction of the mortgage. *Grier's Appeal*, 101 Pa. St. 412.

1. *District of Columbia*.—*Marshall v. Wheeler*, 18 D. C. 414.

*Illinois*.—*Reid v. Morton*, 119 Ill. 118; *Musgrave v. Conover*, 85 Ill. 374; *Whitney v. Porter*, 23 Ill. 445. But see, *contra*, cases in following note; and as to the bewildering conflict in the authorities, see *Myers v. McGavock*, 39 Neb. 861.

*Iowa*.—*Frazier v. Steenrod*, 7 Iowa 339; *Washburn v. Carmichael*, 32 Iowa 475; *Rankin v. Miller*, 43 Iowa 21; *Shawhan v. Loffer*, 24 Iowa 217; *Pursley v. Hayes*, 22 Iowa 11; *Little v. Sinnett*, 7 Iowa 324; *Van Horn v. Ford*, 16 Iowa 581; *Thornton v. Mulquinne*, 12 Iowa 549. Compare *Morrow v. Weed*, 4 Iowa 77. See also *Good v. Norley*, 28 Iowa 188, which is a leading case.

*Kentucky*.—*Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294.

*Mississippi*.—*Kennedy v. Gaines*, 51 Miss. 625; *M'Allister v. Moye*, 30 Miss. 258; *Rule v. Broach*, 58 Miss. 552; *Temple v. Hammock*, 52 Miss. 360.

*North Carolina*.—*Gulley v. Macy*, 81 N. Car. 357.

*Rhode Island*.—*Mathewson v. Sprague*, 1 Curt. (U. S.) 457.

*Texas*.—*Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 133.

Where the record of a proceeding by a guardian for the sale of his ward's

land fails to show any notice of an application to the ward, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally. *Musgrave v. Conover*, 85 Ill. 374.

Where the statute requires notice to the guardian of proceedings to sell the lands of an infant, the court acquires no jurisdiction without such notice. *Whitney v. Porter*, 23 Ill. 445.

In *Kennedy v. Gaines*, 51 Miss. 629, it was held that the fact that a guardian is a petitioner does not bring his ward into court, and does not dispense with notice by citation, required by the statute. See also *M'Allister v. Moye*, 30 Miss. 258; *Rule v. Broach*, 58 Miss. 552.

A decree for the sale of lands made in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian *ad litem*, appointed before the petition was filed, on nomination of the plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. *Gulley v. Macy*, 81 N. Car. 357.

**Amending Order of Sale Without Notice.**—A decree for the sale of land by a guardian required the sale to be for one-third of the purchase money cash, with a credit of six and nine months for the balance. At a succeeding term the guardian reported an inability to sell, and obtained without any further notice an amended order for a sale on one, two, and three years' credit. It was held that the sale under the amended order was valid, and that no further notice was required, as the case was still under the control of the court. *Reid v. Morton*, 119 Ill. 118.

2. *Lyon v. Van Atta*, 35 Iowa 521; *Washburn v. Carmichael*, 32 Iowa 475.

"Counsel assert in their petition for rehearing, with great positiveness and confidence, that 'before this case was decided the Iowa reports did not contain one holding such proceedings not to belong to those *in rem*.' It is a matter of astonishment that the learned

In Many Cases a Contrary View Is Taken, and it is held that the jurisdiction to make the order does not depend upon the giving of the statutory notice, but that it is only necessary that the court should have jurisdiction of the subject-matter, and that this is conferred by the mere filing of a proper petition by the guardian in a court of competent jurisdiction.<sup>1</sup> The cases taking this view

counsel, while charging in direct language that the cases on the subject were overlooked by this court, should have failed to discover the quite familiar case of *Good v. Norley*, 28 Iowa 188, in which the court was equally divided upon the question whether probate proceedings were adversary or *in rem*, and the respective views were fully discussed in the light of authorities. The views of the judges holding that these proceedings were adversary and not *in rem* were approved and concurred in by a unanimous court in *Boyles v. Boyles*, 37 Iowa 592, and have not since, for sixteen years, been questioned. It was cited in *Washburn v. Carmichael*, 32 Iowa 475. Surely it is not now an open question in this state whether probate proceedings are adversary or *in rem*. But it will be observed that the rule was stated in the foregoing opinion *arguendo*, rather than in the announcement of a decision upon the law of the case. The following decisions, not cited in the foregoing opinion, are in accord with the conclusion we reach in the case, and support it: *Lorieu v. Keller*, 5 Iowa 196; *Fallon v. Chidester*, 46 Iowa 588." *Gregg v. Myatt*, 78 Iowa 706.

The proceedings specified in Rev. Stat. Wis., § 3919, as to giving bonds, etc., are, as to the ward, all adversary proceedings required for his protection; none of them can be waived by the guardian so as to bind the ward by such waiver, and the ward may always be heard to allege that any of them have been omitted. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, *distinguishing* *Mohr v. Porter*, 51 Wis. 487.

Notice to a ward of an application to the Circuit Court for an order directing the guardian to pay a claim for the support of the ward is unnecessary, the proceeding not being adversary in its nature, and the guardian being subject to the direction of the court like its own officers. *Brewer v. Stoddard*, 49 Iowa 279.

1. *Arkansas*. — *Beidler v. Friedell*, 44

*Ark.* 414; *Fleming v. Johnson*, 26 *Ark.* 421; *Guynn v. McCauley*, 32 *Ark.* 97; *West v. Waddill*, 33 *Ark.* 575; *Myrick v. Jacks*, 33 *Ark.* 428; *Mock v. Pleasants*, 34 *Ark.* 63; *Phelps v. Buck*, 40 *Ark.* 219; *Trimble v. James*, 40 *Ark.* 401.

*California*. — *Scarf v. Aldrich*, 97 *Cal.* 360, holding that the Code Civ. Pro., § 1783, providing that a copy of the order to show cause why a ward's property should not be sold shall be personally served on all persons interested or must be published, does not require the order to be served on the ward, since he is in court by the filing of the petition and thereby submits his property to the jurisdiction of the court; and *distinguishing* *Townsend v. Tallant*, 33 *Cal.* 45. *Compare* *Kennedy v. Gaines*, 51 *Miss.* 625.

*Illinois*. — *Spring v. Kane*, 86 *Ill.* 580; *Mulford v. Beveridge*, 78 *Ill.* 455; *Smith v. Race*, 27 *Ill.* 387; *Fitzgibbon v. Lake*, 29 *Ill.* 165; *Stow v. Kimball*, 28 *Ill.* 93; *Mason v. Waite*, 5 *Ill.* 127. *Compare* *Loyd v. Malone*, 23 *Ill.* 43; *Mulford v. Stalzenback*, 46 *Ill.* 303.

*Indiana*. — *Davidson v. Lindsay*, 16 *Ind.* 186; *Williams v. Williams*, 18 *Ind.* 345.

*Oregon*. — *Trutch v. Bunnell*, 5 *Oregon* 504.

*Wisconsin*. — *Mohr v. Porter*, 51 *Wis.* 487, *overruling* *Mohr v. Tulip*, 40 *Wis.* 66. And see *Mohr v. Manierre*, 101 *U. S.* 417.

*United States*. — *Gager v. Henry*, 5 *Sawy. (U. S.)* 237; *Miller v. Sullivan*, 4 *Dill. (U. S.)* 343 [adopting and applying the principles laid down in *Grignon v. Astor*, 2 *How. (U. S.)* 319, and *citing* *Good v. Norley*, 28 *Iowa* 188; *Cooper v. Reynolds*, 10 *Wall. (U. S.)* 308; *Thompson v. Tolmie*, 2 *Pet. (U. S.)* 157; *Mohr v. Manierre*, 101 *U. S.* 417; *Thaw v. Ritchie*, 136 *U. S.* 548.

The presentation of the petition brings the ward into court, and gives the court jurisdiction to order the sale of his estate, which the ward cannot afterwards collaterally question although the order to show cause was

of the question do not regard the proceeding as adversary to the ward, but consider it as in the nature of a proceeding *in rem*,<sup>1</sup> and in this particular it is distinguished from proceedings to sell real estate of minor heirs to pay debts of their ancestor, which proceedings are regarded as adversary and to which the heirs are necessary parties.<sup>2</sup>

published irregularly and fixed the hearing at an earlier date than that allowed by the statute. *Scarf v. Aldrich*, 97 Cal. 360.

In *Mohr v. Manierre*, 101 U. S. 418, the lands of a lunatic, which had been sold upon application of his guardian, were involved. The Supreme Court held, first, that the publication of notice of hearing is only intended for the protection of the parties having adversary interest in the property, and is not essential to the jurisdiction of the court; second, that so far as the rights of the lunatic were concerned, jurisdiction of the court attached upon the filing of the guardian's petition setting forth the facts required by the statute; and third, that as against the lunatic a license to sell is not rendered invalid by reason of the insufficient publication of notice of hearing. The rulings in *Grignon v. Astor*, 2 How. (U. S.) 319, and *Comstock v. Crawford*, 3 Wall. (U. S.) 396, were approved.

In *Gager v. Henry*, 5 Sawy. (U. S.) 245, the court said: "The better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of the application, but rather a proceeding in the nature of one *in rem*, carried on by and in the interest of the ward through his legal representative, the guardian. *Mason v. Wait*, 5 Ill. 133; *Fitzgibbon v. Lake*, 29 Ill. 177; *Fitch v. Miller*, 20 Cal. 381. In *Fitzgibbon v. Lake*, 29 Ill. 165, the court, in considering the question of what gives jurisdiction in such a case, cites with approval the following from *Young v. Lorain*, 11 Ill. 637: 'They all agree that enough must appear in the application or the order, or at least somewhere on the face of the proceedings, to call upon the court to proceed to act; and all agree that when that does appear, then the court has properly acquired jurisdiction, or, in other words, is properly set to work.'"

1. *Trutch v. Bunnell*, 5 Oregon 504. Where the jurisdiction of a court is invoked, with reference to real estate in which an infant has an interest, by proceedings *in rem*, or of that nature, service of process upon the infant is not essential to the attaching of the jurisdiction. While in such a case the jurisdiction can only be exercised upon notice to the parties interested, if they have notice in fact, any irregularity, although it may be reversible error, does not necessarily render the judgment void. *Sloane v. Martin*, 145 N. Y. 524.

An application by a guardian for license to sell the real estate of his wards for their maintenance and education is a proceeding *in rem* — one instituted by their guardian for their benefit. It is, in effect, the application of the wards. It is not a proceeding adversary to them; and notice to them of such application is not essential to the jurisdiction of the District Court to grant the license. *Myers v. McGavock*, 39 Neb. 843, following *Mohr v. Manierre*, 101 U. S. 417; *Scarf v. Aldrich*, 97 Cal. 360; *Mohr v. Porter*, 51 Wis. 487. See also *Trutch v. Bunnell*, 5 Oregon 504.

It seems that notice to the wards of an application made by their guardian for the sale of their real estate to pay debts is essential to the jurisdiction of the District Court to license such sale, and that a guardian's sale and conveyance of the real estate of his wards for such purpose without such notice is void. *Mickel v. Hicks*, 19 Kan. 578; *Myers v. McGavock*, 39 Neb. 846.

2. *California*. — *Townsend v. Tallant*, 33 Cal. 52.

*Illinois*. — *Mulford v. Beveridge*, 78 Ill. 455; *Allman v. Taylor*, 101 Ill. 193; *Spring v. Kane*, 86 Ill. 583.

*Indiana*. — *Williams v. Williams*, 18 Ind. 345; *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Anderson*, 5 Ind. 33; *Davidson v. Lindsay*, 16 Ind. 186, *Martin v. Starr*, 7 Ind. 226.

*Iowa*. — *Good v. Norley*, 28 Iowa 188.

*New York*. — *Stilwell v. Swarthout*, 81 N. Y. 109.



**Notice to Relatives.** — In a number of states the statutes require that the next of kin of the minor or other persons legally or beneficially interested shall be summoned or otherwise notified of the application to sell the minor's land.<sup>1</sup> The object of this provision is to apprise those who are supposed to be interested in the minor's welfare of the proposition to sell his estate, in order that they may guard and protect the interests of their kinsman by appearing and objecting to the sale and showing reasons

*North Carolina.* — Moore v. Gidney, 75 N. Car. 39; Stancill v. Gay, 92 N. Car. 462; Perry v. Adams, 98 N. Car. 167; Harrison v. Harrison, 106 N. Car. 283.

*South Carolina.* — Morgan v. Morgan, 45 S. Car. 323.

*Tennessee.* — Frazier v. Pankey, 1 Swan (Tenn.) 75; Linnville v. Darby, 1 Baxt. (Tenn.) 307; Crabtree v. Niblett, 11 Humph. (Tenn.) 488.

*Compare* Gibson v. Roll, 27 Ill. 88.

In some cases where a guardian *ad litem* was appointed an administrator's sale has been sustained, though no notice or process was served upon the infant. See Hare v. Höllomon, 94 N. Car. 21; Price v. Winter, 15 Fla. 66; Bickel v. Erskine, 43 Iowa 213.

A proceeding by an administrator to sell the real estate of his decedent is adverse to the infants, and he must follow the statute in his petition, and give proper notice; if he does this, the sale will be good. The court is to pass upon the sufficiency of the statements in the notice, which calls upon parties to object to the proceedings. Gibson v. Roll, 27 Ill. 88.

A bill filed for the purpose of having a sale of land belonging to an insolvent estate, though stating that it is filed by the administrator for himself and in behalf of the heirs, mentioning their names, speaks alone for the administrator, and not for the heirs. Frazier v. Pankey, 1 Swan (Tenn.) 75.

After rendition of judgment of sale, in an action by an administratrix for the sale of land to pay the intestate's debts, an amended petition was filed reciting that the land had been incorrectly described in the petition and judgment, and setting out a correct description. The descriptions were materially different, land embraced in the first being omitted from the second, and land not embraced in the first being included in the second. Thereafter an order was made amending the judg-

ment of sale and ordering the sale of the newly described land, in accordance with the terms of the original judgment, without any summons ever issuing on the amended petition or any report from the guardian or guardian *ad litem* of the infant defendants ever being made thereon till after the sale was confirmed. This was held error. Robinson v. Clark, (Ky. 1896) 34 S. W. Rep. 1083.

In *North Carolina*, before the adoption of the Code of Procedure, it was the common practice for the administrator to file his petition to sell lands for assets, and if the heir was an infant to have a guardian *ad litem* appointed without any service upon the heir. Cates v. Pickett, 97 N. Car. 21.

1. See statutes of the various states. Temple v. Hammock, 52 Miss. 360; Stampley v. King, 51 Miss. 728; Fitzpatrick v. Beal, 62 Miss. 244; Moody v. McDuff, 58 Miss. 751; Miller v. Sullivan, 4 Dill. (U. S.) 343; Morrisson v. Garrott, (Ky. 1893) 22 S. W. Rep. 320; Wells v. Steckleberg, (Neb. 1897) 70 N. W. Rep. 242; Myers v. McGavock, 39 Neb. 846. See also *infra*, VI. 2. d. *Parties and Process*.

The provisions of § 109, c. 23, Comp. Stat. Neb., 1893, are not applicable to a proceeding instituted by a guardian of minors for a license to sell their real estate for their education and maintenance. The meaning of said section is that when any person other than the minors — such as an insane person, an idiot, a spendthrift, or a drunkard — shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs presumptive, that is, all such persons as would inherit such person's property should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them. Myers v. McGavock, 39 Neb. 846.

against it.<sup>1</sup> Compliance with this provision is a condition precedent to the exercise by the court of jurisdiction to order a sale, and consequently to the validity of the sale.<sup>2</sup>

(2) *Manner of Giving Notice.* — The ordinary and sufficient method of giving notice of an application to sell an infant's real estate is by publication in a newspaper or posting in conspicuous places.<sup>3</sup> Sometimes personal service upon the minor or other interested parties is necessary or proper,<sup>4</sup> sometimes both publication and personal notice should be made,<sup>5</sup> and sometimes either personal service or publication will be sufficient.<sup>6</sup>

Where Notice Is Given by Publication it should be by advertisement in a newspaper published in the county,<sup>7</sup> or in the nearest newspaper.<sup>8</sup> Where the publication must be made in a paper designated by the court, if the publication is made in any other paper the court will not acquire jurisdiction.<sup>9</sup>

1. *Temple v. Hammock*, 52 Miss. 360.

2. *Temple v. Hammock*, 52 Miss. 360; *Stampley v. King*, 51 Miss. 728; *Wells v. Steckleberg*, (Neb. 1897) 70 N. W. Rep. 242.

A decree of sale under Code Miss. 1880, § 2113, rendered without the issuance of a summons to any relative of the minor or any good showing for the nonissuance thereof, is absolutely void. *Fitzpatrick v. Beal*, 62 Miss. 244; *Temple v. Hammock*, 52 Miss. 360.

Where the statute requires service to be made on an infant and on his father or guardian, or, if neither of them can be found, on his mother, or other person having control of him, and the infant has no father or mother, and the proceeding is brought by the guardian, service upon the infant alone is sufficient. *Morrison v. Garrott*, (Ky. 1893) 22 S. W. Rep. 320.

3. *Service by Publication.* — *Scarf v. Aldrich*, 97 Cal. 360; *Townsend v. Tallant*, 33 Cal. 45; *Orman v. Bowles*, 18 Colo. 463; *Prine v. Mapp*, 80 Ga. 137; *Clark v. Thompson*, 47 Ill. 25; *Campbell v. Harmon*, 43 Ill. 18; *Knickerbocker v. Knickerbocker*, 58 Ill. 399; *Fry v. Bidwell*, 74 Ill. 381; *Doe v. Bowen*, 8 Ind. 197; *Cooper v. Sunderland*, 3 Iowa 114; *Frazier v. Steenrod*, 7 Iowa 339; *Belding v. Willard*, 56 Fed. Rep. 699.

4. *Personal Service.* — *Hamiel v. Donnelly*, 75 Iowa 93; *Irons v. Keystone Mfg. Co.*, 61 Iowa 406; *Pursley v. Hayes*, 22 Iowa 11; *Bunce v. Bunce*, 59 Iowa 533; *Rankin v. Miller*, 43 Iowa 21; *Bradford v. Larkin*, 57 Kan. 90; *Howbert v. Heyle*, 47 Kan. 58; *Belding v. Willard*, 56 Fed. Rep. 699.

Under Iowa Code, 1851, c. 133, § 1721, it was not necessary that a copy of the petition and notice should be left with the minors, unless demanded. *Pursley v. Hayes*, 22 Iowa 11.

Where personal service of the notice is required, notice by publication in a newspaper will not give the court jurisdiction. It is a case of no notice, and not one of insufficient or defective notice. *Rankin v. Miller*, 43 Iowa 21.

5. *Mohr v. Manierre*, 101 U. S. 418.

In *Belding v. Willard*, 56 Fed. Rep. 699, the court had ordered that notice of the petition be given directly to persons interested residing within the state, and by publication to nonresidents.

6. *Hobson v. Ewan*, 62 Ill. 147; *Doe v. Bowen*, 8 Ind. 197.

7. *Spellman v. Mathewson*, 65 Ill. 306; *Stow v. Kimball*, 28 Ill. 93; *Pierce v. Carleton*, 12 Ill. 358.

8. *Hobson v. Ewan*, 62 Ill. 147.

Where the publication must be in the "nearest newspaper," it may be made in any newspaper published in the county seat. "The statute has no such trifling meaning as that it is necessary to measure with chain or tape-line the distance from the judges' bench to the printing office, to see which of two or more newspapers published at the county seat is the nearest. Any newspaper printed at that place answers the intention of the law." *Stow v. Kimball*, 28 Ill. 93.

9. *Townsend v. Tallant*, 33 Cal. 45.

Where the notice was required to be published for four successive weeks before the day to show cause, if such notice was published three weeks in

(3) *Contents of Notice.* — The purpose of the statute requiring notice of an application to sell an infant's lands being to enable any one interested to appear and show cause why such sale should not be made, the notice should state the time when the petition will be presented to the court and a hearing had.<sup>1</sup>

It is usually sufficient to designate the term of the court at which the application will be made, and no particular day in the term on which the petition will be presented need be named.<sup>2</sup>

*Term Named Controls.* — Where the guardian gives notice that he will apply to the court at a certain term for an order to sell the land of his ward, the court has no jurisdiction at any other term.<sup>3</sup>

*Description of Land.* — The notice should also contain a correct description of the land sought to be sold.<sup>4</sup>

*Reason of Sale.* — The notice of an application for an order to sell lands of a ward need not state the special reason why an order of sale should be granted.<sup>5</sup>

the paper designated by the court and then the fourth week in another paper designated by the administrator, the court did not acquire jurisdiction. *Townsend v. Tallant*, 33 Cal. 45.

1. *Goudy v. Hall*, 36 Ill. 313; *Nichols v. Mitchell*, 70 Ill. 258; *Knickerbocker v. Knickerbocker*, 58 Ill. 399; *Kitsmiller v. Kitchen*, 24 Iowa 163; *Lyon v. Vanatta*, 35 Iowa 521; *Haws v. Clark*, 37 Iowa 355; *Irions v. Keystone Mfg. Co.*, 61 Iowa 406; *Scarf v. Aldrich*, 97 Cal. 360. See also *Williamson v. Warren*, 55 Miss. 199.

Where the notice gives the wrong time, or no time, for the hearing of the petition, it is equivalent to no notice, and a sale under it is void. *Lyon v. Vanatta*, 35 Iowa 521.

A sale based on a notice returnable on a day other than a return day of the court has been held void. *Haws v. Clark*, 37 Iowa 355.

Where the original notice served was in due form and the return of service thereof showed that the service was properly made by reading the notice to the defendant and by delivering to him a copy thereof, but the original notice named May 24 as the first day of the term at which the defendant was to appear, that being, in fact, the first day of the term, while the copy served on the defendant named the second day of May as the first day of the term, it was held that it was not a case of no service, but of defective service, which did not affect the jurisdiction of the court. *Irions v. Keystone Mfg. Co.*, 61 Iowa 406.

2. *Goudy v. Hall*, 36 Ill. 313; *Nich-*

*ols v. Mitchell*, 70 Ill. 258; *Knickerbocker v. Knickerbocker*, 58 Ill. 399.

3. *Knickerbocker v. Knickerbocker*, 58 Ill. 399.

*Specified Term Not Held.* — Where the term specified is not held, because of the absence of the judge, the court has no jurisdiction to entertain the application at a subsequent term, there having been no petition filed within the time for which the specified term could have been held by law, nor any steps taken to give the court jurisdiction at that term. *Knickerbocker v. Knickerbocker*, 58 Ill. 399.

Where service is made and the term fails, the cause is continued by operation of law to the following term. *Hanks v. Neal*, 44 Miss. 212.

*Term Changed by Law.* — Where a guardian's notice of an application to sell his ward's land was to the April term of the court, but the term of court was changed from April to March, by an act of the legislature, it was held that the application was properly made at the March term, the notice standing in the place, and performing the office, of process. *Nichols v. Mitchell*, 70 Ill. 258.

4. *Frazier v. Steenrod*, 7 Iowa 339; *Lyon v. Vanatta*, 35 Iowa 521.

Where the notice does not contain an entire misdescription of the lands intended to be sold the petition will be good for so much of the land as is properly described. *Frazier v. Steenrod*, 7 Iowa 339. But where the notice contains an entire misdescription the sale will be void. *Lyon v. Vanatta*, 35 Iowa 521.

5. *Spellman v. Mathewson*, 65 Ill. 306.

**Names of Interested Parties.** — It is not necessary to state the names of the heirs or other interested parties in the notice.<sup>1</sup>

**Signature.** — The notice may be signed in the name of the guardian by his attorney.<sup>2</sup>

(4) *Sufficiency of Notice as to Time* — **In General.** — Where notice of the application is required, it must be given the required length of time before the hearing, or the sale will be void.<sup>3</sup>

**Premature Notice.** — Where actual service of notice has been made upon the minors, the fact that the notice was served three days before appointment of the guardian will not make the subsequent sale void.<sup>4</sup> So where a copy of the application and a notice of the time of hearing must be served, the mere fact that the notice is dated before the date of filing the application in court will not render the sale void.<sup>5</sup>

1. *Hobson v. Ewan*, 62 Ill. 147.

In *Pursley v. Hayes*, 22 Iowa 11, notice was directed to the wards, naming each of them, and was personally served upon them, while the petition only described them as "the minor children of Hugh Pursley, deceased." It was held that this was not a jurisdictional defect that could be urged in a collateral proceeding to defeat the title of a purchaser at the sale, especially where it appeared as a matter of fact that the heirs named in the notice were the only minor heirs, and the whole record sufficiently showed that they were sufficiently named and described.

2. *Campbell v. Harmon*, 43 Ill. 18.

3. *Orman v. Bowles*, 18 Colo. 463; *Valle v. Fleming*, 19 Mo. 454; *Mohr v. Tulip*, 40 Wis. 66; *Mohr v. Porter*, 51 Wis. 487; *Fry v. Bidwell*, 74 Ill. 381. But see *Doe v. Jackson*, 51 Ala. 514.

If the interval between the date of an order of the Probate Court to show cause why land left by the intestate should not be sold to pay debts and the day fixed for the hearing of the petition is less than the time required for the publication of the notice, or is less than the time allowed by law from the date of the order for parties interested to appear and show cause, the order is void, and a sale made under proceedings based on the order is also void. *Townsend v. Tallant*, 33 Cal. 45.

**Calculation of Time.** — Where notice was served on April 18, and the hearing was to be had on April 28, the service was at least ten days prior to the time fixed for the hearing, within the meaning of the statute. *Howbert v. Heyle*, 47 Kan. 58.

**Time of Last Publication.** — Illinois Rev. Stat., c. 64, § 30, provided that notice of the application should be given to all persons concerned, by publication in some newspaper published in the county where the application was made at least once each week for three successive weeks, or by setting up written or printed notices in three of the most public places in the county at least three weeks before the session of the court at which such application should be made. Under this statute it was held in *Fry v. Bidwell*, 74 Ill. 381, that where the notice was given by publication in a newspaper it was not necessary that three weeks should intervene between the third publication and the session of the court.

**"Three Weeks Successively."** — The term "three weeks successively," as used in the Iowa statute of 1843, § 13, [708], did not necessarily mean three full weeks or twenty-one days, and however much that construction might be preferred in making an order, *a priori*, the court will not force it beyond the letter of the statute at the expense of a *bona fide* purchaser and of proceedings otherwise well conducted. *Frazier v. Steenrod*, 7 Iowa 339.

**Publication Between Terms.** — "As to the objection that the petition should lie over one term and the publication should be made between the terms, we do not understand that this practice relates to matters of this kind — matters of a probate nature." *Cooper v. Sunderland*, 3 Iowa 114.

4. *Hamiel v. Donnelly*, 75 Iowa 93.

5. *Bradford v. Larkin*, 57 Kan. 90.

(5) *Distinction Between Defective Notice and No Notice.* — A distinction is drawn between cases in which no notice has been given and cases in which there has been a defective notice. Where there has been no notice, the sale will generally be held void, as has been seen.<sup>1</sup> But where it appears that there was a notice, though it was defective, or the service thereof was imperfect, the court has jurisdiction even though its determination as to the sufficiency of the notice was erroneous.<sup>2</sup> The notice which the ward must have, however, is not any paper which may be served upon him; it must at least inform him of the pendency of the proceeding and the time and place where the hearing will be had.<sup>3</sup>

(6) *Proof of Notice.* — The ordinary and sufficient method of proving that notice of an application for order of sale of an infant's lands was duly given is by affidavit of the person serving the notice or publishing it;<sup>4</sup> but this method is not exclusive.<sup>5</sup>

1. See *supra*, VI. 2. c. (1) *Necessity of Notice.*

2. *Indiana.* — Tucker v. Sellers, 130 Ind. 514; Muncey v. Joest, 74 Ind. 409; Hume v. Conduitt, 76 Ind. 598; Jackson v. State, 104 Ind. 516; McAlpine v. Sweetser, 76 Ind. 78.

*Iowa.* — Bunce v. Bunce, 59 Iowa 533; Pursley v. Hayes, 22 Iowa 11; Cooper v. Sunderland, 3 Iowa 114; Boker v. Chapline, 12 Iowa 204; Bon-sall v. Isett, 14 Iowa 309; Morrow v. Weed, 4 Iowa 77; Ballinger v. Tarbell, 16 Iowa 491; Dougherty v. McManus, 36 Iowa 657; Woodbury v. Maguire, 42 Iowa 342; Farmers' Ins. Co. v. Highsmith, 44 Iowa 333; Frazier v. Steenrod, 7 Iowa 339; Shawhan v. Loffer, 24 Iowa 217; Rankin v. Miller, 43 Iowa 21; Lyon v. Vanatta, 35 Iowa 521; Irions v. Keystone Mfg. Co., 61 Iowa 406.

*Mississippi.* — Harrington v. Wofford, 46 Miss. 31; Stampley v. King, 51 Miss. 731.

3. Lyon v. Vanatta, 35 Iowa 521; Kitzmiller v. Kitchen, 24 Iowa 163.

Where that which is offered as a notice of the presentation of a petition for a license to sell real estate is not in any degree a notice of that which is required to be notified, it must be regarded as no notice, and the sale is void. Frazier v. Steenrod, 7 Iowa 339.

4. Spellman v. Mathewson, 65 Ill. 306; Spring v. Kane, 86 Ill. 580; Pierce v. Carleton, 12 Ill. 358; Fry v. Bidwell, 74 Ill. 381; Campbell v. Harmon, 43 Ill. 18; Young v. Lorain, 11 Ill. 625; Finch v. Sink, 46 Ill. 169;

Howbert v. Heyle, 47 Kan. 58; Schlee v. Darrow, 65 Mich. 362; Larimer v. Wallace, 36 Neb. 444.

A notice may be served on the minor by an individual who is not an officer, and the service may be proved by the affidavit of the person serving it. Howbert v. Heyle, 47 Kan. 58.

The attorney of the guardian is a competent person to post a notice and a competent witness to prove such posting. Campbell v. Harmon, 43 Ill. 18.

5. Spellman v. Mathewson, 65 Ill. 306; Spring v. Kane, 86 Ill. 580; Pierce v. Carleton, 12 Ill. 358; Larimer v. Wallace, 36 Neb. 444; Schlee v. Darrow, 65 Mich. 362.

*Oral Proof.* — Oral proof of publication by the guardian of an intention to present a petition has been held sufficient after a lapse of twenty years and a destruction of records, in connection with a recital in a proved copy of the decree that it appeared to the court that proof was made by publication. Spring v. Kane, 86 Ill. 570.

*Affidavit by Unauthorized Officer.* — While an affidavit of the publication of the notice purporting to be made by the bookkeeper of the paper in which the notice was published is not authorized by How. Stat. Mich., § 7498, yet this mode of proof is not exclusive of any other; and if such affidavit purports to be made on the knowledge of the affiant, it is sufficient evidence of the facts therein stated under How. Stat. Mich., § 6047. Schlee v. Darrow, 65 Mich. 362.

Statutes authorizing proof in this manner are construed as merely providing a mode which is sufficient, and not as superseding all other forms of proof.<sup>1</sup>

**County of Publication.** — Where the certificate of the publication of notice does not state that the newspaper is published in the county, the court may receive other evidence of the fact.<sup>2</sup>

**Presumption on Appeal.** — Where the certificate of the publication is insufficient it will be presumed on appeal, in support of the action of the lower court, that, as the court below could receive other evidence of notice, it did so.<sup>3</sup>

**Objections** to the sufficiency of the proof of notice cannot be made for the first time in the appellate court.<sup>4</sup>

(7) *Collateral Attack.* — In cases where the requirement of notice of the proceedings is held to be jurisdictional, an order of sale and sale thereunder without giving the notice is void and may be attacked in a collateral action;<sup>5</sup> but where it is held that the court acquires jurisdiction notwithstanding the failure to give the prescribed notice, an order of sale made without such notice is not void, but merely erroneous, and the validity of the sale cannot be attacked in a collateral proceeding.<sup>6</sup> Where the court has found or treated an attempted notice as sufficient, its finding cannot be questioned collaterally,<sup>7</sup> nor can objections to the proof

1. *Larimer v. Wallace*, 36 Neb. 444.

2. *Spellman v. Mathewson*, 65 Ill. 306; *Pierce v. Carleton*, 12 Ill. 358.

3. *Spellman v. Mathewson*, 65 Ill. 306.

Where the certificate of the publication of the notice of a guardian's application for an order to sell lands was in due form, except that it did not state that the newspaper was published in the county, it was held, on error to reverse the decree, that it would be presumed that the court received other evidence of that fact. *Spellman v. Mathewson*, 65 Ill. 306.

**Recitals in Decree.** — The recital of a decree of the Probate Court for the sale of the real estate belonging to minors, that the court was "satisfied that all persons interested herein have been duly notified of this petition," is not sufficient. It is not evidence of the issuance and service of notice, and fails to show that the court had any jurisdiction of the parties. *Kennedy v. Gaines*, 51 Miss. 625.

4. Where an affidavit of the publication of notice of hearing of a guardian's application for license to sell real estate was made by the bookkeeper of the newspaper in which the notice was published, and was received in evidence in a suit involving the validity of such sale, without objection, and no assign-

ment of error is based thereon, a claim that the license was granted without notice of such hearing being given cannot be raised for the first time in the appellate court. *Schlee v. Darrow*, 65 Mich. 362.

5. See cases cited *supra*, VI. 2. c. (1) *Notice of Application.*

6. See cases cited *supra*, VI. 2. c. (1).

7. A judgment or decree rendered upon a defective service of process is not void, but is good and valid until reversed by a direct proceeding in an appellate court, and its validity cannot be called into question collaterally. *Campbell v. Hays*, 41 Miss. 561; *Harlington v. Wofford*, 46 Miss. 31; *Hanks v. Neal*, 44 Miss. 212.

A certificate of the publication of a notice of a guardian's application for an order of court to sell lands of his ward, signed "Parks & Pinkard, publishers," was objected to in a collateral proceeding, for the reason that the Christian names of the publishers were not given. The order of sale recited that there was due notice published, etc. It was held that there was no force in the objection. *Reid v. Morton*, 119 Ill. 118; *Borden v. State*, 11 Ark. 519; *Richardson v. Butler*, 82 Cal. 174; *Howbert v. Heyle*, 47 Kan. 58; *Wade v. Carpenter*, 4 Iowa 361; *Gibson v. Roll*, 27 Ill. 88;

of publication of notice be raised in that manner.<sup>1</sup>

**Proof and Presumption.** — Where notice is a jurisdictional fact it devolves upon the party attacking the sale in a collateral proceeding to prove the want of notice; in the absence of evidence the law will presume notice.<sup>2</sup>

**d. PARTIES AND PROCESS** — (1) *In General.* — The proceeding to sell a minor's land for his benefit, though not necessarily an *ex parte* proceeding, has all the elements of one, and though notice of some sort may be required to be given to the minor, his next of kin, or others interested, it is usually unnecessary to make the minor or other persons entitled to notice technical parties to the proceeding.<sup>3</sup> But this rule is not universally true, and under

Hobson *v.* Ewan, 62 Ill. 147; Spring *v.* Kane, 86 Ill. 580; Wright *v.* Marsh, 2 Greene (Iowa) 109; Bradford *v.* Larkin, 57 Kan. 90; Williams *v.* Harrington, 11 Ired. L. (N. Car.) 616; Ewing *v.* Higby, 7 Ohio, pt. 1, 201; Paine *v.* Mooreland, 15 Ohio 435; Sheldon *v.* Wright, 5 N. Y. 497.

1. Williams *v.* Harrington, 11 Ired. L. (N. Car.) 616.

An objection to a printer's certificate of publication cannot be raised collaterally. Finch *v.* Sink, 46 Ill. 169; Young *v.* Lorain, 11 Ill. 625.

2. Hawkins *v.* Hawkins, 28 Ind. 71; Pursley *v.* Hayes, 22 Iowa 11; Bouldin *v.* Miller, 87 Tex. 359, (Tex. Civ. App. 1894) 26 S. W. Rep. 133.

3. *Illinois.* — Gibson *v.* Roll, 27 Ill. 91; Mulford *v.* Beveridge, 78 Ill. 455; Spring *v.* Kane, 86 Ill. 583; Allman *v.* Taylor, 101 Ill. 193; Mulford *v.* Stalzenback, 46 Ill. 303; Campbell *v.* Harmon, 43 Ill. 18; Smith *v.* Race, 27 Ill. 387; Fitzgibbon *v.* Lake, 29 Ill. 165; Stow *v.* Kimball, 28 Ill. 93; Mason *v.* Wait, 5 Ill. 127, *overruling* on this point Matter of Sturms, 25 Ill. 390.

*Indiana.* — Williams *v.* Williams, 18 Ind. 345; Davidson *v.* Lindsay, 16 Ind. 186; Worthington *v.* Dunkin, 41 Ind. 515.

*Kentucky.* — Furnish *v.* Austin, (Ky. 1888) 7 S. W. Rep. 400.

*Massachusetts.* — Rice *v.* Parkman, 16 Mass. 326.

*New York.* — Matter of Whitlock, 32 Barb. (N. Y.) 48.

*Texas.* — Berry *v.* Young, 15 Tex. 369; Barnes *v.* Hardeman, 15 Tex. 366.

*United States.* — Gager *v.* Henry, 5 Sawy. (U. S.) 237; Miller *v.* Sullivan, 4 Dill. (U. S.) 343.

**Proceeding Not an Action.** — The proceeding by a guardian to sell his ward's

estate is not an action. Matter of Whitlock, 32 Barb. (N. Y.) 50.

**Ward Represented by Guardian.** — The ward is not a necessary party to proceedings on an application by a guardian for leave to sell land of the ward; he is represented by the guardian, and is entitled to no day in court but such as he has through such representation. Mason *v.* Wait, 5 Ill. 127.

Where, under *Mississippi Code*, 1880, § 2109, a guardian applies for the sale of his ward's land because of the insufficiency of the personal estate and the rents and profits of the real estate to maintain and educate him, or because it is deemed preferable that the real estate be sold instead of the personal estate for that purpose, the court may act upon such application without the previous issuance of a summons. Fitzpatrick *v.* Beal, 62 Miss. 244.

**Sale by Administrator to Pay Debts.** — It was formerly the rule in *Illinois* that the heirs and devisees need not be made formal parties by naming them in the petition or notice, even in the case of an application by an administrator to make assets. Gibson *v.* Roll, 27 Ill. 88; Smith *v.* Race, 27 Ill. 391; Stow *v.* Kimball, 28 Ill. 107. But this has been changed by statute. Starr & Curt. Annot. Stat., 1896, c. 3, § 99. Compare Crabtree *v.* Niblett, 11 Humph. (Tenn.) 488. And see article PROBATE AND ADMINISTRATION.

N. Car. Code, § 1438, "provides that no order of sale in such cases shall be granted until the heirs or devisees of the deceased have been made parties by service of summons. 'This provision embraces infants as well as adult persons. Hence the court has repeatedly and uniformly held that such proceedings, decrees, and judg-

the statutes of some states it is held that the minor must be made a party to the proceeding and be served with process or its equivalent, in default of which the sale will be void.<sup>1</sup>

ments are void and of no effect as against the heir not, in some sufficient way, made a party to the same, whether infant or adult. *Stancill v. Gay*, 92 N. Car. 462, and the cases cited. *Perry v. Adams*, 98 N. Car. 167. *Harrison v. Harrison*, 106 N. Car. 283.

**Sale of Land Owned Jointly.** — In an action by a guardian under section 490 of the Ky. Civil Code for the sale of his ward's real estate owned jointly with another, it is not necessary that the ward should be a party; and, therefore, where he is made a defendant, it is not necessary that he should be served with process. *Howard v. Singleton*, 94 Ky. 336. "By reference to section 489 it will be perceived that there is no provision therein for the sale by order of court of the estate of an infant in real property, except in an action brought against him either by a creditor or by his guardian, and hence it is necessary, in every such action, that the infant be brought before the court by service of summons, actual or constructive, and if the action be by his regular guardian, that a guardian *ad litem* defend for him. But section 490 relates to the sale, by order of a court of equity, of only such real property as may be jointly owned by two or more persons, either of whom, it is expressly provided, may bring an action therefor, though the plaintiff or defendant be an infant. And as, under that section, the guardian may unquestionably bring an action for his ward, and, upon the conditions therein prescribed, obtain an order of court for a sale of the joint property, without making the ward a defendant, we see no reason why he may not as well in his answer adopt the statements of a petition already filed for the same purpose by another joint owner, and unite with him in asking for a sale." *Shelby v. Harrison*, 84 Ky. 148.

In probate proceedings under *Mississippi Code* 1857, art. 151, p. 463, by a guardian to sell lands of infant wards, it was not necessary to have process served on the wards, but process must be served on the nearest relatives. *Stampley v. King*, 51 Miss. 728; *Burrus v. Burrus*, 56 Miss. 92; *Morton v. Carroll*, 68 Miss. 699. If the sale is

sought for division of the interest descended or devised, it is sufficient to summon coheirs or devisees, but where the object is not to effect a division of joint interests, but the application is to sell the minor's interest, whether held in severalty or jointly with others, on the ground that it will be beneficial to the ward or for his interest, at least three of the near relatives of the minor must be summoned, or it must be made to appear by the record of the proceeding for sale that they were not summoned because there were none such in the state. *Fitzpatrick v. Beal*, 62 Miss. 244.

**Suit to Review Judgment.** — The proceedings being *ex parte* in their character, a suit will not lie by the ward to review a judgment therein. *Williams v. Williams*, 18 Ind. 345; *Davidson v. Lindsay*, 16 Ind. 186.

1. *Deyton v. Bell*, 81 Ga. 370; *Sharp v. Findley*, 71 Ga. 654; *Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294; *Revill v. Claxon*, 75 Ky. 558; *Kennedy v. Gaines*, 51 Miss. 625; *Rule v. Broach*, 58 Miss. 552; *M'Allister v. Moye*, 30 Miss. 258; *Bulow v. Witte*, 3 S. Car. 308; *Rollins v. Brown*, 37 S. Car. 345; *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129.

In an application for an order to sell the interest of minors in real estate, it is not necessary to state whether they have any near relatives in the state, nor is it necessary that the parents of minors should be stated to be such, either in the process or the return thereof, when served with process on account of their children. *Harrington v. Wofford*, 46 Miss. 31.

Where the guardian joins in the petition with others for the sale of his ward's real estate under the *Mississippi Act of 1854* (H. C., p. 667, § 102), it is essential to the validity of the sale that the minors should be made parties, and be brought into court by citation duly served upon them. The appearance of the guardian in court will not give the court jurisdiction of the person of the minor. *Kennedy v. Gaines*, 51 Miss. 625.

In Georgia, on an application to sell exempt property for reinvestment, a widow can make the application without joining her children, but if a home-



**Presumptive Heirs and Distributees of Infant.** — Sometimes, as an additional security against improvident proceedings for the sale of an infant's estate, it is required that all those who, if he were then dead, would be his heirs or distributees, shall be made parties.<sup>1</sup>

**Persons Remotely Interested.** — Where the contingent rights of the grantor's heirs are secured in the reinvestment, their interest is too remote to make them necessary parties in an action to pass the title of the grantee's children in the purchased land.<sup>2</sup>

(2) *Appointment of Guardian Ad Litem.* — In proceedings to sell an infant's real estate a guardian *ad litem* need not be appointed unless the proceedings are adverse to the infant's interests, or under a statute making the appointment of a guardian *ad litem* a requisite to the validity of the sale.<sup>3</sup>

stead has been set apart by a guardian for the minors and the guardian applies for leave to sell, the children must then be made parties. *Deyton v. Bell*, 81 Ga. 370.

To a bill filed by the widow in her own behalf and as guardian of her minor children, praying for a decree of sale of their interest in the realty disposed of by the will, the children as well as the widow were parties plaintiff, and no service of the bill upon them was necessary. While an acknowledgment of service by them in person and by a guardian *ad litem* whom the court appointed did no good, it did no harm. *Southern Marble Co. v. Stegall*, 90 Ga. 237.

**Summoning Persons Interested.** — In *Mississippi*, under a statute requiring all persons interested to be summoned, it is held that a summons must be served on the minor. *Rule v. Broach*, 58 Miss. 552; *Kennedy v. Gaines*, 51 Miss. 625; *M'Allister v. Moye*, 30 Miss. 258.

In *California* it is held that such a statute does not require service on the minor, since he is in court by the filing of the petition by his guardian and thereby submits his property to the jurisdiction and order of the court. *Scarf v. Aldrich*, 97 Cal. 360.

1. *Knotts v. Stearns*, 91 U. S. 638; *Lancaster v. Barton*, 92 Va. 615.

2. *Fritsch v. Klausling*, (Ky. 1890) 13 S. W. Rep. 241.

3. **Guardian Ad Litem Unnecessary** — *Alabama*. — *Daughtry v. Thweatt*, 105 Ala. 615.

*Colorado*. — *Orman v. Bowles*, 18 Colo. 463.

*Connecticut*. — *Clark v. Platt*, 30 Conn. 285.

*Georgia*. — *Calloway v. Bridges*, 79 Ga. 753; *Prine v. Mapp*, 80 Ga. 137.

*Illinois*. — *Campbell v. Harmon*, 43 Ill. 18; *Smith v. Race*, 27 Ill. 387; *Fitzgibbon v. Lake*, 29 Ill. 165; *Spring v. Kane*, 86 Ill. 580; *Mason v. Wait*, 5 Ill. 127. But see *Loyd v. Malone*, 23 Ill. 43, *contra*.

*Kentucky*. — *Smith v. Leavill*, (Ky. 1895) 29 S. W. Rep. 319; *Power v. Power*, (Ky. 1891) 15 S. W. Rep. 523; *Shelby v. Harrison*, 84 Ky. 144.

*Massachusetts*. — *Rice v. Parkman*, 16 Mass. 326.

*New Hampshire*. — *Boody v. Emerson*, 17 N. H. 577.

*New York*. — *Matter of Whitlock*, 32 Barb. (N. Y.) 48.

*Texas*. — *Berry v. Young*, 15 Tex. 369; *Barnes v. Hardeman*, 15 Tex. 366.

**Guardian Ad Litem Necessary.** — *Orman v. Bowles*, 18 Colo. 463; *M'Allister v. Moye*, 30 Miss. 258; *Talley v. Starke*, 6 Gratt. (Va.) 339; *Hull v. Hull*, 26 W. Va. 1.

**Investing Money in Lands.** — Where an application is made by a guardian for leave to invest money in lands as provided by statute, it is not necessary that a guardian *ad litem* should be appointed. *Calloway v. Bridges*, 79 Ga. 753.

In *Illinois* it was first held that a guardian *ad litem* should be appointed to resist the application or take care of the interests of the ward on an application by his guardian for the sale of his estate, *Loyd v. Malone*, 23 Ill. 43; but subsequently the rule was established that the ward need not be made a party to the proceeding, and that a guardian *ad litem* is unnecessary. *Campbell v. Harmon*, 43 Ill. 18; *Smith v. Race*, 27 Ill. 387.

**A Statute Which Provides for Notice to the ward of the proceedings** does not thereby require the appointment of a guardian *ad litem*.<sup>1</sup>

**Time of Appointment.** — Where it is necessary to appoint a guardian *ad litem* it cannot be done until service of notice or process has been made upon the minor.<sup>2</sup>

**Considerations Governing Appointment.** — The appointment of a guardian *ad litem* when necessary is governed by ordinary considerations, which have already been sufficiently discussed.<sup>3</sup>

**The Duties of guardians *ad litem*** have also already been sufficiently discussed.<sup>4</sup>

### e. WHEN COURT WILL ORDER SALE — (i) *Maintenance and*

**Sale in Partition.** — An action pursuant to *Kentucky* Civil Code, § 490, providing that a court of equity may order land owned by two or more infants to be sold if it cannot be divided without impairing its value, may be prosecuted by the statutory guardian for his ward, and the appointment of a guardian *ad litem* and a defense by him are not necessary. *Smith v. Leavill*, (Ky. 1895) 29 S. W. Rep. 319; *Power v. Power*, (Ky. 1891) 15 S. W. Rep. 523; *Shelby v. Harrison*, 84 Ky. 144.

1. *Prine v. Mapp*, 80 Ga. 137; *Boody v. Emerson*, 17 N. H. 577.

2. *Good v. Norley*, 28 Iowa 188; *Allen v. Saylor*, 14 Iowa 437; *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129; *Gulley v. Macy*, 81 N. Car. 357; *M'Allister v. Moye*, 30 Miss. 258; *Potter v. Ogden*, 136 N. Y. 384. See also *supra*, III. 3. f. (2) *Before Service of Process*.

A decree for the sale of lands made in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian *ad litem* appointed before the petition was filed on the nomination of the plaintiff and who filed an answer prepared for him at the plaintiff's instance, and without inquiry as to the rights of the infant defendants. *Gulley v. Macy*, 81 N. Car. 357.

*Compare Rollins v. Brown*, 37 S. Car. 345, where it was said that infants were bound by a proceeding for the sale of land in the Court of Ordinary in 1867, even if not served, where represented by a guardian *ad litem*, that being sufficient under the law at that time.

The fact that process was not served upon infant defendants until after the appointment of a guardian *ad litem* and after he had filed the answer in their behalf will render a sale of an infant's lands not merely irregular and void-

able, but absolutely void and incapable of confirmation. *Ivey v. Ingram*, 4 Coldw. (Tenn.) 129.

3. See *supra*, III. 3. *Guardians Ad Litem*.

**Appointment by Clerk and Master.** — The guardian *ad litem* required by *Tennessee* Code, § 3324, in proceedings to sell the property under disability, may be appointed by the clerk and master under *Tennessee* Code, § 4420, as in other cases. A subsequent order of the chancellor directing the sale of an infant's property is, it seems, a ratification of the appointment by the master. *Beaumont v. Beaumont*, 7 Heisk. (Tenn.) 226.

**Effect of Irregularity in Appointment on Purchaser.** — In *Martin v. Porter*, 4 Heisk. (Tenn.) 408, it was held that the fact that a guardian *ad litem* was appointed, an answer filed, and order for report, proof, and report and order of sale made at the same term, was no ground of exception by a purchaser to the validity of the sale; the court saying that it would be slow to hold that a purchaser could take advantage of an irregularity in the appointment of a guardian *ad litem*.

4. See *supra*, III. 3. j. *Powers and Duties of Guardians Ad Litem*.

A sale of land of an infant should not be ordered on the answer of the guardian *ad litem* without further proof. *Fridley v. Murphy*, 25 Ill. 146.

A special guardian appointed simply to represent an infant in a private sale of land has no authority to bind the infant by a judgment in a suit brought by the guardian to compel the purchaser to take title; and therefore, if the will presents a reasonable doubt as to whether the infant's interest can be lawfully sold, the purchaser will be released from his contract. *Armstrong v. Wernstein*, (Supreme Ct.) 6 N. Y. Supp. 148.

**Education.** — An infant's lands may be sold when necessary for his maintenance and education.<sup>1</sup> This is the usual ground upon which such sales have been made.

(2) **Sale to Pay Debts and Charges.** — A minor's lands may be sold when necessary for the purpose of paying his debts and removing charges and incumbrances upon his property.<sup>2</sup> Where

1. *Arkansas.* — *Phelps v. Buck*, 40 Ark. 219.

*California.* — *Smith v. Biscailuz*, 83 Cal. 344; *Braly v. Reese*, 51 Cal. 447; *Fitch v. Miller*, 20 Cal. 352 [cited in 50 Cal. 398, 83 Cal. 355].

*Florida.* — *Fuller v. Fuller*, 23 Fla. 236.

*Georgia.* — *Prine v. Mapp*, 80 Ga. 137; *Sharp v. Findley*, 71 Ga. 654.

*Illinois.* — *Loyd v. Malone*, 23 Ill. 43; *Mulford v. Stalzenback*, 46 Ill. 303; *Matter of Harvey*, 16 Ill. 127.

*Iowa.* — *Dickinson v. Hughes*, 37 Iowa 160.

*Kentucky.* — *Farris v. Rogers*, (Ky. 1888) 7 S. W. Rep. 543; *Lynn v. Lynn*, (Ky. 1896) 34 S. W. Rep. 1065.

*Maine.* — *Preble v. Longfellow*, 48 Me. 279.

*Maryland.* — *Brodess v. Thompson*, 2 Har. & G. (Md.) 120; *Williams's Case*, 3 Bland (Md.) 200.

*Massachusetts.* — *Lyman v. Conkey*, 1 Met. (Mass.) 317.

*Michigan.* — *Matter of Dorr*, Walk. (Mich.) 145.

*Minnesota.* — *Montour v. Purdy*, 11 Minn. 384.

*Mississippi.* — *Dalton v. Jones*, 51 Miss. 585; *Fitzpatrick v. Beal*, 62 Miss. 244.

*Missouri.* — *Beal v. Harmon*, 38 Mo. 435; *Strouse v. Drennan*, 41 Mo. 289; *Blackburn v. Bolan*, 88 Mo. 80; *Bone v. Tyrrell*, 113 Mo. 175; *Robert v. Casey*, 25 Mo. 584.

*New Jersey.* — *Morris v. Morris*, 15 N. J. Eq. 239.

*North Carolina.* — *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96.

*Tennessee.* — *Porter v. Porter*, 1 Baxt. (Tenn.) 299.

*Virginia.* — *Cumming v. Simpson*, (Va. 1887) 1 S. E. Rep. 657.

*Wisconsin.* — *Farrell v. Hennesy*, 21 Wis. 632; *Emery v. Vroman*, 19 Wis. 689.

*United States.* — *Belding v. Willard*, 56 Fed. Rep. 699; *Thaw v. Ritchie*, 136 U. S. 520.

**Absence of Other Means.** — It is only when a minor has no other means for his education and support that the

Orphans' Court is authorized by statute to order a sale of his lands. *Morris v. Morris*, 15 N. J. Eq. 239; *Phelps v. Buck*, 40 Ark. 219.

**Inability of Parent.** — Where the parent has sufficient ability to maintain and educate the infant, as a general rule the lands of the latter should not be sold for that purpose. *Morris v. Morris*, 15 N. J. Eq. 239.

But the disparity between the fortunes of the minor and the pecuniary circumstances of his father may be such as to make it proper that the fortune of the child should contribute to its own support. The court, in making the order, should be governed by the same principles as have been adopted in chancery in like cases. *Morris v. Morris*, 15 N. J. Eq. 239; *Prine v. Mapp*, 80 Ga. 137; *Hines v. Mullins*, 25 Ga. 696. See also *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214; 16 Am. Dec. 648, and note; *Bourne v. Maybin*, 3 Woods (U. S.) 724.

**Proceedings Referred to Statute Sustaining Sale.** — A guardian's sale of real property of his ward, made in 1850, partly for the future maintenance and education of his ward and partly to pay debts and charges against the estate, was held valid where the proceedings conformed to Wis. Rev. Stat. 149, c. 65, relating to sales for the latter purpose, but not to c. 64, relating to sales for the future maintenance, etc., of the ward. *Emery v. Vroman*, 19 Wis. 689.

In *Missouri*, under Rev. Stat. 1845, c. 73, § 22, the County Court did not have jurisdiction to order a sale of a minor's lands for the purpose of maintenance, but only for the purpose of procuring and completing his education. *Beal v. Harmon*, 38 Mo. 435; *Blackburn v. Bolan*, 88 Mo. 80. Where, however, a sale was made for the education as well as the support of the minor, the jurisdiction of the County Court was sustained and the sale was held valid. *Strouss v. Drennan*, 41 Mo. 290; *Bone v. Tyrrell*, 113 Mo. 175.

2. *California.* — *Fitch v. Miller*, 20 Cal. 352.

*Illinois.* — *Allman v. Taylor*, 102 Ill.

the sale sought is for the purpose of removing an incumbrance, it must be shown that such a course will be advantageous to the interests of the infant.<sup>1</sup>

(3) *Sale for Reinvestment*. — A sale for the purpose of reinvesting the proceeds is sometimes authorized where such course will be for the manifest advantage of the minor.<sup>2</sup>

185; *Greenbaum v. Greenbaum*, 81 Ill. 367.

*Indiana*. — *Linder v. Holmes*, 2 Ind. 629.

*Kentucky*. — *Neuner v. Neuner*, (Ky. 1887) 6 S. W. Rep. 122.

*Massachusetts*. — *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Davison v. Johnnot*, 7 Met. (Mass.) 388.

*Michigan*. — *Schaale v. Wasey*, 70 Mich. 414.

*North Carolina*. — *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42; *Brock v. King*, 3 Jones L. (N. Car.) 45.

*Tennessee*. — *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 441.

*Texas*. — *Berry v. Young*, 15 Tex. 369; *Alford v. Halbert*, 74 Tex. 346; *Laughter v. Seela*, 59 Tex. 177.

*Wisconsin*. — *Emery v. Vroman*, 19 Wis. 689.

**Sale to Pay Debts**. — The order of the court to sell must find and adjudge that there are debts against the ward rendering the sale necessary. *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259; *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431.

**Debts of Deceased Minor**. — After the death of a minor under guardianship the County Court cannot order a sale of the minor's estate to pay the debts, and has jurisdiction in the matter of guardianship only to receive and act on the guardian's final accounting and order the estate turned over to the person entitled to receive it. *Alford v. Halbert*, 74 Tex. 346.

**Sale on Execution for Costs**. — Under the *Texas* Probate Act of March 20, 1848, a minor's estate may be sold on execution to pay costs of partition. *Laughter v. Seela*, 59 Tex. 177.

**Sale to Remove Incumbrances**. — A part of a minor's estate may be sold to discharge incumbrances on the residue. *Allman v. Taylor*, 101 Ill. 186; *Davison v. Johnnot*, 7 Met. (Mass.) 388; *Smith v. Sackett*, 10 Ill. 534. Unproductive lands may be sold to raise means to discharge incumbrances on

productive property in which an heir has a reversionary interest in fee. *Allman v. Taylor*, 101 Ill. 185.

A sale to remove incumbrances may be made although the property to be relieved is situated in another state. *Allman v. Taylor*, 101 Ill. 185.

**Sale to Pay Debt of Ancestor**. — Where a debt was a charge upon the estate in the hands of the guardian of the sole heir, it was held that the guardian might pay it by a sale under the order of the Probate Court, without administration. *Berry v. Young*, 15 Tex. 369.

**Sale to Pay Taxes**. — If real estate in which a mother who is a married woman, and her children who are infants, are jointly interested, is about to be sold for taxes which they cannot otherwise pay, it would be a good ground for selling the property, as manifestly to their interest, either under the statute, or the inherent powers of a court of equity. *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435.

1. *Allman v. Taylor*, 101 Ill. 185.

A petition by guardian for leave to sell the real estate of his wards for the purpose of paying off a mortgage thereon should not be entertained, unless there is something shown in the petition, more than the mere opinion of the guardian, by which the court can see that such a sale would be more advantageous to the interests of the wards than a sale upon a foreclosure of the mortgage. *Greenbaum v. Greenbaum*, 81 Ill. 367. See also *Smith v. Sackett*, 10 Ill. 534. See also *infra*, VI. 2. c. (13).

2. **Reinvestment**. — *Gassenheimer v. Gassenheimer*, 108 Ala. 651; *Fitch v. Miller*, 20 Cal. 352; *Smith v. Biscailuz*, 83 Cal. 344; *Ames v. Ames*, 148 Ill. 322; *Doe v. Wise*, 5 Blackf. (Ind.) 404; *Linder v. Holmes*, 2 Ind. 629; *Hays v. Bradley*, (Ky. 1893) 23 S. W. Rep. 372; *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Blanchard v. DeGraff*, 60 Mich. 110; *Troy v. Troy*, Busb. Eq. (N. Car.) 85; *Walker v. Page*, 21 Gratt. (Va.) 637.

**Original Chancery Jurisdiction**. — In *Gassenheimer v. Gassenheimer*, 108 Ala. 651, the court said: "It has long been the settled doctrine in this state

(4) *Sale for Partition.* — Where land is owned jointly by minors and other persons it may be sold for the purpose of making partition, where the property cannot be divided without materially impairing its value.<sup>1</sup>

that it is within the original jurisdiction of courts of equity to decree the sales of lands of infants, not only for their maintenance and education, or to remove incumbrances, or to satisfy charges resting thereon, but for the investment of the proceeds of sale for the general interest and advantage of the infant." *Citing Ex p. Jewett*, 16 Ala. 409; *Rivers v. Durr*, 46 Ala. 418; *Goodman v. Winter*, 64 Ala. 410; *Thorington v. Thorington*, 82 Ala. 489.

In Massachusetts, before the Revised Statutes went into operation, a judge of probate had no authority to license a guardian to sell the real estate of a ward for his benefit in order to put the proceeds at interest. *Lyman v. Conkey*, 1 Met. (Mass.) 317.

**Grounds Rendering Reinvestment Desirable.** — "When sales have been decreed for the mere purpose of otherwise investing the proceeds it has generally been because the lands were deteriorating in value, and from some cause probably subject to continuous deterioration, or because they will not yield income sufficient to keep down burdens to which they are liable, or the income was greatly disproportionate to their market value." *Gassenheimer v. Gassenheimer*, 108 Ala. 651.

Where a tract was given in trust for the sole and separate use of a married woman for life, remainder in trust for her children living at her death, a court of equity will not decree a sale with a view of reinvesting the proceeds upon the ground that the land is valuable principally for its timber and yields no present rents and profit. In decreeing the sale the court will regard the interests of the persons most to be affected by its action — particularly when those persons are infants. *Troy v. Troy*, Busb. Eq. (N. Car.) 85.

1. *Ames v. Ames*, 148 Ill. 322; *Reynolds v. McCurry*, 100 Ill. 356; *Swearingen v. Abbott*, (Ky. 1896) 35 S. W. Rep. 925; *Power v. Power*, (Ky. 1891) 15 S. W. Rep. 523; *Farris v. Rogers*, (Ky. 1888) 7 S. W. Rep. 543; *Smith v. Leavill*, (Ky. 1895) 29 S. W. Rep. 319; *Billingslea v. Baldwin*, 23 Md. 86; *Fitzpatrick v. Beal*, 62 Miss. 244; *Cocks v. Simmons*, 57 Miss. 183; *Matter of*

*Congdon*, 2 Paige (N. Y.) 566; *Glasgow v. McKinnon*, 79 Tex. 116.

It is within the discretion of a chancellor who has rendered a decree which established the infant complainant's interest in certain lands, but which reserved an adjudication as to its partition until a future term, to dispose at such future term of the interest adjudicated to the infant for a money consideration. *Bent v. Miranda*, (N. Mex. 1895) 42 Pac. Rep. 91.

In Texas the Probate Court has no power to order a sale of land for partition. The power of partition is given to the Probate Court in case of administration of estates of deceased persons, but not in the case of minors. *Glasgow v. McKinnon*, 79 Tex. 116.

**Sale to Cotenant.** — A statute authorizing the general guardian of an infant tenant in common, with the consent of the Court of Chancery, to agree to the sale of the estate for the purpose of making a partition, does not authorize the guardian to sell to a cotenant, but only to join in common in a sale of the joint interest in the property. If a cotenant wishes to buy an infant's share in an estate which cannot be divided, the general guardian should apply for liberty to sell under the statute relative to the sale and disposition of infants' estates. It is sufficient ground to authorize a sale of an infant's property that it is held in common with adults, and that the value of the estate is small in comparison with the expense of a partition suit to which it must otherwise be subjected. *Matter of Congdon*, 2 Paige (N. Y.) 566.

**Assignment of Dower.** — A sale should not be made of the lands of an infant heir upon a proceeding for assignment of dower and partition where there are abundant means for the support of the heir and he is the sole owner, subject to the right of dower. *Reynolds v. McCurry*, 100 Ill. 356.

**"Joint," "Common," or "Concurrent" Interests.** — Where the infant is the owner in fee of the whole property, subject to the life estate in her mother in one-half of it, there is no "joint interest or interest in common," and they do not hold the estate "otherwise con-

5) *Improvements and Repairs.* — It has been held that the power to authorize a sale for the purpose of reinvestment does not include the power to authorize a sale for the purpose of making improvements and repairs upon the property.<sup>1</sup> But, on the other hand, it has been held that a court of equity may order a sale for the purpose of improving unproductive property by the construction of buildings thereon.<sup>2</sup>

(6) *Conveyance by Infant Trustees.* — An infant trustee may be compelled to convey the trust property in accordance with the terms of the trust,<sup>3</sup> and it is immaterial whether the trust is an expressed or an implied one.<sup>4</sup>

(7) *Specific Performance of Ancestor's Contract.* — Infant heirs

currently," within the meaning of the statute authorizing the sale of the estate for partition. *Gill v. Wells*, 59 Md. 492.

**Partition Limited to Land Held as Coheirs or Codevisees.** — Mississippi Code, 1880, § 2114, which provides for the sale of the ward's share or interest in land descended or devised to "heirs or devisees jointly, one or more of whom are minors, and an equal division thereof cannot be made," does not apply where a guardian seeks to sell a two-fourths undivided interest of his two wards inherited in lands, the other interests in which belong to persons not their coheirs. This section only applies where a ward holds lands as heir or devisee jointly with other heirs or devisees, and a separation of his interest from theirs is sought. *Fitzpatrick v. Beal*, 62 Miss. 244.

1. *Hays v. Bradley*, (Ky. 1893) 23 S. W. Rep. 372.

In *Brodess v. Thompson*, 2 Har. & G. (Md.) 120, it was held that the value of buildings erected on the land of a ward by direction of his guardian, and under order of the Orphans' Court, at an expense exceeding the income of his estate, could not be recovered from the ward, because section 10 of the Act of 1778 did not empower the Orphans' Court to order any part of the principal of the ward's estate to be applied to any other purpose than his support and maintenance. See also *Thaw v. Ritchie*, 136 U. S. 544.

2. *Ames v. Ames*, 148 Ill. 322.

3. *Walsh v. Walsh*, 116 Mass. 377; *Anderson v. Mather*, 44 N. Y. 249; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280.

4. "The statute of 7 Anne, c. 19, provided that infants holding lands in trust might be directed or required, by

order of the Court of Chancery or Exchequer, on the petition of their guardian or of the *cestuis que trustent*, to convey and assure the same. That statute was repeatedly held by Lord Chancellor King to include trusts resulting by implication of law. *Bertie v. Vernon*, cited in *Moseley* 197, and 2 P. Wms. 549; *Holworth v. Lane*, *Moseley* 197; *Ex p. Vernon*, 2 P. Wms. 549, 7 Price 685, note. Lord Talbot, indeed, apparently unaware of the decisions of his predecessor, expressed the opposite opinion and decreed accordingly, but with liberty to the plaintiff to apply to the court in case any precedent could be found where such constructive trusts had been held to be within the statute. *Goodwyn v. Lister*, 3 P. Wms. 387. And Chancellor Kent considers the opinion of Lord King the better authority. *Livingston v. Livingston*, 2 Johns. Ch. (N. Y.) 541. The Court of Chancery in some cases declined to act under the statute of 7 Anne, when the infant himself had or claimed any interest in the estate. *Anonymous*, 2 Eq. Cases Ab. 521; *Hawkins v. Obeen*, 2 Ves. 559. But our statutes have removed all doubt upon the subject by providing that when a person seized or possessed of an estate, real or personal, or any interest therein, upon a trust, express or implied, is an infant, or under other disability, or out of the jurisdiction, this court may by decree direct either a sale or a conveyance to be made of such an estate, or of any interest therein, by him or his guardian, or by some suitable person appointed by the court for the purpose, in the place of the trustee, in order to carry into effect the objects of the trust. Gen. Stat., c. 100, § 15." *Walsh v. Walsh*, 116 Mass. 381.

may be compelled to perform specifically a contract by their ancestor for the sale of land.<sup>1</sup>

(8) *Sale to Pay Debts of Ancestor.* — Lands descended to infant heirs may be sold in a proper proceeding for the payment of the debts of the ancestor.<sup>2</sup>

(9) *Sale for General Advantage of Infant.* — Sometimes a sale of an infant's land is authorized when; for any reason, it appears to be greatly to his interest to make the sale.<sup>3</sup>

(10) *Sale for Unauthorized Purpose.* — The sale of a minor's lands for an unauthorized purpose is void;<sup>4</sup> and where the proceeding is not instituted in good faith to sell the land for the infant's benefit, but is resorted to for the purpose merely of passing the title unencumbered with the infant's interest, the sale is

1. *Hyatt v. Seeley*, 11 N. Y. 52.

**Covenants in Deed.** — Where a conveyance is directed to be made by infants in performance of an agreement entered into, in his lifetime, by their ancestor, who had stipulated to give a deed with full covenants to the purchaser, the court will not order the infants to enter into personal covenants, but only to release and convey all the title whereof their ancestor died seized. *In re Ellison*, 5 Johns. Ch. (N. Y.) 261.

**Appeal.** — An appeal lies from a final decree upon a petition to compel the specific performance, by infant heirs, of their ancestor's contract for the sale of land; it is a special proceeding. *Hyatt v. Seeley*, 11 N. Y. 52.

2. See article PROBATE AND ADMINISTRATION.

**Payment from Rents and Profits.** — Upon a bill by creditors of decedent against his administrators and heirs, to marshal assets, the court may decree a sale of the land descended to the heirs; but it is not bound, and ought not, to decree such sale if the rents and profits of the lands will satisfy the debts within a reasonable time, especially if the heirs are infants. *Tennent v. Pattons*, 6 Leigh (Va.) 197.

**Pleading.** — A bill brought by a guardian to sell an infant's lands under Code Va. 1860, c. 128, which contains no matter as to the existence of debts of the ancestor, and asks no relief in that respect, cannot be made a vehicle to enforce such debts against the land. *Fowler v. Lewis*, 36 W. Va. 112.

3. *Ex p. Jewett*, 16 Ala. 409; *Hale v. Hale*, 146 Ill. 227; *Smith v. Sackett*, 10 Ill. 534; *Dickinson v. Hughes*, 37 Iowa 160; *Gill v. Wells*, 59 Md. 492; *Matter of Dorr, Walk.* (Mich.) 145; *Williams*

*v. Harrington*, 11 Ired. L. (N. Car.) 616; *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435; *Davidson v. Bowen*, 5 Sneed (Tenn.) 129.

**Sale for Removal of Proceeds to Domicil of Infant.** — A chancery court may sell the realty of an infant for the purpose of removing the proceeds to another state where the infant permanently resides, upon the ground that it is manifestly to the infant's interest, if the proof shows that fact. *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435; *Hickman v. Dudley*, 2 Lea (Tenn.) 375; *McClelland v. McClelland*, 7 Baxt. (Tenn.) 210; *Hart v. Czapski*, 11 Lea (Tenn.) 151; *Clanton v. Wright*, 2 Tenn. Ch. 342; *Yandell v. Elam*, 1 Tenn. Ch. 102; *Bright v. Bright*, 3 Baxt. (Tenn.) 109.

The removal of a trustee and infant beyond the limits of a state is not, in itself, sufficient to induce the Court of Chancery to order a sale of the infant's lands. *Ex p. Jewett*, 16 Ala. 409.

4. *Rome Land Co. v. Eastman*, 80 Ga. 683; *Kinslow v. Grove*, 98 Ky. 266; *Moscowitz v. Homberger*, 19 Misc. Rep. (N. Y. City Ct.) 429; *Weinstock v. Levison*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 244, 20 Civ. Pro. Rep. (N. Y.) 1; *Bartee v. Tompkins*, 4 Sneed (Tenn.) 623; *Fowler v. Lewis*, 36 W. Va. 112; *Beal v. Harmon*, 38 Mo. 435.

"It is nowhere specified as amongst the general duties of guardians to convert the real estate of their wards into personal for their general benefit; nor have they any authority to sell real estate, even under a license for the purpose, except for the payment of debts, and for the necessary support of the ward, of which necessity and propriety the court granting the authority is to judge. The license is to be limited to

void,<sup>1</sup> and it is immaterial that no wrong to the infant was intended, and that full value is paid for the infant's interest.<sup>2</sup>

(11) *Proof of Grounds.* — An order of sale will not be granted except upon proof of facts showing the existence of a recognized ground for authorizing a sale, and that the sale is necessary, or at least advantageous to the infant.<sup>3</sup>

that purpose, and a sufficient amount of the real estate may be sold to accomplish it, and no more." Lyman v. Conkey, 1 Met. (Mass.) 317.

1. Rome Land Co. v. Eastman, 80 Ga. 683; Kinslow v. Grove, 98 Ky. 266; Moscovitz v. Homberger, 19 Misc. Rep. (N. Y. City Ct.) 429; Weinstock v. Levison, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 244, 20 Civ. Pro. Rep. (N. Y.) 1; Bartee v. Tompkins, 4 Sneed (Tenn.) 623.

**Sale to Carry Out Previous Arrangement.**

— A guardian cannot sell property of the estate in his hands to carry out a private arrangement made beforehand. Rome Land Co. v. Eastman, 80 Ga. 683; Downing v. Peabody, 56 Ga. 40.

The court has no power to order a title of an infant to be conveyed by a commissioner to a third person, to enable the latter to convey to a person to whom he has contracted to convey it. Kinslow v. Grove, 98 Ky. 266.

2. Weinstock v. Levison, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 244, 20 Civ. Pro. Rep. (N. Y.) 1, wherein it is said: "The statute is intended for the benefit of the infant, and cannot be resorted to for the purpose of divesting the infant of title or curing a defect therein; and it seems reasonably free from doubt that had the court been placed in possession of the real facts and purpose of the proceeding it would have withheld its sanction and not permitted what was in truth a fictitious sale. It makes no difference, in my opinion, that no fraud was intended; nor is it material, as was shown, that the infant received fair value of her interest in the property from the father. The facts still remain that the proceeding was not resorted to for the purpose of selling in good faith to a real purchaser the infant's property, but the alleged purchaser was brought forward to assist and co-operate with the special guardian in carrying out the plans arranged beforehand by which the title, unencumbered by the infant's interest, could be transferred to the father. It is true, the father deposited with the

city chamberlain the money value of the infant's interest, and while, therefore, no attempt to overreach or wrong the infant was done or intended, it would never do to hold that such a proceeding was merely irregular or voidable, but it should be held to be absolutely void. To hold otherwise would be in effect to say that when no wrong is intended the statute authorizing a sale of infant's real estate may be resorted to, the forms of law employed, the sanction of the court obtained in a proceeding brought not to really sell an infant's property, but for a purpose entirely foreign to that authorized by statute."

**Removal of Cloud from Title of Third Person.**

— A sale of an infant's land, not for his benefit, but to remove a cloud from the title of another person, is void, notwithstanding full value was paid for the infant's interest. Moscovitz v. Homberger, 19 Misc. Rep. (N. Y. City Ct.) 429.

3. *Proof of Grounds.* — *Ex p.* Jewett, 16 Ala. 409; Pulliam v. Pulliam, 4 Dana (Ky.) 125; Loyd v. Malone, 23 Ill. 43; Mulford v. Stalzenback, 46 Ill. 303; Crain v. Parker, 1 Ind. 376; Linder v. Holmes, 2 Ind. 629; Martin v. Starr, 7 Ind. 226; Hough v. Doyle, 8 Blackf. (Ind.) 300; Harris v. Harris, 6 Gill & J. (Md.) 111; Blanchard v. De Graff, 60 Mich. 110; Castleman v. Relfe, 50 Mo. 583; Matter of Congdon, 2 Paige (N. Y.) 566; Potter v. Ogden, 136 N. Y. 384; Morrison v. Nellis, 115 Pa. St. 41; Greenlaw v. Greenlaw, 16 Lea (Tenn.) 435; Davidson v. Bowden, 5 Sneed (Tenn.) 129; Walker v. Page, 21 Gratt. (Va.) 636.

In Adkins v. Sidener, 5 Ind. 228, it was said that in the case of a guardian's application to sell real estate, the allegations in the petition need not be sustained by evidence, the statute merely requiring the court to be satisfied as to the propriety of selling, and being silent as to the means to be resorted to in order to satisfy the court.

In Martin v. Starr, 7 Ind. 224, which was an application by an admin-



**Consent of Parties.** — An order of sale cannot be entered upon consent of the parties.<sup>1</sup>

**Opinion of Guardian.** — An application for leave to sell land should not be entertained upon the mere opinion of the guardian that such a sale would be advantageous to the ward.<sup>2</sup>

istrator for an order of sale, it was held that the petition must be sustained by proof.

**Reference to Master.** — "We may with profit reproduce as applicable to the present case the remarks of the venerable Chief Justice Ruffin, in *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136. 'The court cannot forbear expressing a decided disapprobation of the loose and mischievous practice adopted in this case of decreeing the sale of an infant's land upon *ex parte* affidavits offered to the court, without any reference to ascertain the necessity and propriety of the sale and the value of the property, so as to compare the price with it. The court ought not to act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by the report of the master or the finding of an issue; and after a sale it ought to appear in like manner to be for the benefit of the infant to confirm it, otherwise there is great danger of imposition on the court, and much injury to infants.' " *In re Dickerson*, 111 N. Car. 108.

The court will not authorize a sale except upon the report of a master that such a sale is necessary and proper. *Matter of Congdon*, 2 Paige (N. Y.) 566.

**Propriety of Sale Not Shown.** — Where it appeared from the proof that the land sought to be sold constituted the home of the infants and was their entire estate, and that if sold it would realize a sum sufficient to support and educate the wards for only a few days, and that the wards and their mother had maintained themselves without the sale of such land for several years, and until the marriage of the mother to the guardian of the wards, it was proper to refuse an order of sale. *Lynn v. Lynn*, (Ky. 1896) 34 S. W. Rep. 1065.

Under the provisions of Tennessee Code, §§ 3323, 3332, and 3331, a widow and three minor children, being the owners of a valuable tract of land near Columbia, Tenn., asked the court to decree the sale of eighty-four acres of said land, to enable the widow to complete the purchase of a house in Co-

lumbia for herself and children, the personal property having been exhausted by the war: upon the ground that there were no suitable schools or churches near the farm for the education of the children, and to avoid being separated from them while at school; that the rents of the residue of the land were sufficient to support the family, and that the eighty-four acres could be detached without injury to the remainder of the tract. The court refused the prayer of the bill upon the ground that it did not sufficiently appear that it was to the interest of the minors that the land be sold, as the money was not needed to pay for their education or maintenance. *Porter v. Porter*, 1 Baxt. (Tenn.) 299.

1. *Martin v. Starr*, 7 Ind. 226; *Hough v. Doyle*, 8 Blackf. (Ind.) 300; *Crain v. Parker*, 1 Ind. 374; *Knox v. Coffey*, 2 Ind. 161; *Pulliam v. Pulliam*, 4 Dana (Ky.) 125; *Harris v. Harris*, 6 Gill & J. (Md.) 111.

**Answer as Evidence.** — The chancellor is not authorized to decree a sale of an infant's interest in land on the ground that it would be for his benefit, except upon proof of that fact; of which neither the infant's answer nor the answer of adult defendants is evidence to charge the infant. *Harris v. Harris*, 6 Gill & J. (Md.) 111; *Watson v. Godwin*, 4 Md. Ch. 25.

**Making the Infants Complainants** does not dispense with the necessity of proof that it will be for their interest to have the land sold. *Watson v. Godwin*, 4 Md. Ch. 25.

**Consent of Guardian Ad Litem.** — While the consent of the guardian *ad litem* will not justify a decree for the conveyance of the minor's estate if it appears that the conveyance will be to the prejudice of the infant, if it is apparently to his advantage a conveyance may be decreed, subject to the right of the infant to open the decree upon coming of age. *Pulliam v. Pulliam*, 4 Dana (Ky.) 125.

2. *Greenbaum v. Greenbaum*, 81 Ill. 367; *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136; *In re Dickerson*, 111 N. Car. 108.

Mere Opinion of Witnesses unaccompanied by facts clearly sustaining its correctness is not "satisfactory proof."<sup>1</sup>

(12) *Reference and Report*. — In some states the court is required to refer the petition to a master or commissioners to ascertain the necessity and propriety of the sale and the value of the property,<sup>2</sup> and a noncompliance with such requirement has been held to render the sale absolutely void.<sup>3</sup> But mere informalities in the report will not have this effect,<sup>4</sup> though they may render the sale erroneous.<sup>5</sup>

1. Davidson v. Bowden, 5 Sneed (Tenn.) 129; *In re* Dickerson, 111 N. Car. 108; Harrison v. Bradley, 5 Ired. Eq. (N. Car.) 136.

2. Upon application for the sale of land for partition upon the ground that the sale will be manifestly for the interest of the minors, it will be sufficient to give the court jurisdiction and to make the sale valid if upon a reference to the master he takes proof in which witnesses state that a sale will be to their interest, and give reasons or facts to sustain that opinion, and the decree of sale pursues the report. Swan v. Newman, 3 Head (Tenn.) 288. See also cases cited in succeeding notes.

3. Barrett v. Churchill, 18 B. Mon. (Ky.) 389; Lee v. Page, 12 Bush (Ky.) 202.

In New York, however, it has been held that the omission to order a reference is not fatal to the proceedings, but that the court may in its discretion determine the facts. Aldrich v. Funk, 48 Hun (N. Y.) 367, *distinguishing* Matter of Valentine, 72 N. Y. 184; Ellwood v. Northrup, 106 N. Y. 172. A purchaser under such defective proceedings may move to have his title perfected by new or amended proceedings, or to have the purchase money refunded. Matter of Valentine, 72 N. Y. 184.

In Mississippi the law does not require that the commissioners shall be appointed to ascertain that the land can be divided before a probate court can order a sale of the interest of minors under Code of 1857, art. 153, p. 464. This is a matter for the determination of the court on evidence at the hearing of the cause. Harrington v. Wofford, 46 Miss. 31.

4. Lampton v. Usher, 7 B. Mon. (Ky.) 63; Furnish v. Austin, (Ky. 1888) 7 S. W. Rep. 399; Lee v. Page, 12 Bush. (Ky.) 202 [*reviewing* Beil v. Clark, 2 Metc. (Ky.) 573; Mattingly v. Read, 3 Metc. (Ky.) 524; Woodcock v. Bowman, 4 Metc. (Ky.) 40; Watts v.

Pond, 4 Metc. (Ky.) 61; Thornton v. McGrath, 1 Duv. (Ky.) 349; Woodcock v. Bowman, 2 Duv. (Ky.) 508; and holding that the word "void," as used in the statutes and these cases, signified merely "voidable;" but see Wyatt v. Mansfield, 18 B. Mon. (Ky.) 782; Wells v. Cowherd, 2 Metc. (Ky.) 516; Carpenter v. Strother, 16 B. Mon. (Ky.) 296.

In Walker v. Hallett, 1 Ala. 379, it was held that a report of a master "that it would be for the interest of the defendants to sell the premises in separate lots, if the premises can be conveniently divided," was not sufficiently definite to be the foundation of a decree for the sale of mortgaged property.

5. *Sufficiency of Report as to Necessity of Sale*. — A report stating that the commissioners "believed a sale of said land would redound to the benefit of said infants," whereas the statute required them to state positively whether the interest of the infants required the sale to be made, did not render the sale void, but only voidable upon a direct appeal. Furnish v. Austin, (Ky. 1888) 7 S. W. Rep. 399.

A report that a sale would "rebound" to the interest of the infant, instead of that the interest of the infant "required" the sale to be made, is erroneous. Mattingly v. Read, 3 Metc. (Ky.) 524.

*Sufficiency of Report as to Value of Estate*. — Where the report of the commissioners fails to show that the estate valued and reported by them was all of the real and personal estate of the infants, the sale is irregular and may be set aside. Mattingly v. Read, 3 Metc. (Ky.) 524; Wyatt v. Mansfield, 18 B. Mon. (Ky.) 782; Wells v. Cowherd, 2 Metc. (Ky.) 515.

It has been held in Kentucky that failure to report the net value and annual profits of the estate renders the sale erroneous. Carpenter v. Strother, 16 B. Mon. (Ky.) 296; Wells v. Cow-

**Report Not Conclusive.** — The master's report that the interest of the infants would be promoted by the sale of the lands in question is not conclusive upon the court.<sup>1</sup>

(13) *Discretion of Court.* — The power to order the sale of a minor's lands should not be exercised as a matter of course, but only after investigation and inquiry into all the facts, and not then unless the judge is convinced that such sale is a necessity or is for the best interests of the minor.<sup>2</sup> The court should exercise a sound legal discretion in granting or refusing such an order of sale.<sup>3</sup>

herd, 2 Metc. (Ky.) 515; Woodcock v. Bowman, 4 Metc. (Ky.) 40; Woodcock v. Bowman, 2 Duv. (Ky.) 508.

**Reporting Evidence.** — Where a reference was to the master it was held that a report of the facts proved was sufficient, but that the better practice was to report the evidence. Campbell v. Harmon, 43 Ill. 18.

1. Troy v. Troy, Busb. Eq. (N. Car.) 85.

2. Ames v. Ames, 148 Ill. 338; Matter of Guernsey, 21 Ill. 443; Hartmann v. Hartmann, 59 Ill. 103; Dickinson v. Hughes, 37 Iowa 160; Myers v. McGavock, 39 Neb. 846; Bent v. Miranda, (N. Mex. 1895) 42 Pac. Rep. 91; Morrison v. Nellis, 19 W. N. C. (Pa.) 20; Cochran v. Van Surlay, 20 Wend. (N. Y.) 376.

3. In Linder v. Holmes, 2 Ind. 629, an order to sell to pay debts was refused, where it appeared that the debts were not pressing.

It is the duty of the court, where a fraud is attempted to be perpetrated upon infants, to protect them and to refuse an order where an application is made to sell their inheritance. Matter of Guernsey, 21 Ill. 443.

**Recital of Consent in Decree.** — A recital in a decree that it was entered on "consent" does not show that it was based on the "consent" alone, the presumption being that the chancellor, in directing the sale, exercised the discretion vested in him. Bent v. Miranda, (N. Mex. 1895) 42 Pac. Rep. 91.

**Review on Appeal.** — Where the court had jurisdiction and decreed a sale of a minor's real estate, the Supreme Court will not inquire into the question whether the sale was or was not advisable. Morrison v. Nellis, 19 W. N. C. (Pa.) 20.

Where the proof as to the propriety of selling land for the benefit of an infant seems to be sufficient, the judg-

ment of the lower court decreeing the sale will be affirmed. Neuner v. Neuner, (Ky. 1887) 6 S. W. Rep. 122.

**Sale for Partition.** — The right of an infant to partition is not absolute in all cases, and it is the duty of the court to inquire whether the partition, if granted, will result beneficially to the minor, or to his detriment; and if upon investigation it turns out that a partition is not for his best interest, then a partition should be denied. Ames v. Ames, 148 Ill. 321; Hartmann v. Hartmann, 59 Ill. 103. In this last case the partition was refused, the land being deemed the safest investment and unsuited to an actual partition.

In Watson v. Godwin, 4 Md. Ch. 25, the chancellor said: "This bill, as has been correctly observed, is founded upon the provisions of the 12th section of the Act of 1785, c. 72, which authorizes the chancellor to direct lands, tenements, etc., to be sold, in which infants, etc., have a joint interest or interest in common with any other person or persons, when it shall appear, upon hearing and examination of all the circumstances, that it will be for the interest and advantage both of the infant, etc., and of the other person or persons concerned, that a sale should be made. It is not sufficient that one or any number of the parties less than the whole would be benefited by the sale, but it must appear to the chancellor that all will be benefited by selling the property. And, as will be seen upon reference to the case of Tomlinson v. McKaig, 5 Gill (Md.) 274, the jurisdiction of the court cannot be sustained unless the bill alleges that it will be for the interest and advantage of all parties interested that the land should be sold."

In Power v. Power, (Ky. 1891) 15 S. W. Rep. 523, it was held, under Kentucky Civil Code, § 490, providing that

**Discretion Not Absolute.** — The discretion with which the court is invested in granting or refusing an order of sale is not an absolute one, but will be controlled when improperly exercised.<sup>1</sup>

**f. APPLICATION OR PETITION FOR ORDER OF SALE** — (1) *In General.* — The court has no jurisdiction to order the sale of an infant's land until called upon to act by the presentation of a proper petition asking for an order of sale.<sup>2</sup> The petition must be in writing,<sup>3</sup> and should be addressed to the proper court.<sup>4</sup> It must aver the existence of every fact necessary to confer jurisdiction upon the court.<sup>5</sup>

**Exhibits.** — Sometimes the petition is required to be accompanied by certain exhibits or certificates,<sup>6</sup> but this requirement is usually regarded as merely directory, and not jurisdictional.<sup>7</sup>

a vested estate in real property owned jointly by two or more persons may be sold in an action brought by either of them, though the plaintiff or defendant be an infant, if the property cannot be divided without materially impairing its value or the plaintiff's interest therein, that the minors have an absolute right to a sale if the land cannot be divided, and the question as to whether a sale will be beneficial to them is not involved, although the chancellor will see that the interests of the infant are not sacrificed.

1. *Dickinson v. Hughes*, 37 Iowa 160.

2. *Fitch v. Miller*, 20 Cal. 352; *Richardson v. Butler*, 82 Cal. 174; *Tracy v. Roberts*, 88 Me. 310.

3. *Hubermann v. Evans*, 46 Neb. 784; *Barry v. Clarke*, 13 R. I. 65, *distinguishing* *Robbins v. Tafft*, 12 R. I. 67.

4. Petitions in proceedings for the sale of infant's real estate should be addressed to the "Supreme Court of the State of New York." *Matter of Bookhout*, 21 Barb. (N. Y.) 348.

5. *Fitch v. Miller*, 20 Cal. 352; *Smith v. Biscailuz*, 83 Cal. 346; *Ryder v. Wood*, (Supreme Ct.) 8 N. Y. Supp. 421; *Wilson v. Holt*, 83 Ala. 528; *Loyd v. Malone*, 23 Ill. 43; *Mohr v. Tulip*, 40 Wis. 66; *Mohr v. Porter*, 51 Wis. 487; *Bryan v. Manning*, 6 Jones L. (N. Car.) 334; *Coffield v. McLean*, 4 Jones L. (N. Car.) 15.

**Substantial Compliance with Statute.** — While the petition must comply with the statute in order to confer jurisdiction, yet a substantial compliance with the statute is sufficient, and a petition which fully and fairly answers the purpose of the statute will confer jurisdiction. *Richardson v. Butler*, 82 Cal. 174.

**Infelicitous Presentation of Facts.** — Where the facts necessary to give jurisdiction to order the sale of an infant's land under the *New York* Code of Civil Procedure are proven, the infelicitous presentation of them in the petition does not affect the validity of the sale. *Ryder v. Wood*, (Supreme Ct.) 8 N. Y. Supp. 421.

**Averment of Ancestor's Debt.** — Where the proceeding is under a statute authorizing the sale, on application of a guardian, to pay debts of the ward's ancestor, the sale will be void if the petition, instead of alleging that the debt is a debt of the ancestor, alleges merely that the ward is indebted. *Coffield v. McLean*, 4 Jones L. (N. Car.) 15. For a petition held sufficient under such a statute, see *Bryan v. Manning*, 6 Jones L. (N. Car.) 334.

**Sale of Lands Descended.** — Where the proceeding is under a statute authorizing the sale of lands descended to infants, the petition must allege that the infant holds title by descent. *Singleton v. Cogar*, 7 Dana (Ky.) 479.

**Averment of Ward's Residence.** — Where the application is required by statute to be brought in the county where the ward resides, without regard to the situation of the lands, the petition must state the ward's residence. *Loyd v. Malone*, 23 Ill. 43.

6. *Overton v. Johnson*, 17 Mo. 442; *Pattee v. Thomas*, 58 Mo. 163; *Williams's Petition*, 3 Mass. 397.

Where the petition sets up the source of title it is not necessary that the title papers should be filed. *Smith v. Leavell*, (Ky. 1895) 29 S. W. Rep. 319.

7. *Overton v. Johnson*, 17 Mo. 449.

The failure of the guardian to file an inventory, list, and appraisal of

(2) *Designation of Parties in Interest.* — It is usual to designate the parties in interest in some manner in the petition.<sup>1</sup>

(3) *Showing Reason and Necessity for Sale* — **Necessity of Allegations.** — The petition for an order of sale should contain allegations of facts showing the reason for which the sale is sought and the necessity or propriety of making it.<sup>2</sup>

his ward's property does not deprive the Probate Court of jurisdiction nor render void a sale made under order of the court. *Pattee v. Thomas*, 58 Mo. 163. See also *infra*, VI. 2. f. (8) *Collateral Attack*.

1. *Harrington v. Wofford*, 46 Miss. 31; *Richardson v. Parrott*, 7 B. Mon. (Ky.) 379; *Persinger v. Jubb*, 52 Mich. 304; *Bryan v. Manning*, 6 Jones L. (N. Car.) 334; *Erwin v. Garner*, 108 Ind. 488; *Revill v. Claxon*, 12 Bush (Ky.) 558; *Exendine v. Morris*, 8 Mo. App. 383; *Mitchner v. Holmes*, 117 Mo. 185; *Elrod v. Lancaster*, 2 Head (Tenn.) 572.

**Ignoring Party.** — Where the guardian of one of several joint owners of an estate petitioned for the sale of the whole of it, without noticing the existence of another tenant in common, it was held that a purchaser obtained title for the part of the petitioner, but as to the other the sale was void. *Bryan v. Manning*, 6 Jones L. (N. Car.) 334; *Erwin v. Garner*, 108 Ind. 488.

**Designation of Petitioner.** — Where the proceedings are in fact prosecuted by the duly qualified curatrix of a minor, the sale will not be void for the reason that she described herself in the petition as "guardian" instead of as "curatrix." *Mitchner v. Holmes*, 117 Mo. 185.

Though the bill did not formally aver that the suit was brought by one as guardian, yet it stated that the plaintiff was the guardian, and the whole frame of the bill was in pursuance of what was required to be set out in such a case, and the infants were made defendants. The omission of this formal averment was held not to vitiate the proceedings. *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

Where an application for partition between heirs was made by one as administratrix, but she was also a widow with a right of dower, and also was guardian for the two minor heirs, the court regarded the misdescription as a mere formality. "The interest existed and was apparent to the judge of probate when he received and acted upon

the petition which she presented, and he would have had power to permit an amendment to show the fact in any stage of the proceedings. This being so, the proceedings ought not to be held void in another court for the informality." *Persinger v. Jubb*, 52 Mich. 304.

A petition in the name of the infant by his guardian for the sale of land is good under the *Kentucky* statute of 1813. *Richardson v. Parrott*, 7 B. Mon. (Ky.) 379.

It is immaterial whether the petition is filed in the name of the guardian for the minors, naming them, or in the names of the minors by their guardian. *Elrod v. Lancaster*, 2 Head (Tenn.) 572.

**Misnomer of Minor.** — Where the question of identity or of notice is not raised it is immaterial that the minor is called "Ellen," her name being "Eleanor." *Exendine v. Morris*, 8 Mo. App. 383.

**Naming Minors in Title.** — Infants whose names appear in the body of the petition filed by their guardian for the sale of their interest in land, being necessary parties, recognized and treated as such by the court, judgment rendered for the sale, sale made and confirmed, are held to have been parties to the proceedings and bound by the judgment and sale. "The mere omission of the clerical formality of writing their names at the head of the petition is an objection too unsubstantial to render the solemn judgment of a court a nullity." *Revill v. Claxon*, 12 Bush (Ky.) 558.

**Relatives.** — It is not necessary to state whether the minors have any relatives in the state. *Harrington v. Wofford*, 46 Miss. 31.

2. *Alabama.* — *Ex p. Jewett*, 16 Ala. 410.

*California.* — *Smith v. Biscailuz*, 83 Cal. 344; *Fitch v. Miller*, 20 Cal. 352.

*Colorado.* — *Orman v. Bowles*, 18 Colo. 463.

*Illinois.* — *Young v. Lorain*, 11 Ill. 625; *Loyd v. Malone*, 23 Ill. 43; *Matter of Harvey*, 16 Ill. 127.

**Manner of Making Allegations.** — It is not necessary, however, that such facts should be specifically alleged, but if it appears by rea-

*Indiana.* — Doe *v.* Wise, 5 Blackf. (Ind.) 406.

*Iowa.* — Bunce *v.* Bunce, 59 Iowa 533.

*Kansas.* — Howbert *v.* Heyle, 47 Kan. 58.

*Kentucky.* — Phalen *v.* Louisville Safety Vault, etc., Co., 88 Ky. 24; Vowless *v.* Buckman, 6 Dana (Ky.) 466; McKee *v.* Hann, 9 Dana (Ky.) 526.

*Maryland.* — Watson *v.* Godwin, 4 Md. Ch. 25.

*Michigan.* — Stewart *v.* Bailey, 28 Mich. 251; Ryder *v.* Flanders, 30 Mich. 336; Nichols *v.* Lee, 10 Mich. 526; Matter of Dorr, Walk. (Mich.) 145; Lynch *v.* Kirby, 36 Mich. 238; Schlee *v.* Darrow, 65 Mich. 362.

*Mississippi.* — Hanks *v.* Neal, 44 Miss. 212.

*Nebraska.* — Hubermann *v.* Evans, 46 Neb. 791.

*New York.* — Ryder *v.* Wood, (Supreme Ct.) 8 N. Y. Supp. 421.

*North Carolina.* — Patton *v.* Thompson, 2 Jones Eq. (N. Car.) 285.

*Oregon.* — Walker *v.* Goldsmith, 14 Oregon 125.

*Pennsylvania.* — Graham's Estate, 14 W. N. C. (Pa.) 31; Morrison *v.* Nellis, 115 Pa. St. 41.

*Tennessee.* — Kindell *v.* Titus, 9 Heisk. (Tenn.) 728.

*Texas.* — Weems *v.* Masterson, 80 Tex. 45.

*United States.* — Sprigg *v.* Stump, 8 Fed. Rep. 207.

**The Foundation of the Jurisdiction of the court to make the order is a petition specifying the purpose for which the sale is required.** Schlee *v.* Darrow, 65 Mich. 362.

**Construction of Petition.** — Where the petition does not conform to the strict terms of either of the statutes authorizing a sale, but that the intent of the sale is to pay debts of the wards is apparent from the fact that the proceeds were used for such purpose and for the support of the wards, no order being made for their investment, the proceeding will be treated as had under the statutes authorizing a sale for the payment of debts. Schaale *v.* Wasey, 70 Mich. 414.

**Changing Purpose by Amendment.** — A bill for a sale under a statute authorizing the sale of lands in which infants have a joint interest with other persons

may be converted by an amendment into a bill for partition. Watson *v.* Godwin, 4 Md. Ch. 25.

**Proving Facts Not Alleged.** — It seems that general facts showing either the necessity or the expediency of a guardian's sale not set out in the petition may be supplied by proofs at the hearing, and stated in the decree, under section 1537 of the Code of Civil Procedure; and that such general facts are merely those ultimate facts showing a contingency as prescribed in sections 1777 and 1778 of the Code of Civil Procedure, as distinguished from the more explicit facts and circumstances showing the condition of the estate required by section 1771 to be stated in the petition. Smith *v.* Biscailuz, 83 Cal. 344.

**Illustrative Petitions Showing Necessity and Propriety of Sale.** — A petition by a guardian alleging that his wards were seized of certain lands, that it was for the interests of the wards to sell such lands, and that he had been offered a sum which he regarded as reasonable and better than could be obtained at public sale, is sufficient, and a sale under the decree is valid. Morrison *v.* Nellis, 115 Pa. St. 41.

A petition stating that a part only of a minor's land was under improvement and that the balance was unproductive, that it was necessary that a portion of the proceeds of the land should be used to pay certain debts incurred in behalf of the ward, and that in the opinion of the petitioner it would be for the interest of the minor to have the land sold and the proceeds, after paying the debts, put out at interest, is a sufficient compliance with the statute. Nichols *v.* Lee, 10 Mich. 526.

A statement that a ward had no money or other personal property, and that it was to his interest and necessary for his support and education that the land should be sold, is sufficient. Howbert *v.* Heyle, 47 Kan. 58.

Where a guardian alleged in his petition "that at the time of the said appointment, nor at any time since, has there come into the hands or possession of your petitioner any personal property of his said wards," it was held that this departure from the expressions of the statute was not fatal to the jurisdiction of the court, although

sonable inference from the facts stated in the petition that one or more of the contingencies authorizing a sale exists, the court has jurisdiction, and the sale will be sustained.<sup>1</sup> A general averment in regard to the necessity of the sale is sufficient to give the court jurisdiction,<sup>2</sup> though it would be better to set forth fully all the facts and circumstances rendering a sale or other disposition of the minor's property necessary, so that the court may judge of the necessity and effectiveness of the measure.<sup>3</sup>

**Condition of Estate.** — The petition is usually required to set forth the condition of the estate in such manner as to enable the court to judge of the propriety or necessity of the sale.<sup>4</sup>

**Stating Several Grounds for Sale.** — The fact that two distinctly different grounds of sale — *e. g.*, partition and payment of debts —

the averment was somewhat equivocal. *Young v. Lorain*, 11 Ill. 625, *followed* in *Young v. Keogh*, 11 Ill. 642; *Matter of Harvey*, 16 Ill. 127.

A petition which, after showing the situation of the real estate of the minors, states that their interest would be promoted by the sale of the property and by a reinvestment of the proceeds, is sufficient. *Doe v. Wise*, 5 Blackf. (Ind.) 405.

Where a petition for the sale of lands alleged that the greater part was occupied by persons who refused to pay any rent and who were cutting down trees, and that it was subjected to heavy taxes which would amount to more than the value of the land by the time all the infants came of age, a case was presented for the exercise of the judgment of the court as to the necessity or expediency of the sale for a reinvestment, and it had jurisdiction to make the order. *Fitch v. Miller*, 20 Cal. 352.

1. *Fitch v. Miller*, 20 Cal. 352; *Sprigg v. Stump*, 8 Fed. Rep. 207.

Although it is not alleged in the petition that the land cannot be conveniently divided among the devisees, it is sufficient that it appears from the allegations in the petition that it cannot be conveniently divided among the owners without great loss to them, and that it would be to the interest of all that the whole tract should be sold and the proceeds divided among the owners according to their respective interests. This is a substantial compliance with the statute. *Hanks v. Neal*, 44 Miss. 212.

2. *Bunce v. Bunce*, 59 Iowa 533.

As affecting the question of jurisdiction, no just distinction can be made

between general and specific allegations of fact which in substance amount to the same thing and tend to show that the land to be sold is unproductive and expensive. *Smith v. Biscailuz*, 83 Cal. 344.

3. *Matter of Dorr*, Walk. (Mich.) 145.

4. *Fitch v. Miller*, 20 Cal. 352; *Smith v. Biscailuz*, 83 Cal. 344; *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336; *Lynch v. Kirby*, 36 Mich. 238; *Ryder v. Wood*, (Supreme Ct.) 8 N. Y. Supp. 421; *Weems v. Masterson*, 80 Tex. 45; *Lynch v. Baxter*, 4 Tex. 431; *Kindell v. Titus*, 9 Heisk. (Tenn.) 728.

The statute does not directly require, nor is it essential, that the value of the several items and parcels of property of which the estate consists, should be stated. *Fitch v. Miller*, 20 Cal. 352.

**Sale to Pay Debts.** — The petition should generally show the complete exhaustion of all the personal estate in the payment of debts, leaving just debts unpaid. The precise sum, as nearly as practicable, should be known to the court, that it may sell only a sufficiency to pay debts, and not needlessly dispose of the minor's estate. *Kindell v. Titus*, 9 Heisk. (Tenn.) 728.

**Sale for Reinvestment.** — If the sale is asked on the ground of necessity the petition must state the condition of the whole estate, real and personal; but if the sale of realty is asked upon the ground of an expediency for better investment of the proceeds, the petition need only state the condition of the estate to be sold, and the omission of the petition to describe and show the condition of the ward's personal estate will not affect the question of jurisdiction. *Smith v. Biscailuz*, 83 Cal. 344.

are joined in the same bill or petition will not affect the validity of the sale, although the practice is irregular.<sup>1</sup>

It has been held that it is not good practice to embrace in the same petition an application to sell lands, because such course would be for the general advantage of those concerned and an application for leave to invest the proceeds in other lands.<sup>2</sup>

**Opinion of Petitioner as to Propriety of Sale.** — The petitioner should state his opinion as to the propriety of the sale.<sup>3</sup>

(4) *Description of Premises.* — The petition should contain a description of the lands sought to be sold, sufficiently accurate to enable them to be identified.<sup>4</sup>

1. *Kindell v. Titus*, 9 Heisk. (Tenn.) 728.

A petition which sets forth a valid ground for sale, but joins therein another ground which is insufficient, will not thereby be rendered insufficient to give the court jurisdiction to order the sale. *Walker v. Goldsmith*, 14 Oregon 125.

2. "It is not good practice to embrace in one and the same petition proceedings in their nature distinct and independent. They should always be separated. One may be granted, the other refused. And while additional labor may be required of counsel, this is preferable to probable confusion of the record, thus misleading other counsel and the parties interested. It is of the utmost importance that the record, the history of each case or proceeding, should be intelligible and harmonious. The petition is, therefore, defective in combining with an application to sell decedent's real estate at private sale under the Act of 1853 a further application to be allowed to invest the purchase money in other real estate. We will, however, in this instance, treat the latter as surplusage, and as if the petition was simply for the sale of the real estate." *Graham's Estate*, 14 W. N. C. (Pa.) 31.

3. *McKee v. Hann*, 9 Dana (Ky.) 526; *Vowless v. Buckman*, 6 Dana (Ky.) 466.

But a petition for leave to sell lands for the purpose of paying off a mortgage thereon should not be entertained unless there is something more shown in the petition than the mere opinion of the guardian, by which the court can see that such a sale would be more advantageous to the interest of the wards than a sale under a foreclosure of the mortgage. *Greenbaum v. Greenbaum*, 81 Ill. 367.

4. *Alabama.* — *Doe v. Jackson*, 51 Ala. 514; *Gilchrist v. Shackelford*, 72 Ala. 7.

*California.* — *Scarf v. Aldrich*, 97 Cal. 360; *Wilson v. Hastings*, 66 Cal. 244.

*Indiana.* — *Weed v. Edmonds*, 4 Ind. 468.

*Iowa.* — *Deford v. Mercer*, 24 Iowa 118.

*Kansas.* — *Bryan v. Bauder*, 23 Kan. 95; *Burke v. Wheat*, 22 Kan. 722; *Hodgin v. Barton*, 23 Kan. 740; *Howbert v. Heyle*, 47 Kan. 58; *Watts v. Cook*, 24 Kan. 278.

*Kentucky.* — *Robinson v. Clark*, (Ky. 1896) 34 S. W. Rep. 1083.

*Massachusetts.* — *Verry v. McClellan*, 6 Gray (Mass.) 535.

*Michigan.* — *Dexter v. Cranston*, 41 Mich. 448; *Howard v. Moore*, 2 Mich. 226.

*Minnesota.* — *Rumrill v. St. Albans First Nat. Bank*, 28 Minn. 202; *Montour v. Purdy*, 11 Minn. 384.

*Missouri.* — *Trent v. Trent*, 24 Mo. 307.

*Nebraska.* — *Hubermann v. Evans*, 46 Neb. 784.

*North Carolina.* — *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259; *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431; *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42; *Bryan v. Manning*, 6 Jones L. (N. Car.) 334.

*Ohio.* — *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Mauarr v. Parrish*, 26 Ohio St. 636.

*Rhode Island.* — *Barry v. Clarke*, 13 R. I. 65.

*Texas.* — *Wells v. Mills*, 22 Tex. 302; *Wells v. Polk*, 36 Tex. 121; *Davis v. Touchstone*, 45 Tex. 491.

*Washington.* — *Brazee v. Schofield*, 2 Wash. Ter. 209.

**Descriptions Held Sufficient.** — A petition alleging ownership of the lands to



**The Proceedings Will Not Be Invalidated** by reason of a manifestly false statement in the description of the property in the application and license, when the remainder of the description, after rejecting that which is erroneous, is sufficiently certain to enable the land to be located.<sup>1</sup>

**Describing All of Estate.** — Where the contrary does not appear, it will be presumed that the real estate described in the petition includes all that the ward owns.<sup>2</sup>

(5) *Description of Ward's Interest.* — The ward's interest in the land should also be stated.<sup>3</sup>

(6) *Signature.* — While not generally considered essential to the jurisdiction of the court, it is usual and proper for a petition for the sale of an infant's lands to be signed by the guardian or other person presenting it.<sup>4</sup>

(7) *Verification.* — It is usually required that the allegations

be in the infant and showing them to be situated in the county is sufficient to sustain the jurisdiction of the court without a designation of the township and range or other description. *Doe v. Jackson*, 51 Ala. 514.

Where land was described as being "the southeast quarter of section 32, range 17, township 12," without stating specifically in what county or state the land was situated, or whether in range east or west or township north or south, but land answering to the above description was in fact situated in the county where all the parties interested resided and where all the proceedings were had, the petition was held sufficient when collaterally attacked after many years. *Howbert v. Heyle*, 47 Kan. 58.

The description need not necessarily be more specific, definite, and certain than is required in a conveyance of real property. Therefore, a general description of the premises as of real estate of the ward situated "in this state" or in any particular county or city therein is not void for indefiniteness or uncertainty. *Hubermann v. Evans*, 46 Neb. 784.

A description by naming the owners of adjacent lands is sufficient. *Bryan v. Manning*, 6 Jones L. (N. Car.) 334.

**Judicial Notice** is taken whether lands described by township and range in a guardian's petition for leave to sell are located in a township described only by name in the notice of sale. *Dexter v. Cranston*, 41 Mich. 448.

1. *Hubermann v. Evans*, 46 Neb. 784.

2. *Mauarr v. Parrish*, 26 Ohio St. 636.

3. Where the petition stated the interest of the wards in a certain rancho to be two thousand acres, when in reality it was four thousand acres, but asked the sale of their whole interest, and the order of sale and the sale in conformity thereto were for their whole interest, it was held that the mistake did not affect the jurisdiction of the court or the validity of the purchaser's title. *Fitch v. Miller*, 20 Cal. 352.

Where the allegations of the petition show the interest of the ward to be a remainder, a mistake in calling the interest a reversion is not material where the order of the court is also broad enough to cover whatever interest the ward had in the land. *Worthington v. Dunkin*, 41 Ind. 515.

4. *Mohr v. Tulip*, 40 Wis. 66; *Mohr v. Porter*, 51 Wis. 487; *Illinois Rev. Stat.* 1874, c. 64, § 29.

**Sufficient Signing.** — A petition of a guardian filed in 1865 and signed "Mary M. Olcott, guardian of Lizzie Olcott and Sue Olcott, by Levi Davis, her solicitor," was held to be sufficiently signed by the guardian. *Reid v. Morton*, 119 Ill. 118.

**In Michigan** it is not essential to the validity of the conveyance by the guardian that the petition for leave to sell be signed. *Ellsworth v. Hall*, 48 Mich. 407; *Stewart v. Bailey*, 28 Mich. 251.

As the petition is not required by statute to be signed, it is sufficient if it describes the guardian and he presents it in person. *Ellsworth v. Hall*, 48 Mich. 407.

of a petition for the sale of a minor's lands shall be verified by affidavit;<sup>1</sup> but while the want of a verification, when required, constitutes error, it is not usually regarded as a jurisdictional defect, and the sale will be sustained upon a collateral attack.<sup>2</sup> At best, it would only be cause for reversal.<sup>3</sup>

Where Two Guardians of Infants Unite in a petition for an order of sale, a verification by the affidavit of one only is sufficient.<sup>4</sup>

(8) *Collateral Attack* — (a) *Insufficiency of Petition in General*. — The authority to grant a license to sell real estate carries with it the implied power to determine the necessity for such sale and the sufficiency of the pleadings presented to the court for that purpose.<sup>5</sup> Therefore, as a general rule, the authority of a guardian's sale cannot be attacked in a collateral proceeding on the ground that the petition for the order was insufficient.<sup>6</sup> The power to hear and determine is jurisdictional. If the court thus having jurisdiction errs in holding an insufficient petition to be good it is mere error, reviewable upon appeal, but not a defect of jurisdiction.<sup>7</sup>

1. *Sprigg v. Stump*, 8 Fed. Rep. 207; *Vowless v. Buckman*, 6 Dana (Ky.) 466; *Owens v. Cowan*, 7 B. Mon. (Ky.) 155; *Lancaster v. Barton*, 92 Va. 615. See also the statutes and codes of the various states.

2. *Hamiel v. Donnelly*, 75 Iowa 93; *Gates v. Kennedy*, 3 B. Mon. (Ky.) 167; *Ellsworth v. Hall*, 48 Mich. 407; *Stewart v. Bailey*, 28 Mich. 251; *Coon v. Fry*, 6 Mich. 506; *Castleman v. Relfe*, 50 Mo. 583; *Trumble v. Williams*, 18 Neb. 144; *Mohr v. Tulip*, 40 Wis. 66, holding that the fact that the guardian's signature, though affixed to the petition, was not affixed to the jurat, did not deprive the court of jurisdiction. Followed in *Mohr v. Porter*, 51 Wis. 487.

In *Mississippi*, in proceedings under Rev. Code, 464, art. 153, it is not necessary that the petition should be verified by affidavit. *Hanks v. Neal*, 44 Miss. 212.

3. *Castleman v. Relfe*, 50 Mo. 583.

4. *Owens v. Cowan*, 7 B. Mon. (Ky.) 155.

Where an affidavit merely recited, "sworn to before me at my county aforesaid, this 22d day of October, 1886," and did not show what was sworn to, or by whom, but evidence was introduced showing that the plaintiff had sworn to the bill, it was held to be sufficient verification within the Code of *Virginia*, § 2616. *Lancaster v. Barton*, 92 Va. 615.

5. *Trumble v. Williams*, 18 Neb. 144.

6. *Alabama*. — *Goodman v. Winter*, 64 Ala. 410.

*Arkansas*. — *Borden v. State*, 11 Ark. 519.

*Indiana*. — *Worthington v. Dunkin*, 41 Ind. 515; *Nesbit v. Miller*, 125 Ind. 106; *McKeever v. Ball*, 71 Ind. 406; *Dequindre v. Williams*, 31 Ind. 444.

*Iowa*. — *Cooper v. Sunderland*, 3 Iowa 114; *Wright v. Marsh*, 2 Greene (Iowa) 109.

*Kansas*. — *Watts v. Cook*, 24 Kan. 279.

*Michigan*. — *Schlee v. Darrow*, 65 Mich. 362.

*Nebraska*. — *Trumble v. Williams*, 18 Neb. 144.

*New York*. — *Sheldon v. Wright*, 5 N. Y. 497.

*Ohio*. — *Ewing v. Higby*, 7 Ohio, pt. i., 201; *Paine v. Moreland*, 15 Ohio 435.

*Texas*. — *Lynch v. Baxter*, 4 Tex. 431; *Poor v. Boyce*, 12 Tex. 443; *Gillenwaters v. Scott*, 62 Tex. 672; *Klein-ecke v. Woodward*, 42 Tex. 311; *Weems v. Masterson*, 80 Tex. 45.

*United States*. — *Gager v. Henry*, 5 Sawy. (U. S.) 237.

In *Weems v. Masterson*, 80 Tex. 45, the court said that the proceedings would be conclusive on the parties until set aside by some direct proceeding for that purpose, even if the pleadings were so defective as to be bad on general demurrer or as to present no issue of fact.

7. *Nesbit v. Miller*, 125 Ind. 106; *Worthington v. Dunkin*, 41 Ind. 515;

(b) **Failure to Allege Grounds for Sale.** — It seems that a petition alleging no grounds for making the sale is insufficient to support the jurisdiction of the court.<sup>1</sup> But on collateral attack a general averment in regard to the necessity of the sale is sufficient.<sup>2</sup>

(c) **Want of or Defect in Description of Land.** — The authorities do not agree as to whether a guardian's sale may be attacked collaterally on the ground that the petition does not contain a correct description of the land sold.<sup>3</sup> Some hold that the description is essential, and that a license based upon a petition with the description omitted and the sale thereunder are void,<sup>4</sup> while other cases hold that a mistake in the description will not affect the jurisdiction of the court or the validity of the purchaser's title.<sup>5</sup> Any description will be sufficient when collaterally attacked if it provides the means of identifying the property.<sup>6</sup>

(d) **Failure to File Inventories, Accounts, etc.** — It has been held that the failure of the guardian to file an inventory, list, and appraisal of his ward's property did not deprive the Probate Court of jurisdiction, and therefore the sale would not be void on collateral attack.<sup>7</sup>

(e) **Want of Verification.** — A guardian's sale cannot be attacked collaterally on the ground that the petition for the sale was not verified.<sup>8</sup>

McKeever v. Ball, 71 Ind. 406; Dequindre v. Williams, 31 Ind. 444.

"As the Probate Court of Allen county had the power to hear and determine the matters alleged in the petition, it had the power to decide wrongly as well as rightly. In the course of its proceedings it became the duty of that court to decide whether the petition was sufficient for a sale of the premises. The court held it sufficient. As the petition presented a case for judicial determination, if the determination was erroneous it was reviewable in the appellate court, but not a void or worthless determination." Watts v. Cook, 24 Kan. 279. See also Bryan v. Bawder, 23 Kan. 95.

1. Ryder v. Flanders, 30 Mich. 336. But see Smith v. Biscailuz, 83 Cal. 344. See also cases cited *supra*, under VI. 2. f. *Application or Petition for Order of Sale*.

In Ryder v. Flanders, 30 Mich. 336, Christianity, J., said: "I am strongly inclined to think that such a petition, stating no ground or purpose for which the license to sell is asked, confers no more jurisdiction of the particular case upon the Probate Court, under our statutes, than a piece of blank paper."

2. Bunce v. Bunce, 59 Iowa 533. And cases cited *supra*, VI. 2. f. (3) *Showing Reason and Necessity for Sale*.

Collaterally the sale will be sustained if it appears by reasonable inference from the facts stated in the petition that it was necessary to sell the lands to maintain the minor in an insane asylum as provided by law. Sprigg v. Stump, 8 Fed. Rep. 207.

3. As to the necessity and sufficiency of description of lands sought to be sold, see cases cited *supra*, VI. 2. f. (4) *Description of Premises*.

4. Hubermann v. Evans, 46 Neb. 791, [citing Leary v. Fletcher, 1 Ired. L. (N. Car.) 259; Duckett v. Skinner, 11 Ired. L. (N. Car.) 431; Spruill v. Davenport, 3 Jones L. (N. Car.) 42; Verry v. McClellan, 6 Gray (Mass.) 535; Weed v. Edmonds, 4 Ind. 468; Trent v. Trent, 24 Mo. 307; Wilson v. Hastings, 66 Cal. 243; Gilchrist v. Shackelford, 72 Ala. 71].

5. Fitch v. Miller, 20 Cal. 352; Wilson v. Hastings, 66 Cal. 243; Scarf v. Aldrich, 97 Cal. 360; Howbert v. Heyle, 47 Kan. 58; Brazee v. Schofield, 2 Wash. Ter. 209, holding that a sale would be sustained on collateral attack although the petition contained no definite description of the property to be sold.

6. Hubermann v. Evans, 46 Neb. 784.

7. Overton v. Johnson, 17 Mo. 442; Pattee v. Thomas, 58 Mo. 163.

8. See cases cited *supra*, VI. 2. f. (7) *Verification*.

(f) **Falsehood of Allegations.** — Whether a sale was in fact for the interest of minors will not be inquired into collaterally where the jurisdiction of the court making the order of sale had attached.<sup>1</sup> The sufficiency of the evidence is a question for the court making the order, and its determination cannot be reviewed collaterally.<sup>2</sup>

If the Evidence Is Totally Insufficient, this will merely constitute an error in proceeding of the court rendering it; but the judgment will be valid until reversed, annulled, or set aside in the proper manner.<sup>3</sup> Jurisdiction depends upon the averments in the petition, and not upon their truth or falsity.<sup>4</sup>

1. *Morrison v. Nellis*, 115 Pa. St. 41; *Castleman v. Relfe*, 50 Mo. 583; *Young v. Lorain*, 11 Ill. 625; *Potter v. Ogden*, 136 N. Y. 384.

If the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law, and the decree is sustained and justified by the evidence then introduced, the infants will not be allowed, as against a *bona fide* purchaser, to go out of the record to show that upon facts and events arising subsequent to the decree their interests were not promoted by the sale of their real estate. *Walker v. Page*, 21 Gratt. (Va.) 636. This was applied to a sale in 1863 where the proceeds were invested in Confederate bonds.

2. *Linder v. Holmes*, 2 Ind. 629; *Young v. Lorain*, 11 Ill. 625; *Castleman v. Relfe*, 50 Mo. 583.

In order to give the Circuit Court jurisdiction to order the sale of the real estate of a ward on the application of his guardian under the tenth section of the act relative to guardian and ward, it must appear on the face of the record or proceeding itself that the contingency provided for in said section existed which authorized the court to make the order. Hence "the inquiry is not whether the proof was sufficient, but was such a case presented to the court as called upon it, under the statute, to act, to deliberate, and to decide? Was its aid properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment. Indeed, nothing can be alleged against it" in a collateral proceeding. *Young v. Lorain*, 11 Ill. 652.

Where certain facts are to be proved to a court having only special and limited jurisdiction in order to give it jurisdiction, a total defect of evidence

renders its action void; it is only when there is some evidence that the decision of the court as to its sufficiency is conclusive. *Potter v. Ogden*, 136 N. Y. 384.

**Failure to Find Jurisdictional Facts.** — A sale to pay debts is void where it does not appear that the County Court passed on and ascertained the fact that there was a debt or demand against the estate of the ward. *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42; *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Coffield v. McLean*, 4 Jones L. (N. Car.) 16.

3. *Castleman v. Relfe*, 50 Mo. 583.

4. *Fitch v. Miller*, 20 Cal. 352; *Richardson v. Butler*, 82 Cal. 174; *Young v. Lorain*, 11 Ill. 625; *Ryder v. Flanders*, 30 Mich. 336; *Lynch v. Kirby*, 36 Mich. 238; *Hurt v. Long*, 90 Tenn. 451.

In *Davidson v. Bowden*, 5 Sneed (Tenn.) 129, it was, among others, assumed as a ground for vacating a decree at the instance of a purchaser thereunder that the evidence did not authorize it. This case was thereafter cited as authority to the effect that when a minor's land had been sold, in a proceeding for that purpose, any other court or the same, in a collateral attack, could look to the evidence upon which the decree was made, and declare that decree void if the evidence did not justify it — in other words, that the jurisdiction of the court to make it depended upon the evidence. But this case was expressly *overruled* upon this point in *Hurt v. Long*, 90 Tenn. 451, where, after making the above statement of the doctrine announced, the court said: "This, of course, was not law, but the case gave much trouble to the profession and the court. The latter, without at once determining that it was erroneously decided, struggled against its effect by assuming that the bill by the purchaser in that case was

**3. Order of Sale — a. IN GENERAL —** The Requisites of the Statutes as to the form and entry of an order of sale must be strictly complied with.<sup>1</sup>

**Judge at Chambers.** — It has been held that an order of sale can be made by the judge at chambers,<sup>2</sup> and the contrary has also been held.<sup>3</sup>

**Joint Order.** — The fact that an order is joint for the sale of the property of several minors does not render the sale void.<sup>4</sup>

**b. FIXING TIME AND PLACE OF SALE.** — The order of sale should properly fix the time when and the place where the sale is to take place.<sup>5</sup> The failure of the order to fix a time and place

a 'direct attack' on the decree. See Judge Cooper's headnote to the case, page 129. But in practice it was treated as applying only to cases of direct attack, and was never properly recognized as authority for any other. In *Kindell v. Titus*, 9 Heisk. (Tenn.) 727, as in many others before and since, the jurisdictional doctrine it announced was expressly repudiated, and at Nashville, in 1877 (MS. opinion, case of *Wallace v. Mason*), it was declared overruled. It seems that it had been theretofore, as it was thereafter, deemed superfluous to say in terms that the case was not authority, in view of the fact that it had been impliedly overruled in so many cases holding that jurisdiction of a case did not depend and could not depend upon proof. It, of course, depends upon parties and subject matter as stated in the pleadings, and a court would have jurisdiction to hear a case so brought within it, and determine it, whether there was or not any proof on which to found a decree for complainant. Whether a particular decree could or should be rendered was not a jurisdictional question. The right to hear and determine, which is jurisdiction in the sense considered, is one thing; the decree to be rendered upon evidence offered is another. If the jurisdiction exists, the decree might be erroneous upon the evidence, but not void. So neither as to pleadings nor effect of proof in the original case do minors stand on any different footing, when they seek to impeach it, than other suitors."

As to an administrator's sale where the notice and petition fulfil the requirements of the statute, the order of sale is valid against any collateral proceedings, even though it be shown that no debts were proved up and allowed against the estate. *Stow v.*

*Kimball*, 28 Ill. 93; *Young v. Lorain*, 11 Ill. 625.

**Presumption of Proper Evidence.** — Where a ward's land was decreed to be sold on a proper petition presented to the court, it will be presumed that the necessary evidence was introduced. *Williams v. Pollard*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020.

**1. Signing Order.** — In *North Carolina* the decree for the sale may be signed by the judge of the Superior Court, although the clerk of such court had the authority to act as probate judge. *Barcello v. Hapgood*, 118 N. Car. 712.

**The Presence of President or Law Judge.** — The *Pennsylvania* Price Act of April 18, 1853, did not require the president or a law judge of the court to be present when the decree of sale was made. *Morrison v. Nellis*, 115 Pa. St. 41.

**Construction of Will under Which Minor Holds.** — Where all persons having any interest in the property have been made parties, it is not necessary, before decreeing the sale of land held by infants, to construe the will. *Lancaster v. Barton*, 92 Va. 615.

**2. *Stewart v. Daggy***, 13 Neb. 290; *Dietrichs v. Lincoln*, etc., R. Co., 14 Neb. 356; *Sharp v. Findley*, 71 Ga. 663.

**3. *Matter of Bookhout***, 21 Barb. (N. Y.) 348.

**4.** "The order is joint for the sale of the property of several minors. If this objection could have been available in any stage of the proceedings, it certainly does not constitute an impeachment of the jurisdiction of the Probate Court. It could, at most, have been successfully urged in error; but that is a matter not now under consideration, and in regard to which we give no opinion." *Doe v. Wise*, 5 Blackf. (Ind.) 402.

**5. *Campbell v. Harmon***, 43 Ill. 18:

of sale, though perhaps erroneous, does not affect the jurisdiction and render the sale void.<sup>1</sup>

*c. TERMS AND MANNER OF SALE.* — The order should prescribe the terms upon which the proposed sale shall be made,<sup>2</sup> and where the court has any discretion in the matter it should direct whether the sale be a public or private one.<sup>3</sup> Where the sale is to be a public one, the order should direct proper notice to be given.<sup>4</sup>

*d. FINDING FACTS AUTHORIZING SALE.* — The order authorizing a guardian's sale must find the existence of the facts showing the necessity, expediency, or propriety of making the sale.<sup>5</sup>

*Spring v. Kane*, 86 Ill. 580; *Benefield v. Albert*, 132 Ill. 665.

In Mississippi it is not necessary that the court should appoint a day for the hearing of the case where the proceedings were under Rev. Code 464, art. 153, providing for the sale of lands descended to infants. *Hanks v. Neal*, 44 Miss. 212. See also *Williamson v. Warren*, 55 Miss. 199.

In Illinois it is not necessary to fix the precise day or hour for sale. It is sufficient if the court in its order fixes certain reasonable limits, both as to the day and hour within which the sale shall be held, requiring the guardians to give notice. The guardian may exercise some discretion in the mode, favorable to the ward's interest. *Campbell v. Harmon*, 43 Ill. 18.

1. *Benefield v. Albert*, 132 Ill. 665.

The omission to fix the day is at most an irregularity which does not vitiate the sale. *Spring v. Kane*, 86 Ill. 580; *Williamson v. Warren*, 55 Miss. 199.

2. Rev. Code Ala., § 2434; *Reid v. Merton*, 119 Ill. 118.

**Amending Order as to Terms.** — Where the guardian is unable to sell upon the terms prescribed by the order, and so reports at a subsequent term, the court may make an amended order without notice, prescribing different terms, the case being still under the control of the court. *Reid v. Morton*, 119 Ill. 118.

3. **Alternative Order.** — A license to sell the land of a minor under the statute of *Maine* 1826, c. 342, could be in the alternative for public or private sale. *Ex p. Cousins*, 5 Me. 240.

In Pennsylvania the Orphans' Court had power to decree a private sale of the undivided interest of one or more minors, although the parties owning the other interest did not unite in the

sale. *Gilmore v. Rodgers*, 41 Pa. St. 120.

**Collateral Attack.** — A decree of the Orphans' Court directing a private sale of real estate cannot be impeached collaterally if the court has jurisdiction. *Gilmore v. Rodgers*, 41 Pa. St. 120.

**Innocent Purchaser.** — In *Indiana*, by the Act of 1843, pp. 529, 530, §§ 233, 239, as amended by the Act of 1845, p. 17, and the Act of 1849, p. 52, the court was authorized to make an order allowing the guardian to sell the land of his ward at private sale for two-thirds of its appraised value. Without this provision such an order would not avoid the sale in the hands of an innocent purchaser when the lands were sold for their full appraised value. *Worthington v. Dunkin*, 41 Ind. 515.

4. *Schlee v. Darrow*, 65 Mich. 362.

5. *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42, holding that a sale of land by a guardian under an order of a County Court, which was made without ascertaining that there were debts against the ward which made the sale necessary, is void, and no title passes. *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259, followed in *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431.

In *Williams v. Harrington*, 11 Ired. L. (N. Car.) 616, it was held that the decree of a court of equity of general jurisdiction for the sale of a minor's land for his benefit could not be impeached in any other case on the ground that it did not find the facts which showed the sale to be beneficial.

**Sufficiency of Finding as to Debts.** — Though the order must find and adjudicate that there are debts against the ward that render sale necessary, the amount of such debts, to whom due, or

*e.* DESCRIPTION OF LAND. — The order should contain a sufficient description of the land intended to be sold,<sup>1</sup> so that it may be identified, and it is highly important that the description be as accurate and definite as possible. An order authorizing a sale of so much of the land as may be necessary to accomplish the desired purpose has been held void for uncertainty.<sup>2</sup>

*f.* VACATING ORDER. — The order of sale may be vacated or set aside in a proper case upon ordinary principles.<sup>3</sup>

other particular description, is not essential to the validity of the order. *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96.

1. *Hill v. Wall*, 66 Cal. 130; *Doe v. Henderson*, 4 Ga. 148; *Hubermann v. Evans*, 46 Neb. 801; *Bloom v. Burdick*, 1 Hill (N. Y.) 130; *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431; *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259; *Brock v. King*, 3 Jones L. (N. Car.) 45; *Spruill v. Davenport*, 3 Jones L. (N. Car.) 42; *Pendleton v. Trueblood*, 3 Jones L. (N. Car.) 96; *Williams v. Harrington*, 11 Ired. L. (N. Car.) 616.

In Texas it has been held that under the statute in force in that state in 1860, the validity of the sale of real estate made by a guardian under an order of the Probate Court was not affected by a failure accurately to describe the land in the order; the statute directing such description was directory. *Robertson v. Johnson*, 57 Tex. 62.

See also *Wells v. Polk*, 36 Tex. 126, where an order of sale was sustained in which no description was attempted to be given of the land ordered to be sold, or any mention made by name, designation, or description of any particular tract of land.

#### Reference to Documents Not in Record.

— Where, by statute, the order of sale must describe the lands to be sold, the record cannot be helped out by referring to documents not found in it. *Hill v. Wall*, 66 Cal. 130.

#### Illustrations of Sufficient Descriptions.

— In *Georgia* it was early held that an order authorizing an administrator to sell "all the real estate" of the decedent is sufficient. *Doe v. Henderson*, 4 Ga. 148.

In *Bloom v. Burdick*, 1 Hill (N. Y.) 130, the description in a license of an administrator to sell the property of his intestate as "ninety-one acres of the southwest corner of lot number eleven" was held not to be fatally defective.

In *Pendleton v. Trueblood*, 3 Jones

L. (N. Car.) 96, an order authorized the guardian to "sell the land of his ward named in the petition." The petition had prayed an order "to sell her land adjoining the lands of John Bailey and others, containing about one hundred and ten acres." This was held sufficient.

In *Williams v. Harrington*, 11 Ired. L. (N. Car.) 616, a decree authorizing the sale of "the lands of the deceased debtor, lying in Moore county," was sustained.

2. *Graham v. Hawkins*, 38 Tex. 628, where the order authorized the sale of "so much land lying in Robertson county, and west of the Trinity river, \* \* \* as would pay the debts, amounting to some fifteen hundred dollars."

*Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259, where the order was that the guardian "have leave to sell as much of the lands belonging to the orphans of Stephen Mullen, deceased, as will satisfy the debts against said deceased's estate." See also *Ducket v. Skinner*, 11 Ired. L. (N. Car.) 431, where a similar description met with a similar fate.

In *Brock v. King*, 3 Jones L. (N. Car.) 45, the court authorized the guardian to sell one hundred acres, more or less, without definite boundaries. The order was held void, the court saying that if valid it authorized the guardian to sell any part he pleased of the ward's estate which he deemed necessary for the payment of debts, whereby the court, instead of exercising its own discretion, had undertaken to delegate that discretion to the guardian.

3. See article JUDGMENTS. See also *Clark v. Underwood*, 17 Barb. (N. Y.) 202, where an order authorizing a sale and special guardian therefor was set aside as having been fraudulently obtained.

**Improvident Dismissal.** — An order dismissing the proceedings, entered by mistake after decree, does not affect the

**4. Appraisement.** — It is a common requirement that the minor's property must be appraised before it can be sold.<sup>1</sup>

**A Failure to Comply with This Requirement** is an irregularity for which the sale may be set aside in a direct proceeding for that purpose,<sup>2</sup> but it is not regarded as a jurisdictional defect, and the sale will be sustained upon a collateral attack.<sup>3</sup> Nor can the sufficiency of the appraisement be collaterally questioned.<sup>4</sup>

**Fixing Upset Price.** — To prevent a sacrifice of the infant's interests, it is usually provided that the land cannot be sold for less than a certain proportion of the appraised value,<sup>5</sup> and a sale in contravention of such a statute has been held to be absolutely void.<sup>6</sup> But, on the other hand, it has been held that the sale cannot be

order nor the guardian's authority to sell. *Fitzgibbon v. Lake*, 29 Ill. 165.

**Order for Sale Not a Judgment.** — The probate order for a guardian's sale is not a judgment, and Iowa Code, §§ 3154, 3157, providing for reversing, vacating, and modifying judgments, have no proper application to such an order. *Bunce v. Bunce*, 59 Iowa 533.

1. *California*. — *Smith v. Biscailuz*, 83 Cal. 344.

*Indiana*. — *Worthington v. Dunkin*, 41 Ind. 515; *Doe v. Wise*, 5 Blackf. (Ind.) 406; *Meikel v. Borders*, 129 Ind. 529.

*Kentucky*. — *Thornton v. McGrath*, 1 Duv. (Ky.) 350; *Mattingly v. Read*, 3 Metc. (Ky.) 524; *Woodcock v. Bowman*, 4 Metc. (Ky.) 40; *McKee v. Hann*, 9 Dana (Ky.) 526.

*Louisiana*. — *Fraser v. Zyllicz*, 29 La. Ann. 534.

*Missouri*. — *Exendine v. Morris*, 8 Mo. App. 383; *Strouse v. Drennan*, 41 Mo. 289; *Bobb v. Barnum*, 59 Mo. 394; *Johnson v. Beazley*, 65 Mo. 250; *McVey v. McVey*, 51 Mo. 406; *Noland v. Barrett*, 122 Mo. 181; *Overton v. Johnson*, 17 Mo. 442; *Pattee v. Thomas*, 58 Mo. 163; *Carder v. Culbertson*, 100 Mo. 269.

**Appraisement of Minor's Interest.** — Where the minor's interest is only a remainder, and the life estate and remainder are sold together, it is immaterial that the value of the remainder interest does not appear. *Exendine v. Morris*, 8 Mo. App. 383.

**Net Value.** — Where the statute required that the appraisers of the real estate should report its net value, but they reported only in general terms, a sale ordered on the basis of such report is invalid. *Woodcock v. Bowman*, 4 Metc. (Ky.) 40.

2. *Noland v. Barrett*, 122 Mo. 181;

*Strouse v. Drennan*, 41 Mo. 289.

3. *Overton v. Johnson*, 17 Mo. 442; *Noland v. Barrett*, 122 Mo. 181. But see *Strouse v. Drennan*, 41 Mo. 289.

4. "As to the question whether the appraisement in the form made [for the sale of a ward's realty] gave sufficient information to the court to enable it to exercise its prerogative in rendering judgment, it may be said that in a collateral attack the court (being, as in this case, for such proceedings, of general jurisdiction) had, by virtue of the petition filed and exhibited to it, jurisdiction to determine the sufficiency of the evidence upon the matter in hand, and its judgment in the premises cannot here be controverted." *Smith v. Biscailuz*, 83 Cal. 359.

**Failure to Appraise Entire Property.** — Under a statute requiring the entire estate of an infant to be valued upon a petition for a sale of any part of it, where the petition as sworn to stated that the land to be sold was the whole, and the commissioner's report stated the same, the fact that there was other land of the infant's, as it afterwards appeared from an amended petition, cannot vitiate a sale made and confirmed before the amendment was filed. Where the infants have no personal estate the accidental omission of some real estate may be deemed merely a formal objection which cannot affect the purchaser. *McKee v. Hann*, 9 Dana (Ky.) 526.

5. See the statutes and codes of the various states.

6. *Carder v. Culbertson*, 100 Mo. 269.

**In Louisiana** property sold for a purpose other than to pay debts of the succession must bring the full amount of the appraisement, otherwise a sale will be void. *Fraser v. Zyllicz*, 29 La. Ann.

534.



collaterally attacked because the property sold for less than the appraised value.<sup>1</sup>

**Time of Appraisalment.** — An appraisalment should properly be made after the filing of the petition<sup>2</sup> and before the sale;<sup>3</sup> but the fact that the appraisalment is made before the filing of the petition is a mere irregularity which will not render the sale void,<sup>4</sup> and perhaps if the appraisalment is filed before confirmation of the sale it will be sufficient.<sup>5</sup>

**The Appraisers.** — The appraisalment is usually required to be made by a prescribed number of "householders," or "freeholders,"<sup>6</sup> who must be sworn.<sup>7</sup> For the purpose of the law in reference to appraisalment, any one in possession of land notoriously known to claim it will be considered a freeholder.<sup>8</sup>

**Failure of the Appraisers to Sign** their appraisalment will not avoid the sale as against a purchaser in good faith.<sup>9</sup>

**5. Special Sale Bond — a. NECESSITY OF BOND — Generally Required.** — It is almost universally required that a guardian making a sale of his ward's estate under an order of court must execute a special bond properly to apply and account for the proceeds of the sale.<sup>10</sup>

1. Meikel v. Borders, 129 Ind. 529.

"The property was appraised at four hundred dollars, and sold only for one hundred dollars. This matter, most clearly, has nothing to do with the jurisdiction of the court. Nor is it a circumstance which, in any form of objection, can invalidate the sale. It is no evidence of fraud in that transaction." Doe v. Wise, 5 Blackf. (Ind.) 405.

2. Until the statutory guardian's petition is filed the court has no right to appoint the commissioners to value the real estate. Mattingly v. Read, 3 Metc. (Ky.) 524.

3. Strouse v. Drennan, 41 Mo. 289, holding that failure to have an appraisalment before the sale is good reason for avoiding it.

In Bobb v. Barnum, 59 Mo. 394, it was held that the sale of land by a curator is not rendered invalid merely by the fact that the appraisalment is subsequent to the contract of sale, where the contract is made with the understanding that it cannot be finally consummated until further proceedings are had. In such case, where the requirements of the statute as to appraisalment, report, etc. (Wagn. Stat. Mo., 677, § 32), were subsequently carried out, it will be held, notwithstanding such irregularity, to be a substantial compliance with the statute.

4. Noland v. Barrett, 122 Mo. 181, where the court said: "Irregularities in the appraisalment have not heretofore been considered by this court sufficient to invalidate the sale of an administrator or curator." Citing Moore v. Wingate, 53 Mo. 398; Johnson v. Beazley, 65 Mo. 250; McVey v. McVey, 51 Mo. 406; Bobb v. Barnum, 59 Mo. 394.

5. See Smith v. Biscailuz, 83 Cal. 344.

6. See codes and statutes of the various states.

Where the law requires appraisers of realty to be "freeholders," it is competent to show by oral testimony that such appraisers described in their certificate as "householders" were freeholders. Exendine v. Morris, 8 Mo. App. 383.

7. Although it may not appear from the record that the commissioners to value the estate of the infant were sworn, it cannot be presumed that they were not in fact sworn as the law requires. Thornton v. McGrath, 1 Duv. (Ky.) 350.

8. Exendine v. Morris, 8 Mo. App. 383.

9. Worthington v. Dunkin, 41 Ind. 515.

10. California. — Smith v. Biscailuz, 83 Cal. 344.

Colorado. — Orman v. Bowles, 18 Colo. 463.

**Effect of Failure to Give Bond.** — There is considerable conflict in the authorities as to the effect of noncompliance with a statute requiring such bond. One line of cases holds that a failure to give a special sale bond will render the sale absolutely void.<sup>1</sup> The

*Florida.* — Hart *v.* Stribling, 21 Fla. 136.

*Illinois.* — Campbell *v.* Harmon, 43 Ill. 18; Wann *v.* People, 57 Ill. 206.

*Indiana.* — Dequindre *v.* Williams, 31 Ind. 444; Davidson *v.* Koehler, 76 Ind. 399; Davidson *v.* Bates, 111 Ind. 391; Eliason *v.* Bronnenburg, (Ind. 1897) 46 N. E. Rep. 582; Colburn *v.* State, 47 Ind. 311; McKeever *v.* Ball, 71 Ind. 398; Makepeace *v.* Lukens, 27 Ind. 435; Nesbit *v.* Miller, 125 Ind. 106; Shook *v.* State, 53 Ind. 403; Corbaley *v.* State, 81 Ind. 62; State *v.* Steele, 21 Ind. 207; Kinsey *v.* State, 71 Ind. 32; Hudson *v.* State, 54 Ind. 378; Bissot *v.* State, 53 Ind. 408; Stevenson *v.* State, 69 Ind. 257; Marquis *v.* Davis, 113 Ind. 221; Warwick *v.* State, 5 Ind. 350; Davidson *v.* Hutchins, 112 Ind. 322.

*Iowa.* — Hamiel *v.* Donnelly, 75 Iowa. 93; Madison County *v.* Johnston, 51 Iowa 152; McWilliams *v.* Kalbach, 55 Iowa 110; Pursley *v.* Hayes, 22 Iowa 11; Bunce *v.* Bunce, 65 Iowa 106, 59 Iowa 533.

*Kansas.* — Howbert *v.* Heyle, 47 Kan. 64; Watts *v.* Cook, 24 Kan. 278.

*Kentucky.* — Barber *v.* Hopewell, 1 Metc. (Ky.) 261; Taylor *v.* Taylor, 6 B. Mon. (Ky.) 566; Woodcock *v.* Bowman, 4 Metc. (Ky.) 40; Owens *v.* Cowan, 7 B. Mon. (Ky.) 152; Barrett *v.* Churchill, 18 B. Mon. (Ky.) 389; Barnett *v.* Bull, 81 Ky. 127; Fritsch *v.* Klausing, (Ky. 1890) 13 S. W. Rep. 241; Isert *v.* Davis, (Ky. 1895), 32 S. W. Rep. 294; Lampton *v.* Usher, 7 B. Mon. (Ky.) 63; Furnish *v.* Austin, (Ky. 1888) 7 S. W. Rep. 400; Vowless *v.* Buckman, 6 Dana (Ky.) 466; Henning *v.* Barringer, (Ky. 1888) 10 S. W. Rep. 136; Thornton *v.* McGrath, 1 Duv. (Ky.) 350; Wyatt *v.* Mansfield, 18 B. Mon. (Ky.) 781; Taylor *v.* Hemingway, 81 Ky. 158; Phalan *v.* Louisville Safety Vault, etc., Co., 88 Ky. 24; McKee *v.* Hann, 9 Dana (Ky.) 526; Johnson *v.* Johnson, 88 Ky. 275; Johnson *v.* Chandler, 15 B. Mon. (Ky.) 584; Irvine *v.* McDowell, 4 Dana (Ky.) 629.

*Maine.* — Williams *v.* Morton, 38 Me. 47; Probate Judge *v.* Toothaker, 83 Me. 195; Tracy *v.* Roberts, 88 Me. 316.

*Massachusetts.* — Brooks *v.* Brooks,

11 Cush. (Mass.) 18; Mattoon *v.* Cowing, 13 Gray (Mass.) 387 [*distinguishing* Wann *v.* People, 57 Ill. 206]; Bennett *v.* Overing, 16 Gray (Mass.) 267; Williams *v.* Reed, 5 Pick. (Mass.) 480; Lyman *v.* Conkey, 1 Met. (Mass.) 317; Fay *v.* Taylor, 11 Met. (Mass.) 529.

*Michigan.* — Schlee *v.* Darrow, 65 Mich. 362; Stewart *v.* Bailey, 28 Mich. 251; Ryder *v.* Flanders, 30 Mich. 343; Norman *v.* Olney, 64 Mich. 553; Schaale *v.* Wasey, 70 Mich. 414; Persinger *v.* Jubb, 52 Mich. 304.

*Minnesota.* — Tomlinson *v.* Simpson, 33 Minn. 443.

*Mississippi.* — Morton *v.* Carroll, 68 Miss. 699; Vanderburg *v.* Williamson, 52 Miss. 233.

*Missouri.* — State *v.* Weaver, 92 Mo. 673; State *v.* Harbridge, 43 Mo. App. 16; State *v.* Bilby, 50 Mo. App. 162.

*Nebraska.* — Myers *v.* McGavock, 39 Neb. 845.

*Nevada.* — Henderson *v.* Coover, 4 Nev. 429.

*New York.* — Cuddeback *v.* Kent, 5 Paige (N. Y.) 92; Long *v.* Long, 142 N. Y. 545; Kelly *v.* Pitcher, (Brooklyn City Ct.) 4 N. Y. Supp. 3; Ryder *v.* Wood, (Supreme Ct.) 8 N. Y. Supp. 421; Dodge *v.* St. John, 96 N. Y. 260; Salisbury *v.* Van Hoesen, 3 Hill (N. Y.) 77; Behrens *v.* Rodenburg, 1 N. Y. City Ct. 95.

*Ohio.* — Maxsom *v.* Sawyer, 12 Ohio 195.

*Pennsylvania.* — Com. *v.* Lloyd, 34 Leg. Int. (Pa.) 248, 35 Leg. Int. (Pa.) 171; Com. *v.* Pray, 125 Pa. St. 542; Blauser *v.* Diehl, 90 Pa. St. 350.

*Rhode Island.* — McGale *v.* McGale, 18 R. I. 676.

*Tennessee.* — Andrew's Case, 3 Humph. (Tenn.) 592.

*West Virginia.* — Reed *v.* Hedges, 16 W. Va. 168.

*Wisconsin.* — Weld *v.* Johnson Mfg. Co., 84 Wis. 537; Emery *v.* Vroman, 19 Wis. 689; McKinney *v.* Jones, 55 Wis. 39.

*United States.* — Kelley *v.* Morrell, 29 Fed. Rep. 736; Goldsmith *v.* Gilliland, 23 Fed. Rep. 645; Arrowsmith *v.* Gleason, 129 U. S. 86.

1. *Kentucky.* — Barber *v.* Hopewell, 1 Metc. (Ky.) 261; Barrett *v.* Churchill,

weight of authority supports this view. But in some states it is held that where the bond provided for in the statute is not given the sale is not void, although it may be erroneous.<sup>1</sup>

18 B. Mon. (Ky.) 391; *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 781; *Carpenter v. Strother*, 16 B. Mon. (Ky.) 296; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 389; *Barnett v. Bull*, 81 Ky. 127; *Fritsch v. Klausing*, (Ky. 1890) 13 S. W. Rep. 241; *Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294. But compare *Lampton v. Usher*, 7 B. Mon. (Ky.) 63; *Owens v. Cowan*, 7 B. Mon. (Ky.) 155.

*Maine*. — *Williams v. Morton*, 38 Me. 47 [see also *Moody v. Moody*, 11 Me. 247]; *Tracy v. Roberts*, 88 Me. 316.

*Massachusetts*. — *Williams v. Reed*, 5 Pick. (Mass.) 480. But see *Perkins v. Fairfield*, 11 Mass. 227.

*Michigan*. — *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 343.

*Mississippi*. — *Vanderburg v. Williamson*, 52 Miss. 233.

*Nevada*. — *Henderson v. Coover*, 4 Nev. 429.

*Wisconsin*. — *Weld v. Johnson Mfg. Co.*, 84 Wis. 537. But see *McKinney v. Jones*, 55 Wis. 39, a case where the sale was held not to be void although the bond given did not comply with the terms of the statute.

**Bond a Condition Precedent.** — "The execution of the covenant is a precedent condition upon the performance of which the jurisdiction of the court depends," and a judgment and sale made under it without a compliance with these prerequisites are void. *Barber v. Hopewell*, 1 Metc. (Ky.) 261. See also *Carpenter v. Strother*, 16 B. Mon. (Ky.) 296; *Barrett v. Churchill*, 18 B. Mon. (Ky.) 391.

In *Kentucky* the statute requires a bond to be executed (except in certain cases, see *infra*, p. 792), by the guardian of the infant, with at least two sureties, and on this bond the court is required to indorse its approval. It is further provided, Code, § 493, subs. 3, that "if bond be not given, any order of sale, and any sale or conveyance made under such order, shall be absolutely void and of no effect." Under this statute it has been held that "while the omission to approve the bond may be merely erroneous, and the solvency and worth of the sureties could not affect the purchaser, it is plain that if no bond be executed by the guardian

with the two sureties the sale is void." *Barnett v. Bull*, 81 Ky. 127.

Where the bond has been improperly executed, with but one surety, the sale is void. *Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294.

In *Michigan* the statute providing for guardians' sales of real estate for the purpose of investing the proceeds at interest imperatively requiring the giving of a bond before the sale in every case, a sale without the giving of such bond, although not expressly ordered by the Probate Court, is invalid. *Ryder v. Flanders*, 30 Mich. 336.

In *Wisconsin* it is held that the proceedings specified in the Rev. Stat., § 3919, as to giving bond, etc., are, as to the ward, all adversary proceedings, required for the latter's protection, and none of them can be waived by the guardian so as to bind the ward by such waiver, and the ward may always be heard to allege that any of them have been omitted. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, *distinguishing* *Mohr v. Porter*, 51 Wis. 487.

In the former case the bond specifically described certain lands, and the condition was that the guardian should account for the proceeds of the sale "of said real estate." It was held that such bond did not apply to the sale of any lands other than those specifically described, and there being no other bond, a sale of other lands of the wards was void. Compare *McKinney v. Jones*, 55 Wis. 39.

1. *Colorado*. — *Oirman v. Bowles*, 18 Colo. 463.

*Indiana*. — *Dequindre v. Williams*, 31 Ind. 444; *Davidson v. Koehler*, 76 Ind. 399; *Davidson v. Bates*, 111 Ind. 391; *Marquis v. Davis*, 113 Ind. 221; *Eliason v. Bronnenburg*, (Ind. 1897) 46 N. E. Rep. 582; *Davidson v. Hutchins*, 112 Ind. 322.

*Iowa*. — *Bunce v. Bunce*, 59 Iowa 533; *Hamiel v. Donnelly*, 75 Iowa 93.

*Kansas*. — *Watts v. Cook*, 24 Kan. 278; *Higgins v. Reed*, 48 Kan. 279; *Howbert v. Heyle*, 47 Kan. 64.

*Ohio*. — *Arrowsmith v. Harmoning*, 42 Ohio St. 254.

*Pennsylvania*. — *Lockhart v. John*, 7 Pa. St. 137; *Rhawn v. Com.*, 102 Pa. St. 454; *Potts v. Wright*, 82 Pa. St.

**Infant's Interests Secured Without Bond.** — Sometimes the special bond is not required to be given where the infant's interest is amply

498; *Leedom v. Lombaert*, 80 Pa. St. 381; *Dixcy v. Laning*, 49 Pa. St. 143.

*United States.* — *Arrowsmith v. Gleason*, 129 U. S. 86.

In **Indiana** it has been held that a sale under an order of court by the guardian, without giving the additional bond required, and without afterwards accounting for the proceeds of the sale, does not divest the title and interest of the wards. *McKeever v. Ball*, 71 Ind. 398. It was held in this case that the filing of the additional bond was a necessary step to give the court jurisdiction. See *Marquis v. Davis*, 113 Ind. 219.

But it has also been held that a guardian's sale might be sustained where the jurisdictional step of filing the additional bond had not been taken and no such bond had been given, if it appears that the guardian faithfully accounted for the proceeds of the sale, and that in such case the wards have no equity on which to invoke the aid of the court to set aside the sale. *Dequindre v. Williams*, 31 Ind. 444; *Foster v. Birch*, 14 Ind. 445; *Decker v. Fessler*, (Ind. 1896) 44 N. E. Rep. 657; *Eliason v. Bronnenburg*, (Ind. 1897) 46 N. E. Rep. 582.

The sale cannot be avoided except in a direct proceeding seasonably brought to set aside the sale. *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Hutchins*, 112 Ind. 322.

In **Iowa** it is held that it is error to approve a sale made without giving the required sale bond, but that, notwithstanding, where jurisdiction has attached, and the sale has been approved, it cannot be successfully attacked in a collateral proceeding by alleging the want of a sale bond. *Bunce v. Bunce*, 59 Iowa 533, *explained* in *Bunce v. Bunce*, 65 Iowa 106; *Hamel v. Donnelly*, 75 Iowa 93.

In **Kansas** "probate courts should cautiously observe the provisions of the section quoted, and are greatly negligent in permitting sales or mortgages by guardians without security; yet we cannot hold that the failure to give security deprives the court of jurisdiction. It is an error of a court having competent and full jurisdiction, subject to reversal or avoidance by due proceedings. The absence of the security did not render the proceedings

void, but only irregular." *Watts v. Cook*, 24 Kan. 279, *quoted* in *Higgins v. Reed*, 48 Kan. 279.

*Rule of Property.* — In *Howbert v. Heyle*, 47 Kan. 64, the court, speaking of *Watts v. Cook*, 24 Kan. 279, said: "It is now the opinion of the writer of this opinion that that case was decided wrongly and against the great weight of authority, but it was decided nearly eleven years ago, and has possibly to some extent become a rule of property, and it is not against all authority nor all reason, but there are cases in Ohio, Pennsylvania, and Iowa which seemingly sustain it. *Mauarr v. Parish*, 26 Ohio St. 636; *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 34 Pa. St. 42; *Dixcy v. Laning*, 49 Pa. St. 143; *Bunce v. Bunce*, 59 Iowa 533. It is, therefore, now believed by this court, or at least by a majority of its members, that we should follow our former decision upon this subject, and we shall do so."

In **Kentucky** it is difficult, if not impossible, to reconcile all that is said in the cases. Some cases seem in effect to decide that the execution of the bond is not essential to give the court jurisdiction (see *Lampton v. Usher*, 7 B. Mon. (Ky.) 63; *McKee v. Hann*, 9 Dana (Ky.) 526); while others hold that the statute must be complied with or the court will be without jurisdiction and the sale will be void.

In *Owens v. Cowan*, 7 B. Mon. (Ky.) 155, the court said: "It is objected that no bond was executed by the guardians, either prior or subsequent to the sale. But the court required the commissioner appointed to make the sale to execute bond with security before he proceeded to act under the decree, and in a sufficient penalty for the protection of all the heirs. The bonds for the purchase money were directed to be taken payable to the commissioner. Besides, when the complainant exhibited his bill the petition case was within the power of the chancellor, and for aught that appears in the record, may be so still. It was in the power of the chancellor, before permitting the proceeds of the sale to go into the hands of the guardians, to require from them sufficient bonds for the additional protection of their wards. And such

secured without it, as where the proceeds of sale are to be paid into and invested or controlled by the court,<sup>1</sup> or where the sale is not for cash and the purchase price remains a lien upon the land.<sup>2</sup>

**b. REASONS FOR REQUIRING SPECIAL BOND — No Liability on General Bond.** — The sureties upon a guardian's general bond are usually held not to be liable for a default of the guardian in respect to the proceeds of the sale of real estate belonging to his ward.<sup>3</sup>

bonds, it may be presumed, would have been required. The failure to require bonds from the guardians did not affect the jurisdiction of the court, nor, as the whole case and the proceeds of the sale were still within the control of the court, did it oppose any obstacle to the confirmation of the sale, or constitute a sufficient reason for avoiding it by the complainant."

In *McKee v. Hann*, 9 Dana (Ky.) 526, it was held that though the statute requires that the guardian shall give bond before the sale, the court might, for good cause, change the custody of the funds, or change the receiver, and require a proper bond of the party authorized to take charge of the funds. And though errors might intervene in such proceedings, for which the decree might be reversed, the displaced guardian, rather than the infants, would have the right to complain of them; and they could not affect the sale by which the fund was produced.

See also *supra*, p. 791, for cases where no bond is required in Kentucky.

**In Ohio — Rule of Property.** — In Ohio the rule was established in *Mauarr v. Parrish*, 26 Ohio St. 636, that although the order of sale and the confirmation of the sale may have been erroneous, yet such sales are not void because of a failure to give the additional bond required by statute. This decision has become a rule of property in Ohio, *Arrowsmith v. Harmoning*, 42 Ohio St. 254; and as such will be followed by the Federal courts, *Arrowsmith v. Gleason*, 129 U. S. 96.

1. *Power v. Power*, (Ky. 1891) 15 S. W. Rep. 523; *Craig v. Wilcox*, 94 Ky. 484, holding, under amendment of April 15, 1882, to tit. 10, c. 14, of *Kentucky Civil Code*, which provides for the sale of land held in trust by one person for the life of another, with remainder over to persons not ascertained, that the statute did not require the execution of any bond by guardian or committee, because the proceeds are paid into and invested by the court.

In *Kentucky*, where the interest sold is undivided interest, worth less than one hundred dollars, no bond is required. *Farrish v. Rogers*, (Ky. 1888) 7 S. W. Rep. 543; *Barnett v. Bull*, 81 Ky. 127.

2. In *Kentucky* it is not necessary to the validity of a sale made in pursuance of Code, § 490, subs. 2, providing for the sale in chancery of property held jointly, that before it is ordered by the court the guardian should execute the bond required by Code, § 493, as the share of the infant is not paid but remains a lien until the guardian executes a bond. *Shelby v. Harrison*, 84 Ky. 144.

In *Virginia*, under Rev. Code, c. 128, § 120, it was not necessary to direct that the guardian give security where the sale was to be on credit, payments were to be secured by the purchaser, and the person into whose hands they were afterwards to come had not been ascertained. *Talley v. Starke*, 6 Gratt. (Va.) 339.

3. *Indiana*. — *Colburn v. State*, 47 Ind. 313.

*Iowa*. — *Bunce v. Bunce*, 65 Iowa 106.

*Maine*. — *Williams v. Morton*, 38 Me. 47.

*Massachusetts*. — *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Mattoon v. Cowing*, 13 Gray (Mass.) 387, distinguished in *Wann v. People*, 57 Ill. 206.

*Missouri*. — *State v. Harbridge*, 43 Mo. App. 16.

*Nevada*. — *Henderson v. Coover*, 4 Nev. 429.

*Pennsylvania*. — *Blauser v. Diehl*, 90 Pa. St. 350; *Com. v. Pray*, 125 Pa. St. 542.

In *Kentucky* it was held that an action could not be sustained on a guardian's bond, executed prior to the passage of the Act of 1813 authorizing the sale of infant's real estate, for the proceeds of a sale made under that act. *Irvine v. McDowell*, 4 Dana (Ky.) 629, following *Grimes v. Com.*, 4 Litt. (Ky.) 1.

**Exceptions Illustrating Rule.** — If real estate of wards is sold on the applica-

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This is because it is not regarded as part of the general duties of a guardian to convert the real estate into personalty,<sup>1</sup> but such duty is imposed upon him as a matter of convenience.<sup>2</sup>

**Special Trust.** — The authority to sell is regarded as a special trust, not necessarily contemplated at the time the guardian is appointed, and therefore not covered by the general bond given at that time.<sup>3</sup>

**A Contrary View** is taken in a few states, the special bond being regarded as merely cumulative, and the sureties on both bonds are held liable for defaults of the guardian with respect to the proceeds of real estate.<sup>4</sup>

tion of the guardian, he and his sureties are not liable on his original bond for the proceeds of such sale. If real estate of wards is sold on the application of some person other than the guardian, and the proceeds paid over to such guardian, he and his sureties are liable on his original bond for such proceeds. *Colburn v. State*, 47 Ind. 310.

The sureties on a guardian's bond are responsible for the proceeds of real estate not sold by him, but under an order of the Orphans' Court in partition, though additional security was given on awarding him the fund. *Com. v. Lloyd*, 34 Leg. Int. (Pa.) 248, 35 Leg. Int. (Pa.) 171.

When the guardian is appointed commissioner by the chancellor to sell and collect the proceeds of infants' land sold, upon his receipt of the fund it is thenceforth in his hands as guardian, and he and his sureties are responsible to the infant. *Taylor v. Taylor*, 6 B. Mon. (Ky.) 561.

"The result of these provisions of the revised statutes is that the original bond covers the liability of the guardian as to accounting for, managing, and paying over the proceeds of real estate sold, and that the bond given upon obtaining leave to make sale applies only to a proper compliance with the prerequisites to such sale, and a faithful discharge of his duties in conducting the sale, and investing the proceeds thereof in the manner directed by the order of sale." *Fay v. Taylor*, 11 Met. (Mass.) 534.

1. *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Henderson v. Coover*, 4 Nev. 429.

2. *Williams v. Morton*, 38 Me. 52; *Henderson v. Coover*, 4 Nev. 434.

3. *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Mattoon v. Cowing*, 13 Gray (Mass.) 387; *Williams v. Morton*, 38 Me. 52, 61 Am. Dec. 229; *Henderson*

*v. Coover*, 4 Nev. 429; *Morris v. Cooper*, 35 Kan. 156; *Madison County v. Johnston*, 51 Iowa 152; *Bunce v. Bunce*, 65 Iowa 106; *Warwick v. State*, 5 Ind. 350.

**Reason for Rule.** — In *Lyman v. Conkey*, 1 Met. (Mass.) 317, Chief Justice Shaw stated the reason of the rule in the following language: "Whenever the object is to dispose of the real estate of the ward to raise a fund to stand in lieu of the real estate, for the future use of the ward or of any other person who would have been entitled to the real estate, it is deemed a separate special trust, for the due execution of which a separate security is required, as a condition precedent to the validity of the sale, and therefore the court are of opinion that the accounting for the proceeds of a sale made under such special license to sell for the benefit of the ward is not one of the general duties of guardianship, for the performance of which the sureties on the original guardianship bond are responsible."

The reason given by the Superior Court of Iowa is thus stated: "It is reasonable to suppose that the bond holds the surety responsible for the failure of the guardian to perform duties contemplated when the instrument was executed. The failure to discharge duties not contemplated by the law and by the parties cannot be the ground of recovery against the surety." *Madison County v. Johnston*, 51 Iowa 152; *Bunce v. Bunce*, 65 Iowa 106.

"We could not add anything to these reasons. When it is remembered that the liability of sureties is *strictissimi juris*, they seem conclusive." *State v. Harbridge*, 43 Mo. App. 16.

4. *Kentucky.* — *Taylor v. Taylor*, 6 B. Mon. (Ky.) 560; *Elbert v. Jacoby*, 8 Bush (Ky.) 546.

c. **DISCRETION OF COURT TO REQUIRE BOND.** — Sometimes the Probate Court is vested with discretion either to require a bond or to dispense with it.<sup>1</sup> Where the court has discretion to dispense with a bond and does so, the sureties on the general bond are usually held liable for the proceeds,<sup>2</sup> although the contrary has been held.<sup>3</sup>

d. **FORM OF BOND — Statutory Requisites.** — The special bond should conform strictly to the requirements of the statute.<sup>4</sup> In general, it is in the form of the ordinary penal bond,<sup>5</sup> and con-

*Massachusetts.* — *Mattoon v. Cowing*, 13 Gray (Mass.) 387.

*Mississippi.* — *State v. Cox*, 62 Miss. 786.

*Pennsylvania.* — *Com. v. Loyd*, 12 Phila. (Pa.) 221.

**Liability on Special Bond.** — A bond given by a guardian on his obtaining a license to sell the real estate of his ward, conditioned as required by Mass. Rev. Stat., c. 72, § 10, namely, "to sell the same in the manner prescribed for sales of real estate by executors and administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law," does not render the sureties liable for the failure of the guardian, at the expiration of his trust, to pay over and deliver the proceeds of such sale, or the securities therefor, to the person who is legally entitled thereto. *Fay v. Taylor*, 11 Met. (Mass.) 529.

1. *Morton v. Carroll*, 68 Miss. 699, holding that it is unnecessary for the guardian to give a bond before making sale unless the court specially requires him to do so. *Vanderburg v. Williamson*, 52 Miss. 233; *Reed v. Hedges*, 16 W. Va. 168; *State v. Bilby*, 50 Mo. App. 162.

In *Michigan*, notwithstanding the peculiar wording of the statute (Comp. Laws, § 4622, subs. 2), "in case any bond was required," etc., it was held, construing the whole chapter together, that a sale bond is in all cases essential, and that no discretion is lodged with the probate judge in this regard, nor is any express or formal order required, and that a failure to give the bond is a fatal defect, which is open to the wards in their suit for the lands, even against a *bona fide* purchaser. *Stewart v. Bailey*, 28 Mich. 251, followed in *Ryder v. Flanders*, 30 Mich. 343.

2. *State v. Bilby*, 50 Mo. App. 162; *Reed v. Hedges*, 16 W. Va. 168.

3. *Vanderburg v. Williamson*, 52 Miss. 233. In this case the court, con-

trasting guardians' sales with administration sales, said: "The only difference is that in one case the court is compelled to exact the bond, and in the other the exaction is discretionary with the court. The reason for the difference is obvious. The administrator's original bond cannot be made to cover the proceeds of realty. The bond of the guardian, if sufficient, may do so. But if the court has, as in this case, ascertained the insufficiency of the guardian's original bond, and required him to give a special one to cover the proceeds of the realty directed to be sold, there is the same necessity for its execution as in the case of a sale by an administrator, and the same consequences must ensue from its nonexecution."

4. *McKinney v. Jones*, 55 Wis. 39, where the court said: "If it was the intention of the person who drew that bond to ignore the statute and banish from the instrument everything the statute required should be inserted in it, his success in the accomplishment of his purpose challenges admiration. If the jurisdiction of the court to grant the license to sell depended upon the giving of the bond required by the statute, the license could not be upheld."

In *Woodcock v. Bowman*, 4 Metc. (Ky.) 40, the bond, although informal in some respects, was held sufficient. An informal bond may, however, be valid as a voluntary bond, and may be enforced by action in the event of a breach of any of its conditions.

5. **Penalty.** — The omission of a penalty in such a bond does not affect its validity; its only effect is to make it commensurate with the condition. *Dodge v. St. John*, 96 N. Y. 260.

**Bond Not Undertaking.** — In Oregon, under Act of December 16, 1853, § 10 (Laws Oregon, 739), the bond required of a guardian in a proceeding to sell the lands of his ward is a technical penal bond in a definite sum, and not

ditioned as the statute requires for the faithful performance of his duties respecting the proceeds.<sup>1</sup>

**The Bond Usually Runs to the State,** and may be sued in the name of the state at the relation of the person injured,<sup>2</sup> though sometimes the bond is made to the parties interested.<sup>3</sup>

**Where the Bond Contains a Description of the Lands** authorized to be sold, and is conditioned to account for the proceeds of such lands, it is not a bond for the sale of any other lands.<sup>4</sup>

**A Joint Bond** may be given for several wards.<sup>5</sup>

**c. FILING BOND — Time.** — Where a special bond is required to be given it must be filed in the proper office,<sup>6</sup> and usually before the sale takes place, or the sale will be void.<sup>7</sup> But in some cases it is held that it is sufficient if the bond is executed after the sale, where it secures all the objects of requiring a bond.<sup>8</sup>

a mere undertaking, and such bond must be given in such sum as the county judge may direct, and with such sureties as he may approve. *Goldsmith v. Gilliland*, 23 Fed. Rep. 645.

**Changing Terms of Sale.** — The court may, in its discretion, alter the terms of the sale after having fixed them, without impairing the obligation of the bond. *Stevenson v. State*, 69 Ind. 257.

1. *McKee v. Hann*, 9 Dana (Ky.) 526.

In *Indiana*, where the bond is not in terms conditioned for "the faithful payment and accounting for of all moneys arising from such sale according to law," as is required by 2 Rev. Stat. 1876, c. 595, § 18, relating to guardian and ward, it is not void, but it is given the same effect by section 5 of such statute as if it contained the proper condition. *Stevenson v. State*, 69 Ind. 257.

For a bond in substantial compliance with the *Rhode Island* statute, see *McGale v. McGale*, 18 R. I. 676.

2. See the codes and statutes of the various states.

In *Wisconsin* the guardian's bond was formerly properly given to "the territory of Wisconsin." *Emery v. Vroman*, 19 Wis. 689.

**Bond Given to Wards.** — If a guardian's bond is given to the ward instead of to the Probate Court, the approval of it is merely an error in a matter of procedure and a subsequent sale is not invalidated. *Kelley v. Morrell*, 29 Fed. Rep. 736.

3. See the codes and statutes of the various states.

A guardian's bond made payable to the county instead of to the parties

interested is not thereby vitiated, but inures to the benefit of the latter, and suit may be brought thereon in the name of any one thus secured who has sustained any injury by a party thereof. Nor will the fact that the bond is thus made payable invalidate the title derived from the guardian's sale. *Pursley v. Hayes*, 22 Iowa 11.

4. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Tomlinson v. Simpson*, 33 Minn. 443.

5. *Pursley v. Hayes*, 22 Iowa 11; *Hooks v. Evans*, 68 Iowa 52; *Cranston v. Sprague*, 3 R. I. 205; *Ordinary v. Heishon*, 42 N. J. L. 15; *Brunson v. Brooks*, 68 Ala. 248.

6. *Ryder v. Wood*, (Supreme Ct.) 8 N. Y. Supp. 423.

7. *Wyatt v. Mansfield*, 18 B. Mon. (Ky.) 781; *Barber v. Hopewell*, 1 Metc. (Ky.) 261; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Stevenson v. State*, 69 Ind. 257.

**Recital in Decree.** — If the bond is referred to in the decree of sale as having been duly executed, it can be held to have been delivered to the judge, approved, and filed before the sale, although not marked "filed" until after the sale, *Smith v. Biscailuz*, 83 Cal. 344; or although dated before the day, *Thornton v. McGrath*, 1 Duv. (Ky.) 350.

**Clerical Error.** — The indorsement of the day of the filing of a guardian's bond before sale of real estate as of a date subsequent to such order of sale may be shown to be a clerical error by the other proceedings in the case. *Norman v. Olney*, 64 Mich. 553; *Schaale v. Wasey*, 70 Mich. 414.

8. *Owens v. Cowan*, 7 B. Mon. (Ky.)



**Sufficient Filing.** — Delivery of bond to and approval by the judge constitute a sufficient filing.<sup>1</sup>

**f. APPROVAL OF BOND.** — The special bond must be approved and its sufficiency determined by the court,<sup>2</sup> and this should properly be shown by the record;<sup>3</sup> but the failure to enter of record the court's approval of the bond will not invalidate the title derived from the guardian's sale.<sup>4</sup> The approval of the bond, like any other fact, may be shown by the best evidence obtainable.<sup>5</sup>

**Collateral Attack.** — Failure formally to approve the bond is not a sufficient ground for declaring a sale void in a collateral action, where the guardian satisfactorily accounted for the proceeds.<sup>6</sup> The sufficiency of the bond cannot be collaterally attacked after its approval by the court.<sup>7</sup> The sale cannot be collaterally

152, holding that where the money paid is still in the hands of the chancellor the sale should not be avoided, but the chancellor should require a bond from the guardian before paying over the proceeds to him; *Henning v. Baringer*, (Ky. 1888) 10 S. W. Rep. 136, where it was held that no bond was necessary to be executed before the sale, as the law creates a lien for the purchase money, and before the guardian can obtain it bonds must be executed.

In *McKee v. Hann*, 9 Dana (Ky.) 526, Marshall, J., said: "While, therefore, we are satisfied that an entire failure to take the bond required by the statute would avoid the sale, and that there is, in effect, no valid sale, or no transfer of right to the purchaser, until the interest of the infant is secured by a bond substantially conforming to the statute, and while it may, perhaps, be true that any unreasonable delay in requiring or in giving the bond may be ground for avoiding the sale, we are of opinion that the mere fact that the bond is given after instead of before the order of sale or the sale itself should not render the proceeding void. If the object of the bond were to secure the fair conduct of the person who makes the sale, this object could only be answered by its being executed previous to the sale. But as it is directed to be executed by the guardian, and the sale may be made by another, this cannot be its object, and it seems to us that although the omission to take the bond before the order of sale is made is contrary to the directions of the statute, yet, as every purpose of the requisition may be answered by a subsequent

bond, the omission may be supplied afterwards, and that until it is supplied the only consequence is that the effect of the order and sale are suspended."

1. *Smith v. Biscailuz*, 83 Cal. 344.

2. *Marquis v. Davis*, 113 Ind. 219; *Peters v. Griffiee*, 108 Ind. 121; *Schneck v. Cobb*, 107 Ind. 439; *Davidson v. Bates*, 111 Ind. 391; *Hamiel v. Donnelly*, 75 Iowa 93; *Pursley v. Hayes*, 22 Iowa 11; *Revill v. Claxon*, 12 Bush (Ky.) 558; *Barnett v. Bull*, 81 Ky. 127; *Persinger v. Jubb*, 52 Mich. 304; *Myers v. McGavock*, 39 Neb. 845; *Maxsom v. Sawyer*, 12 Ohio 195; *Kelley v. Morrell*, 29 Fed. Rep. 736.

3. The probate judge's approval sufficiently appears by the recital of that fact in the order confirming the sale. *Persinger v. Jubb*, 52 Mich. 304.

An order approving a guardian's bond in an action for the sale of an infant's land being entered on the same day of the judgment of sale is effectual, although entered upon the record after the judgment. *Revill v. Claxon*, 12 Bush (Ky.) 558.

In *Kentucky* the approval of the judge must be indorsed upon the bond. *Barnett v. Bull*, 81 Ky. 127.

4. *Pursley v. Hayes*, 22 Iowa 11.

5. *Myers v. McGavock*, 39 Neb. 845.

6. *Emery v. Vroman*, 19 Wis. 689; *Pursley v. Hayes*, 22 Iowa 11.

7. *Marquis v. Davis*, 113 Ind. 219; *Peters v. Griffiee*, 108 Ind. 121; *Schneck v. Cobb*, 107 Ind. 439; *Davidson v. Bates*, 111 Ind. 391.

If the execution of the bond is approved by the court, it is merely an error in the matter of procedure, and a subsequent sale is not thereby made

attacked, after the approval of the court, upon the ground that the bond was approved by the clerk in vacation, and not by the court.<sup>1</sup>

*g. SURETY COMPANIES.* — Surety companies are sometimes authorized to act as guardians upon the execution of their own bond and without any further security than their capital stock.<sup>2</sup>

*h. ACTION ON BOND — Exclusiveness of Remedy.* — It has been held that the infant's remedy on the bond is exclusive, and that he cannot maintain an action against his guardian for money had and received.<sup>3</sup>

*Conditions Precedent.* — It has been held that no action would lie on the special bond until after an accounting had been had against the guardian,<sup>4</sup> but the weight of authority is the other way.<sup>5</sup>

void. *Kelley v. Morrell*, 29 Fed. Rep. 736.

In *Marquis v. Davis*, 113 Ind. 219, the court approved the bond with but one surety, although the statute required two, and it was held that the approval was conclusive in favor of a purchaser in reliance thereof. Compare *Isert v. Davis*, (Ky. 1895) 32 S. W. Rep. 294, where it was held that a bond improperly executed, as by having but one surety, would render the sale void.

*Presumption.* — It will be presumed that the guardian's bond filed in the Probate Court was such as the law requires. *Campbell v. Harmon*, 43 Ill. 18.

Where the journal entry shows that a bond has been directed and approved, it will be presumed that the bond was executed. *Maxsom v. Sawyer*, 12 Ohio 195.

1. *Hamiel v. Donnelly*, 75 Iowa 93.

2. See the statutes and codes of the various states.

Where this is the case it seems that a bond is not necessary upon an application by such a company as guardian to sell its ward's estate, but if a bond is necessary, a bond executed by itself in the name of its president is sufficient without personal security. *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24.

3. *Brooks v. Brooks*, 11 Cush. (Mass.)

18. *Contra*, *Cuddeback v. Kent*, 5 Paige (N. Y.) 92.

4. *Salisbury v. Van Hoesen*, 3 Hill (N. Y.) 77, where it is said that where the guardian is dead, no accounting having been rendered by him, nor the proceeds of the land invested under the direction of the chancellor, his personal representatives should be required to account before the suit is instituted.

If there be a difficulty in pursuing that course, the plaintiff must make out a special case showing the necessity of a suit on the bond, but until this is done a court of law ought not to undertake the adjustment of a trust of this description.

5. *Long v. Long*, 142 N. Y. 545; *Wann v. People*, 57 Ill. 202.

While it may be, as a general rule, that a surety upon the official bond of a special guardian appointed to sell the real estate of an infant is not liable until the remedies against his principal are exhausted and the extent of the liability ascertained by an accounting, when it appears that an accounting cannot possibly change the facts upon which the liability of the surety depends the infant will not be compelled to resort to it before bringing suit upon the bond. *Long v. Long*, 142 N. Y. 545.

*Necessity of Citation to Account.* — Upon a special bond given under the Mass. Rev. Stat., c. 71, § 6, by an administrator licensed to sell more real estate than is necessary for the payment of debts, to account for the surplus proceeds, an action will lie after neglect for an unreasonable time to render such an account in the Probate Court, although he has not been cited to do so. *Bennett v. Overing*, 16 Gray (Mass.) 267.

*Jurisdiction to Require Accounting.* — The provisions of N. Y. Code Civ. Pro., § 2606, in reference to an accounting by an executor or administrator of a deceased executor, administrator, or testamentary trustee, as to the trust property, do not apply to a special guardian appointed in proceedings for the sale of the real estate of infants. The surrogate has no jurisdiction of

**Prior Decree Against Guardian.** — It is not necessary that a decree should first have been obtained against the guardian alone, but the proceeding may be against him and his sureties jointly.<sup>1</sup>

**Exhaustion of Remedy on Original Bond.** — Nor is it necessary that the remedy on the original bond be exhausted before proceeding upon the special bond.<sup>2</sup>

**Leave to Sue.** — Sometimes leave to sue must be had before instituting suit on the special bond.<sup>3</sup>

**Parties.** — In an action upon a special sale bond the sureties in the original bond are not indispensable parties.<sup>4</sup> One of several infants may maintain a bill against their common guardian without joining the others.<sup>5</sup> An action may be brought against a guardian and his sureties jointly in the first instance.<sup>6</sup>

**Complainant's Case.** — In order to make out a *prima facie* case it is not necessary for the plaintiff to allege the approval of the bond by the court,<sup>7</sup> nor that an appraisement of lands was made,<sup>8</sup> nor a demand before suit for the money due,<sup>9</sup> nor the exhaustion of the original bond,<sup>10</sup> nor approval by the court of the report of sale.<sup>11</sup> An allegation that the guardian converted the proceeds of sale to his own use is a sufficient allegation of the breach of the bond, without alleging in what manner the money was converted.<sup>12</sup>

proceedings to require such a special guardian to account, but the power lies in the court from which he derived his appointment. *Long v. Long*, 142 N. Y. 545.

1. *Cuddeback v. Kent*, 5 Paige (N. Y.) 92; *Long v. Long*, 142 N. Y. 545.

2. *Bissot v. State*, 53 Ind. 408; *Kinsey v. State*, 71 Ind. 32; *Colburn v. State*, 47 Ind. 310; *State v. Steele*, 21 Ind. 207. This is because, as has been seen, the special bond is not usually regarded as subsidiary to the original bond, but as an independent undertaking, covering matters not covered by the original bond. But where the contrary view is taken, no suit can be maintained upon the special bond until the penalty of the original bond is exhausted. *Hart v. Stribling*, 21 Fla. 136.

3. *Fay v. Rogers*, 2 Gray (Mass.) 175; *Behrens v. Rodenburg*, 1 N. Y. City Ct. 94; *Schlee v. Darrow*, 65 Mich. 362.

**Hearing of Application for Leave to Sue.** — Upon an application for leave to sue, the court cannot pass upon the merits of the controversy which may arise upon the prosecution of the bond, or fix the liability of either principal or sureties thereon, and an order attempting to do so is in so far invalid. *Schlee v. Darrow*, 65 Mich. 362; *Fay v. Rogers*, 2 Gray (Mass.) 175; *Landon*

*v. Comet*, 62 Mich. 80.

If the guardian and his sureties should appear and contest the granting of leave to sue the bond, the matter of their legal liability upon such bond could not, in such a proceeding, be properly adjudicated; the order to sue merely grants to the party applying the privilege of raising the question of such liability in a court of law. *Schlee v. Darrow*, 65 Mich. 362; *Landon v. Comet*, 62 Mich. 80.

4. *Johnson v. Chandler*, 15 B. Mon. (Ky.) 584.

5. It is no objection to a decree in behalf of one of several infants against the guardian that others have not been made parties, when the petition for sale and the settlement of the guardian both show the extent of the interest of the complainant, and there has been long acquiescence, especially as the assignment of errors does not embrace the error supposed. *Taylor v. Taylor*, 6 B. Mon. (Ky.) 566.

6. *Cuddeback v. Kent*, 5 Paige (N. Y.) 92.

7. *Shook v. State*, 53 Ind. 403.

8. *Corbaley v. State*, 81 Ind. 62; *Shook v. State*, 53 Ind. 403.

9. *Shook v. State*, 53 Ind. 403.

10. *Shook v. State*, 53 Ind. 403.

11. *Hudson v. State*, 54 Ind. 378.

12. *Shook v. State*, 53 Ind. 403.

The plaintiff makes out a *prima facie* case when he shows that a sale has been made in accordance with the pleading and that the proceeds have been received by the guardian.<sup>1</sup>

**6. Oath — In General.** — In a number of states the guardian is required to take and subscribe an oath that he will faithfully and diligently perform his duties with respect to the sale.<sup>2</sup> Failure to take the oath required by statute renders the sale absolutely void and subject to collateral attack.<sup>3</sup>

**Time of Oath.** — The oath is usually required to be taken before fixing the time and place of sale, and a failure to comply with the statute in this regard is fatal to the validity of the sale.<sup>4</sup> The recital in an oath of a date is not conclusive,<sup>5</sup> though it may be

1. *State v. Weaver*, 92 Mo. 673.

2. *Iowa*. — *Frazier v. Steenrod*, 7 Iowa 339; *Cooper v. Sunderland*, 3 Iowa 114.

*Maine*. — *Tracy v. Roberts*, 88 Me. 315; *Williams v. Morton*, 38 Me. 47; *Kingsley v. Jordan*, 85 Me. 137.

*Massachusetts*. — *Blood v. Hayman*, 13 Met. (Mass.) 231; *Williams v. Reed*, 5 Pick. (Mass.) 480.

*Michigan*. — *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336; *Norman v. Olney*, 64 Mich. 554; *Persinger v. Jubb*, 52 Mich. 304.

*Minnesota*. — *Montour v. Purdy*, 11 Minn. 384; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380.

*Wisconsin*. — *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441.

3. *Cooper v. Sunderland*, 3 Iowa 114; *Williams v. Reed*, 5 Pick. (Mass.) 480; *Ryder v. Flanders*, 30 Mich. 336; *Stewart v. Bailey*, 28 Mich. 251; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441. See also *Tracy v. Roberts*, 88 Me. 315.

**Void or Voidable.** — In several cases it is said that the sale, if not void, is at least voidable. *Williams v. Reed*, 5 Pick. (Mass.) 480; *Williams v. Morton*, 38 Me. 47; *Tracy v. Roberts*, 88 Me. 315.

When a guardian sells lands of his wards in good faith and for full value without taking the oath required by statute, the wards, having full knowledge of the fact, may affirm or disaffirm the sale within a reasonable time after they become of age. *Kingsley v. Jordan*, 85 Me. 137.

**Death of Guardian — Oath of Successor.** — Where a guardian dies after making a sale and reporting it to the court, and after the sale has been confirmed and a

conveyance ordered, the oath required in connection with the sale would be inappropriate on the part of a new guardian appointed to complete the transaction. *Lynch v. Kirby*, 36 Mich. 238.

4. The guardian being imperatively required by statute (Comp. L. 1857, § 3107) to take and subscribe a prescribed oath "before fixing on the time and place of sale," under a license to sell the real estate of his ward, an oath taken only a few days before the sale, and after the giving of the notice of the sale, is unauthorized and extrajudicial. *Ryder v. Flanders*, 30 Mich. 336. See also *Blackman v. Baumann*, 22 Wis. 611, to the same effect.

**Bona Fide Purchasers.** — Failure to take the prescribed oath "before fixing on the time and place of sale" renders the sale void, even as to *bona fide* purchasers. *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 30 Mich. 336; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441.

**Confirmation Will Not Cure** a noncompliance with the statute in this regard. *Blackman v. Baumann*, 22 Wis. 611.

**In Massachusetts** the statute of 1783, c. 36, § 17, which prescribed the form of oath to be taken, did not, like the statute of 1817, c. 190, § 11, require the oath to be taken before fixing on the time of sale. *Blood v. Hayman*, 13 Met. (Mass.) 231.

5. Where the report of the sale of land by executor was confirmed in June, 1871, and showed the taking of the required oath before the sale, but the oath on file purported to be made December 31, 1871, oral proof is admissible to show that the real date should be December 31, 1870. *Norman v. Olney*, 64 Mich. 554.

sufficient<sup>1</sup> to show when the oath was filed.

**Form of Oath.** — Though it is always safest to comply strictly with statutory requirements as to forms, an oath in substantial conformity to the statute will be held sufficient.<sup>2</sup> An oath should be entitled so as to identify the estate.<sup>3</sup>

**7. The Sale.** (See in general article JUDICIAL SALES.) —  
**a. NOTICE OF SALE** — (1) *Necessity* — **In General.** — Where the sale is to be a public one, due notice of the time and place of sale must be given, in compliance with the statute;<sup>4</sup> but a failure to give due notice when required is usually considered merely an error which does not render the sale void, but only irregular,<sup>5</sup>

1. The fact that a guardian licensed to sell real estate filed the oath required by statute is sufficiently proven by such an oath, dated before the sale, found among the regular files of the Probate Court, although the fact or date of filing was not indorsed upon it by the probate judge. *West Duluth Land Co. v. Kurtz*, 45 Minn. 380.

2. In *Frazier v. Steenrod*, 7 Iowa 339, an oath by a guardian which differed in phraseology from the oath required by statute but made no material change in the sense was held sufficient. In this case the oath was as follows: "That in fixing the time and place of sale," etc., "I will use my best judgment and so conduct the sale as in my opinion shall be most to the advantage of my said ward."

In *Minnesota* the statute requires the guardian, before fixing on the time and place of sale, "to take and subscribe an oath, in substance, that in disposing of the real estate which he is licensed to sell he will exert his best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested." This is complied with by an oath that "in conducting the sale of the real estate of the said minors, under the order of the Probate Court, that I will in all respects conduct the same according to law and for the benefit and best interest of the wards." *Montour v. Purdy*, 11 Minn. 384.

3. A guardian's oath is not defective because entitled merely "in the matter of the estate of Henry McVay *et al.*, minors," since this identifies the estate, which is the office of the entitling in any case. *Persinger v. Jubb*, 52 Mich. 304.

4. *Alabama.* — *Doe v. Jackson*, 51 Ala. 514; Rev. Code, § 2434.

10 Encyc. Pl. & Pr. — 51.

*Colorado.* — *Orman v. Bowles*, 18 Colo. 463.

*Illinois.* — *Conover v. Musgrave*, 68 Ill. 58; *Reid v. Morton*, 119 Ill. 118.

*Indiana.* — *Maxwell v. Campbell*, 45 Ind. 360; *Worthington v. Dunkin*, 41 Ind. 515; *Eliason v. Bronnenburg*, (Ind. 1897) 46 N. E. Rep. 582.

*Massachusetts.* — *Brigham v. Boston, etc., R. Co.*, 102 Mass. 14.

*Michigan.* — *Persinger v. Jubb*, 52 Mich. 304; *Schlee v. Darrow*, 65 Mich. 362; *Schaale v. Wasey*, 70 Mich. 414; *Dexter v. Cranston*, 41 Mich. 448; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433.

*Minnesota.* — *Richardson v. Farwell*, 49 Minn. 210; *Montour v. Purdy*, 11 Minn. 384.

*Mississippi.* — *Morton v. Carroll*, 68 Miss. 699; *Williamson v. Warren*, 55 Miss. 199; *Hanks v. Neal*, 44 Miss. 212.

*Missouri.* — *Pattee v. Mowry*, 59 Mo. 163.

*Oregon.* — *Walker v. Goldsmith*, 14 Oregon 125.

*South Carolina.* — *Bulow v. Witte*, 3 S. Car. 309.

*Washington.* — *Brazee v. Schofield*, 2 Wash. Ter. 209.

*United States.* — *Hobart v. Upton*, 2 Sawy. (U. S.) 302; *Gager v. Henry*, 5 Sawy. (U. S.) 237.

In *South Carolina* it was held that a sale made by a master at public auction under a decree in equity which gave no direction as to advertising was not irregular or void, although advertised in a newspaper for less than one week before the sale, there being no statute requiring notice of sale by masters or commissioners under decrees in equity. *Bulow v. Witte*, 3 S. Car. 309.

5. *Hanks v. Neal*, 44 Miss. 212; *Minor v. Natchez*, 4 Smed. & M. (Miss.) 602; *Palmer v. Oakley*, 2

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and the title of a *bona fide* purchaser will be protected.<sup>1</sup>

**Private Sale.** — Where the lands are to be sold at private sale<sup>2</sup> no notice is required.<sup>3</sup>

(2) *Sufficiency.* — The Ordinary and Sufficient Method of giving notice of a sale is by advertisement in a newspaper,<sup>4</sup> or by posting notices in conspicuous places.<sup>5</sup>

The Statutory Provisions as to manner and time of notice should be strictly complied with.<sup>6</sup>

Dougl. (Mich.) 443; Eliason v. Bronnenburg, (Ind. 1897) 46 N. E. Rep. 582. *Contra*, Hobart v. Upton, 2 Sawy. (U. S.) 302. See also *infra*, VI. 12. c. *Curative Statutes*.

1. Palmer v. Oakley, 2 Dougl. (Mich.) 443; Hanks v. Neal, 44 Miss. 212; Minor v. Natchez, 4 Smed. & M. (Miss.) 602.

2. See *infra*, VI. 7. b. *Conduct of Sale*.

3. Worthington v. Dunkin, 41 Ind. 515; Maxwell v. Campbell, 45 Ind. 360; Eliason v. Bronnenburg, (Ind. 1897) 46 N. E. Rep. 582; Pattee v. Thomas, 58 Mo. 163; Barcello v. Hapgood, 118 N. Car. 712.

4. Richardson v. Farwell, 49 Minn. 210; Conover v. Musgrave, 68 Ill. 58; Schaale v. Wasey, 70 Mich. 414; Brigham v. Boston, etc., R. Co., 102 Mass. 14; Orman v. Bowles, 18 Colo. 463; Calvert v. Calvert, 15 Colo. 390.

5. Dexter v. Cranston, 41 Mich. 448; Schaale v. Wasey, 70 Mich. 414; Schlee v. Darrow, 65 Mich. 362.

In Michigan, under How. Stat., § 6040, the notice of a guardian's sale should be posted in the ward in the city where the land is situated, and the order of sale should so direct. Schlee v. Darrow, 65 Mich. 362.

6. In Oregon it is not necessary that the publication should be during the four weeks next preceding the sale, but it is sufficient if notice is published for four weeks successively prior to the sale. Walker v. Goldsmith, 14 Oregon 125.

In Minnesota the statute required a notice of sale to be published "for three weeks successively next before such sale," and an allegation that a notice was published "for three successive weeks previous" to the sale was held not to show a compliance with the statute. Montour v. Purdy, 11 Minn. 384.

In Michigan it is required that the notice be published for "six weeks successively next before such sale."

Comp. L., § 4560; Dexter v. Cranston, 41 Mich. 448.

**What Is Sufficient Publication of Notice — Illustrations.** — The publication of the notice in each issue of a daily paper, commencing April 21, and including May 11, a period of twenty days, was a compliance with an order that the sale should take place May 11, notice to be published at least once a week for three successive weeks in a newspaper. Calvert v. Calvert, 15 Colo. 390, followed in Orman v. Bowles, 18 Colo. 463.

Where the notice is required to be published "six weeks successively next before such sale," each week begins to run on the day of publication, and if fully six weeks' notice has been given and there is a fraction of a week left before the day of sale, it is not necessary that the notice should be published on the last recurrence of publication day immediately before sale; *e. g.*, where notice of sale to be held March 4 was first published January 12, it was not necessary to insert it after February 23. Dexter v. Cranston, 41 Mich. 449.

**Failure to Date Notice.** — Where the notice of sale is published in a newspaper, the omission of the date in the notice is immaterial, as the notice taken in connection with the date of publication indicates the time and place of sale beyond possibility of mistake. Brigham v. Boston, etc., R. Co., 102 Mass. 14.

**Error in Signature.** — An error in the published signature of the guardian's attorney attached to the notice is a mere informality, and will not render the sale void, where the guardian's name is correctly attached to the notice of sale. Richardson v. Farwell, 49 Minn. 210.

**Naming Wrong Day of Sale.** — A sale is not void as made without power merely because the published notice sets the time of sale as one day earlier

**The Newspaper.** — Where the statute requires notice to be published in a newspaper printed in the county where the land lies, a paper published and circulating in the county is meant, and a notice published in a paper printed in the county, but not circulating there, is not a compliance.<sup>1</sup>

**Shorter Notice than Required.** — The giving of a shorter notice of sale than is required is an error, but it does not affect the validity of the sale when collaterally attacked.<sup>2</sup>

**The Giving of Longer Notice than Is Required** does not render the sale invalid.<sup>3</sup>

**Description.** — The notice should contain an adequate description of the lands intended to be sold.<sup>4</sup>

**Place of Sale.** — The notice should designate the place of sale.<sup>5</sup>

(3) **Proof of Notice.** — Proof that notice was given is usually made by affidavit that the notice was posted<sup>6</sup> or published in a

than that named in the order and on which the sale is actually made. *Conover v. Musgrave*, 68 Ill. 58.

1. *Dexter v. Cranston*, 41 Mich. 449.

**Paper Published in Foreign Language.**

— Publication of a notice in English in a paper published mainly in a foreign language has been held sufficient when attacked collaterally. *Schaale v. Wasey*, 70 Mich. 414.

2. *Brazee v. Schofield*, 2 Wash. Ter.

209; *Doe v. Jackson*, 51 Ala. 514.

3. *Morton v. Carroll*, 68 Miss. 699.

4. A notice of sale stated that the real estate to be sold belonged to the children of C. W., late of W., deceased. "Said estate consists of a part of the deceased's late dwelling-house and land in front of the same; one other lot of land called the Hardy lot, containing twenty-three acres. \* \* \* The sale will commence at the said deceased's dwelling-house at the above time. Further particulars and terms made known at the time and place of sale." It was held that the "Hardy lot" was sufficiently described in the notice. *Wyman v. Hooper*, 2 Gray (Mass.) 141.

**Failure to Name County and State.** — A description by government subdivisions, published in the county where the land described is situated, is not void for uncertainty though the name of the county and state are omitted. *Richardson v. Farwell*, 49 Minn. 210.

**Judicial Notice** is taken as to whether lands described by township and range in a guardian's petition for leave to sell are located in a township described only by name in the notice of sale. *Dexter v. Cranston*, 41 Mich. 448.

5. *Wyman v. Hooper*, 2 Gray (Mass.) 141.

Failure to mention the place of sale will not be fatal to the sale. *Williamson v. Warren*, 55 Miss. 199.

**Judicial Notice.** — The court will take notice of the existence of the political subdivision of Oregon called Yamhill county, and that Lafayette is the county seat thereof. Therefore, a notice to sell lands upon the order of the Yamhill County Court at the court house in Lafayette is notice of a place of sale in Yamhill county. *Gager v. Henry*, 5 Sawy. (U. S.) 237.

6. *Walker v. Goldsmith*, 14 Oregon 125.

**Presumption in Support of Affidavit.** — The court cannot take judicial notice that a certain building mentioned in an affidavit of posting a notice of sale is situated in a certain city ward, and in the absence of proof upon the subject it must be presumed that the judge of probate had proper evidence before him of a legal posting of such notice before confirming such sale. *Schaale v. Wasey*, 70 Mich. 414.

**Objection Not Raised Below.** — Where notice of a guardian's sale was ordered to be posted in three of the most public places in the township, and the proof of notices specified the places where it was actually posted, but did not state that they were the most public places, it was held that the notices and proof together were a sufficient statement of fact, and that if the Probate Court accepted it the question could not be raised for the first time in the Supreme Court. *Dexter v. Cranston*, 41 Mich. 448.

newspaper,<sup>1</sup> but this mode of proof is not exclusive of any other.<sup>2</sup>

Mere Clerical Errors in the affidavit do not affect the validity of the sale.<sup>3</sup>

*b. CONDUCT OF SALE* — (1) *Conformity to Order* — *Strict Conformity*. — The sale should be conducted in strict conformity to the provisions of the statute and order of the court under which it is made.<sup>4</sup>

1. *Who May Make Affidavit*. — Affidavit of publication may be made by the publisher of the paper in which the notice was published, *Reid v. Morton*, 119 Ill. 118; or by the guardian. *Frazier v. Steenrod*, 7 Iowa 339.

Where a statute provides for an affidavit of publication by the foreman of the printer of the newspaper in which the notice appears, an objection that it purports to be made by an affiant who describes himself as a foreman of the paper, naming it, is "more nice than wise." *Dexter v. Cranston*, 41 Mich. 449.

In *Michigan*, under How. Stat., § 7498, providing that proof of publication of notice may be made by affidavit of the printer of the newspaper in which it was published or of his foreman or principal clerk, an affidavit of publication made by one describing himself as bookkeeper was held sufficient, where it was couched in positive and affirmative language. The court said that this certainly was not a compliance with the statute, but that the statutory mode of proof was not exclusive of any other. *Schlee v. Darrow*, 65 Mich. 362.

2. *Sufficient publication of notice of a guardian's sale* may be shown by other evidence than the affidavit thereof, which is for the purpose of a permanent record. Want of an affidavit of the posting of notice of a guardian's sale is not fatal if the fact is shown in the sworn report of the sale and is recited in the order confirming the same. *Persinger v. Jubb*, 52 Mich. 304. See also *Schaale v. Wasey*, 70 Mich. 474; *Schlee v. Darrow*, 65 Mich. 362; *Frazier v. Steenrod*, 7 Iowa 339.

3. *Want of Venue* to an affidavit to the service of notice is not a fatal defect if the venue is indorsed on the notice and the affidavit is properly entitled and sworn to. *Persinger v. Jubb*, 52 Mich. 304.

*Error in Date of Jurat*. — Where the proof of posting the notice is sufficient in form, but the jurat bears a date

prior to that on which the notice was posted, as shown by the affidavits, though the return of sale by the guardian recites such a posting and publication as the law requires, the misdate in the jurat will be deemed a clerical error, and on appeal the court will decide that the affidavit was made on some day after the notice was posted. *Walker v. Goldsmith*, 14 Oregon 125.

4. *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365; *Tennent v. Patton*, 6 Leigh (Va.) 196; *Cox v. Manvel*, 56 Minn. 358; *Matter of Axtell*, 95 Mich. 244; *Berry v. Young*, 15 Tex. 369; *Emery v. Vroman*, 19 Wis. 689.

*Following Instructions of Parties*. — Where there was a decree for the sale of lands against adult and infant defendants, and the plaintiff and adult defendants instructed the marshal to make sale in a manner different from that directed by the decree, and the marshal conformed with such instructions and not with the decree, the sale was irregular. *Tennent v. Patton*, 6 Leigh (Va.) 196.

*Price and Terms of Sale*. — A sale of land by the guardian for the support and education of the ward which was authorized and confirmed as a sale for cash is not invalidated by the fact that it was actually made for the grantee's agreement to support and educate the ward. *Farrell v. Hennesy*, 21 Wis. 632.

A special guardian who is licensed to sell the real estate of an infant can make the sale only at the price and upon the terms fixed by the order of sale, and purchasers are presumed to have knowledge of the proceedings. *Matter of Axtell*, 95 Mich. 244.

*Effect of Confirmation as Curing Error*. — Error in failing to sell the lands in the order named in the license is cured by the confirmation of the sale. *Emery v. Vroman*, 19 Wis. 689.

*What Amounts to Confirmation*. — If a guardian disposes of his ward's property in violation of the direction of the court, the mere fact that the court subsequently allowed the account



**Disposing of Property in Violation of Order.** — Any disposition of the property in violation of the order of the court is unauthorized, although in the absence of any order on the subject the guardian would have had authority to make such disposition.<sup>1</sup>

**Failure to Comply with the Order** of the court renders the sale not void, but merely irregular, and it cannot be taken advantage of collaterally.<sup>2</sup>

(2) *Public or Private.* — In the great majority of cases the sale of an infant's lands is made publicly at auction to the highest bidder;<sup>3</sup> but in a number of states the court has power to authorize what is called a private sale, that is, a sale without advertisement and public outcry,<sup>4</sup> and in such cases it is in the discretion of the court whether the sale shall be public or private.<sup>5</sup>

(3) *Time and Place* — **Time of Sale.** — A guardian's sale should be

of the guardian, in which he charged himself with the proceeds of the sale, cannot be construed as amounting to a confirmation of the unauthorized act of the guardian, where it does not appear that the court knew that the guardian had disobeyed its orders or the source from which the money charged in the account was derived. *Cox v. Manvel*, 56 Minn. 358.

**Compliance by Purchaser with Terms.** — Where lands are directed to be sold on a credit of twelve months, the purchaser to execute a note and mortgage to secure the purchase money, and the purchaser fails so to do or to pay the purchase price at the expiration of twelve months, he acquires no title. *Judson v. Sierra*, 22 Tex. 365. See also to the same effect, *Mulford v. Beveridge*, 78 Ill. 455, approved in *Spring v. Kane*, 86 Ill. 583, cited in *Allman v. Taylor*, 101 Ill. 193.

1. *Cox v. Manvel*, 56 Minn. 358.

2. Whether or not the sale was in compliance with the order of the court is for the court to determine when it approves the sale, and the question will not be examined collaterally. *Fitzgibbon v. Lake*, 29 Ill. 178.

Where the court has jurisdiction to make an order of sale, the fact that the guardian proceeds irregularly in the execution of the order will not invalidate the sale. *Mulford v. Beveridge*, 78 Ill. 455.

3. See the codes and statutes of the various states and the cases cited generally in this article. And see in general article JUDICIAL SALES.

4. *Ex p. Cousins*, 5 Me. 240; *Gilmore v. Rodgers*, 41 Pa. St. 120; *Maxwell v. Campbell*, 45 Ind. 360; *Worthington*

*v. Dunkin*, 41 Ind. 515; *Robert v. Casey*, 25 Mo. 584; *McVey v. McVey*, 51 Mo. 406; *Pattee v. Thomas*, 58 Mo. 163; *Barcello v. Hapgood*, 118 N. Car. 712; *Rowland v. Thompson*, 73 N. Car. 514; *Belding v. Willard*, 56 Fed. Rep. 699.

In *In re Dickerson*, 111 N. Car. 108, the terms of the decree were held to require a public sale.

In *Indiana* the court is authorized to order a private sale only in cases where the appraised value of the real estate ordered to be sold does not exceed one thousand dollars. Rev. Stat. Ind. 1894, § 2697. Under this statute it has been held that an order directing a private sale of real estate appraised at thirty-six hundred dollars was erroneous, but not void when collaterally attacked. *Eliason v. Bronnenburg*, (Ind. 1897) 46 N. E. Rep. 582.

In *Oregon*, under the Act of Dec. 16, 1853, a guardian's sale was void as against the ward or those who claimed under him, unless it appeared that the sale was made at public auction after due notice of the time and place. *Hobart v. Upton*, 2 Sawy. (U. S.) 302.

5. *Barcello v. Hapgood*, 118 N. Car. 712.

"It is most usual for sales made by the order of a court of equity to be public sales, but the court, as the guardian of infants, has full power in regard to the mode of sale, and under special circumstances not only has power, but should, in the exercise of its discretion, authorize and confirm what is called a private sale." *Rowland v. Thompson*, 73 N. Car. 514.

**Alternative Order.** — Under the statute of *Maine* of 1826, c. 342, the license

made at the time prescribed by law and fixed in the notice of sale, or it will be irregular<sup>1</sup> and should be set aside,<sup>2</sup> but the sale is not void,<sup>3</sup> and if improperly confirmed it cannot be collaterally attacked.<sup>4</sup> See also article JUDICIAL SALES.

**Adjournment of Sale.** — For good cause, the sale may be adjourned to a later date than the one fixed in the notice of sale,<sup>5</sup> and when the sale is confirmed it cannot be questioned collaterally for an error in the adjournment.<sup>6</sup>

**Renewing Decree.** — The principle that forbids procedure at law after a year and a day has no application to a court of equity; therefore a sale is valid although the decree under which it was made had not been renewed within a year and a day before the sale.<sup>7</sup>

**Place of Sale.** — The sale should be made at the place fixed by law and the order of court and notice of sale, and when made elsewhere is irregular.<sup>8</sup>

may be in the alternative for a public or a private sale. *Ex p. Cousins*, 5 Me. 240.

1. *Robert v. Casey*, 25 Mo. 584; *Brown v. Christie*, 27 Tex. 77; *Butler v. Stephens*, 77 Tex. 599.

2. *Brown v. Christie*, 27 Tex. 77; *Butler v. Stephens*, 77 Tex. 599.

3. The fact that the sale was made subsequent to the term at which the guardian was directed to report his proceedings does not invalidate the sale. *Robert v. Casey*, 25 Mo. 584.

4. *Gager v. Henry*, 5 Sawy. (U. S.) 237. A guardian's sale of land not made at the time prescribed by law was illegal and should have been set aside by the Probate Court, and if improperly confirmed by the Probate Court, its judgment might be corrected by a direct proceeding instituted for that purpose by any one having interest in the matter. But where a sale of land by a guardian, so illegally made, has been confirmed by the Probate Court, it cannot be collaterally questioned in a suit for the land, brought by a party who in good faith derives his title from the purchaser at such sale. *Brown v. Christie*, 27 Tex. 73, quoted with approval in *Butler v. Stephens*, 77 Tex. 599. See also *Alexander v. Maverick*, 18 Tex. 179.

5. *Gager v. Henry*, 5 Sawy. (U. S.) 237. See also *Noland v. Barrett*, 122 Mo. 181; *Richards v. Holmes*, 18 How. (U. S.) 143. And see the article JUDICIAL SALES.

6. **Adjournment for Too Long a Time.** — Where a guardian gave due notice of

time and place of the sale of his ward's lands, and upon the day of such sale, for good cause, adjourned the sale for four weeks and then made a sale, which was duly confirmed by the court, such confirmation will be sustained when attacked collaterally although the statute forbade the adjournment of the sale for more than a week at a time. *Gager v. Henry*, 5 Sawy. (U. S.) 237.

**Adjourned Sale Made on Original Notice.** — A sale regularly adjourned so as to give notice to all persons present of the time and place to which it is adjourned is, when made, in effect, the sale of which previous public notice was given. *Richards v. Holmes*, 18 How. (U. S.) 143; *Gager v. Henry*, 5 Sawy. (U. S.) 237.

7. *Bulow v. Witte*, 3 S. Car. 309.

8. *Brown v. Christie*, 27 Tex. 77. See also article JUDICIAL SALES.

**In Alabama** all sales of real property by guardians must be had at such place in the county as the probate judge in his discretion may direct. *Rev. Code Ala.*, § 2435.

**In Mississippi** it was not necessary to the validity of a guardian's sale of real estate that it should be made at the door of the court house of the county. The Code of 1871, § 1038, has no reference to sales by guardians, but such sales are regulated by section 1222, which does not designate where the sales shall be made. *Williamson v. Warren*, 55 Miss. 199.

**Changing Place Designated in Order and Notice.** — In *Talley v. Starke*, 6 Gratt. (Va.) 348, the court was of the opinion

(4) *Sale in Parcels.* — Sometimes the guardian is authorized to sell the land in parcels instead of as a whole.<sup>1</sup> Where the land is sold in parcels, the sale of more land than is necessary to raise the required sum does not affect the validity of sales made before that sum is raised.<sup>2</sup>

(5) *By Whom Made.* — Sales of infants' real estate are usually conducted by their statutory guardian,<sup>3</sup> but sometimes a commissioner<sup>4</sup> or special guardian<sup>5</sup> will be appointed to make the sale.<sup>6</sup>

that, the decree of sale having directed it to be made on the premises, the commissioner, especially after advertising that it would be made there, acted irregularly in making it at a different place, instead of reporting to the court that it could not be had there for want of bidders, and obtaining instructions as to his future action; and that inasmuch as the purchasers could not have enforced their contracts if resisted by the parties in the case, they ought not to be compelled to perfect them.

1. Guardians making public sale may in their discretion divide a tract appraised entire and sell in parcels, being responsible for the abuse of that discretion. *Stall v. Macalester*, 9 Ohio 19.

"The commissioner, moreover, acted indiscreetly, though not fraudulently, in his manner of conducting the sale. The decree having authorized him to sell the land in one entire tract or to divide the same and sell it in parcels, with authority to engage the services of a surveyor to enable him to make such division, and having determined to sell in parcels, he ought to have caused them to be laid off by survey, prior to the sale, instead of attempting to describe them orally and by reference to a general plat at the time of the sale, in which description he fell into errors, the consequence of which was, as appears from the evidence, that the appellants Talley and Melton were misled to their prejudice in regard to the quantities and advantages of the lots sold to them." *Talley v. Starke*, 6 Gratt. (Va.) 348.

2. *Emery v. Vroman*, 19 Wis. 689.

3. See the codes and statutes of the various states; and, generally, the cases cited in this article.

**Memorandum of Sale — Signature by Guardian.** — A guardian who acts as auctioneer in selling land of his ward under license of court is not authorized as such to sign for the purchaser a

memorandum in writing to take the sale out of the statute of frauds. *Bent v. Cobb*, 9 Gray (Mass.) 397.

4. *McKeever v. Ball*, 71 Ind. 398; *Pope v. Jackson*, 11 Pick. (Mass.) 113; *Talley v. Starke*, 6 Gratt. (Va.) 348.

5. **Who Will Be Appointed Special Guardian.** — The general guardian of an infant, unless for special reasons shown, will be appointed by the court to sell the infant's lands. *Matter of Wilson*, 2 Paige (N. Y.) 412.

A part owner of lands in which a ward is interested is not a suitable person to be appointed special guardian to make sale of the ward's share. *Matter of Tillotson*, 2 Edw. Ch. (N. Y.) 113.

**Misconduct of Special Guardian.** — A special guardian, after his appointment, cannot so use an invalid claim held by him against the real estate as to put a purchaser from him of such claim in possession, rendering an action of ejectment necessary by the one lawfully entitled; and the guardian is liable for damages and expenses of such suit. *Spelman v. Terry*, 74 N. Y. 448.

6. **Interrogatories to Special Agent.** — Where, upon the petition of the guardian of a minor for license to sell real estate of the ward, such license is granted and a person appointed to make the sale, the agent is bound to answer upon oath, in the Probate Court, interrogatories relative to the proceedings under the license. Where such agent sold the land and took mortgages for the purchase money in the name of the minor, and after the minor came of age received from her a power of attorney to discharge the mortgages, it was held that he was not thereby discharged of his obligation to render an account and answer such interrogatories in the Probate Court. *Pope v. Jackson*, 11 Pick. (Mass.) 113.

(6) *False Representations.* — The rule of *caveat emptor* is applicable to guardians' sales;<sup>1</sup> but the doctrine does not apply so as to excuse fraud.<sup>2</sup> It has also been held that the doctrine does not apply where the guardian represents that the purchaser will acquire a good title, which turns out to be untrue;<sup>3</sup> but the contrary has been held on the ground that the purchaser has no right to rely upon representations as to title.<sup>4</sup>

(7) *Joint Sales of Infants' and Adults' Interests.* — The special guardian of infants may enter into a contract of sale jointly with adult co-owners.<sup>5</sup>

(8) *Who May Purchase* — (a) *Disqualification of Guardian* — Generally. — A guardian will not be permitted to place himself in a position of hostility to the interests of his ward,<sup>6</sup> and therefore, as a general rule, he cannot become a purchaser at a sale of his ward's real estate. In some states this prohibition is declared by statute,<sup>7</sup> but it exists even independently of statutes.<sup>8</sup>

*Purchase Void or Voidable.* — Accordingly, it has been held that a purchase by a guardian is absolutely void,<sup>9</sup> and he can convey

1. *Black v. Walton*, 32 Ark. 321; *Findley v. Richardson*, 46 Iowa 103; *Mason v. Wait*, 5 Ill. 127. See also *Bingham v. Maxcy*, 15 Ill. 295; *Ray v. Virgin*, 12 Ill. 216.

2. *Ray v. Virgin*, 12 Ill. 217; *Bingham v. Maxcy*, 15 Ill. 295; *Mason v. Wait*, 5 Ill. 135, where a distinction is made between *suppressio veri* and *suggestio falsi*.

3. *Black v. Walton*, 32 Ark. 321, holding that the purchaser will not be held at law or in equity, although the guardian may not have known of the falsity of his representation.

4. *Findley v. Richardson*, 46 Iowa 103.

5. *O'Reilly v. King*, 28 How. Pr. (N. Y. Super. Ct.) 409.

6. *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

7. See the codes and statutes of the various states.

8. "Although there was no statutory prohibition covering the question, it does not follow that the law authorized a person occupying a fiduciary relation to become a purchaser at a foreclosure sale where the rights of the *cestui que trust* were involved, and obtain the beneficial interest thereunder. On the contrary, it was the settled common-law doctrine, always enforced by a court of equity, that such purchase inured to the benefit of the *cestui que trust*. *Gardner v. Ogden*, 22 N. Y. 327. There is, however, this distinction, which becomes of controlling im-

portance in this case, that whereas the statutory prohibition rendered the sale absolutely void, the common-law principle, enforced as an equitable rule, made such sale voidable only, at the instance of the *cestui que trust*. *Forbes v. Halsey*, 26 N. Y. 65; *Barr v. New York, etc., R. Co.*, 125 N. Y. 277; *Harrington v. Erie County Sav. Bank*, 101 N. Y. 257. We have recently held that a purchase made at a foreclosure sale by a mother who was the guardian in socage of her infant children, and therefore chargeable with a duty to 'safely keep the inheritance of her ward,' was not void, but voidable only, and that she acquired the title subject to its being charged with a trust in her hands. *O'Brien v. Reformed Church*, 10 N. Y. App. Div. 605." *Dugan v. Denyse*, 13 N. Y. App. Div. 214.

9. *Forbes v. Halsey*, 26 N. Y. 53; *Terwilliger v. Brown*, 44 N. Y. 237; *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3; *Hampton v. Hampton*, 9 Tex. Civ. App. 497; *Beal v. Harmon*, 38 Mo. 435; *Winter v. Truax*, 87 Mich. 324; *Dohms v. Mann*, 76 Iowa 723.

*Effect of Confirmation.* — The fact that an order is entered in a partition suit confirming a sale made in contravention of a statute prohibiting a purchase by the guardian gives no validity to the sale. *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3.

*Guardianship a Relation of Trust.* — The guardian occupies a relation of trust towards his ward which precludes

no title to even a *bona fide* purchaser.<sup>1</sup> But it is most usually held that a purchase by the guardian is not absolutely void, but is merely voidable at the election of the wards,<sup>2</sup> and therefore a *bona fide* purchaser for value from the guardian before the sale is avoided is entitled to hold the land as against the ward.<sup>3</sup>

**Guardian Ad Litem.** — A purchase by a guardian *ad litem* is, in the absence of statute, not void, but voidable.<sup>4</sup>

**Guardian Purchasing in Good Faith.** — In some cases it has been held that the guardian may purchase if he acts with the utmost good faith and fairness, and the transaction is entirely free from any suspicion of a design on his part to gain a benefit for himself at the expense of his wards,<sup>5</sup> but the transaction will be watched

him from purchasing at his own sale, and a deed cannot be executed to the guardian for the premises sold. *Beal v. Harmon*, 38 Mo. 435.

**Purchase and Reconveyance by Third Person.** — No title passes by a sale and conveyance by a guardian, at a guardian's sale, of the land of his ward and its immediate reconveyance to him individually by the purchaser for the same consideration. *Winter v. Truax*, 87 Mich. 324, citing *McKay v. Williams*, 67 Mich. 547.

**Purchase by Guardian at Tax Sale.** — A tax sale of an infant's realty to his guardian, and a tax deed issued thereon to the assignee, convey no title adverse to the ward. *Dohms v. Mann*, 76 Iowa 723.

1. *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3; *Hampton v. Hampton*, 9 Tex. Civ. App. 497; *Beal v. Harmon*, 38 Mo. 435.

2. *Boyd v. Blankman*, 29 Cal. 19; *Wallace v. Jones*, 93 Ga. 420; *Clements v. Ramsey*, (Ky. 1887) 4 S. W. Rep. 311; *Wyman v. Hooper*, 2 Gray (Mass.) 141; *Hayward v. Ellis*, 13 Pick. (Mass.) 272; *White v. Iselin*, 26 Minn. 487; *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409; *Hoel v. Coursery*, 26 Miss. 511; *Hoskins v. Wilson*, 4 Dev. & B. L. (N. Car.) 243; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285.

In New York this was the rule prior to the enactment of the Code of Civil Procedure, section 1679, making such a purchase void. *Dugan v. Denyse*, 13 N. Y. App. Div. 214; *Gardner v. Ogden*, 22 N. Y. 327; *Forbes v. Halsey*, 26 N. Y. 53; *Barr v. New York*, etc., R. Co., 125 N. Y. 263; *Harrington v. Erie County Sav. Bank*, 101 N. Y. 257; *O'Brien v. Reformed Church*, 10 N. Y. App. Div. 605; *Dodge v. Stevens*, 94 N. Y. 209; *Bostwick v. Atkins*, 3 N. Y. 53.

But now, by statute, in New York a purchase by the guardian is absolutely void. *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3; *Dugan v. Denyse*, 13 N. Y. App. Div. 214.

**Guardian a Constructive Trustee.** — A guardian becoming a purchaser at the sale takes the land subject to a constructive trust for his wards. *Downs v. Rickards*, 4 Del. Ch. 416; *O'Brien v. Reformed Church*, 10 N. Y. App. Div. 605. And the confirmation of the sale by the court will not affect this principle unless it appears that it had judicial cognizance of the fact that the purchaser was also the guardian. *Downs v. Rickards*, 4 Del. Ch. 443.

**Immaterial whether Purchase Is Direct or Indirect.** — It is immaterial whether the guardian purchased directly or indirectly; the sale is voidable. *Wyman v. Hooper*, 2 Gray (Mass.) 141.

**Ratification by Ward.** — A purchase by the guardian may be ratified by his wards. *White v. Iselin*, 26 Minn. 487.

**Circumstances Showing Actual Fraud.** — The circumstances that the guardian accepted the guardianship with a view of enabling himself to purchase the lands without paying the purchase money until the majority of the wards, and that he filed a petition stating that the purchase money was in the hands of the trustee appointed to make the sale, when in fact it was not, are sufficient to raise the inference of actual fraud. *Downs v. Rickards*, 4 Del. Ch. 416.

3. *Wyman v. Hooper*, 2 Gray (Mass.) 141; *Clements v. Ramsey*, (Ky. 1887) 4 S. W. Rep. 311.

4. *Dugan v. Denyse*, 13 N. Y. App. Div. 214.

5. *Mann v. McDonald*, 10 Humph. (Tenn.) 275; *Talbot v. Provine*, 7 Baxt. (Tenn.) 502; *Elrod v. Lancaster*, 2 Head

with jealousy, and the burden is upon the guardian to show its entire fairness.<sup>1</sup>

**Guardian's Wife.** — The prohibition of a direct or indirect purchase by the guardian has been held to preclude a purchase by the guardian's wife.<sup>2</sup>

(b) **Disqualification of Other Persons.** — A sale to the probate judge who ordered and approved the sale and afterwards resold the lands at an advance will be set aside.<sup>3</sup> Purchases by the administrator of the estate of the infant's ancestor,<sup>4</sup> by the life tenant of lands in which the infant owns the remainder,<sup>5</sup> and by a cotenant,<sup>6</sup> have been sustained. Sometimes the court expressly permits one, who otherwise could not do so, to purchase an infant's lands.<sup>7</sup>

(g) **Substitution of Purchasers and Assignment of Bid.** — The court has the power, with the consent of the reported purchaser, to substitute another person in his place.<sup>8</sup> A bidder at a sale of infant's lands may assign his bid, and a deed to such assignee passes the title.<sup>9</sup>

(Tenn.) 572; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439.

**Facts Entitling Guardian to Equitable Relief.** — When equitable relief is sought in aid of an attempt, however innocent, of a mother and guardian to purchase her wards' and children's property, circumstances which might be sufficient to repel the wards, if they were the actors, are not necessarily sufficient to set the process of the court in motion against them. *Dickinson v. Durfee*, 139 Mass. 232.

1. *Elrod v. Lancaster*, 2 Head (Tenn.) 571; *Mann v. McDonald*, 10 Humph. (Tenn.) 275. See also *Talbot v. Provine*, 7 Baxt. (Tenn.) 502.

2. *Hampton v. Hampton*, 9 Tex. Civ. App. 497; *Rome Land Co. v. Eastman*, 80 Ga. 683.

*Contra.* — *Gregory v. Lenning*, 54 Md. 52, holding that there is no disability of the husband of the guardian of the infants to become a purchaser at the sale.

3. *Hoskinson v. Jaquess*, 54 Ill. App. 59.

4. *Hurt v. Long*, 90 Tenn. 447.

5. *Blankenbaker v. Blankenbaker*, (Ky. 1889) 12 S. W. Rep. 708.

6. *Matter of Congdon*, 2 Paige (N. Y.) 566. In this case it was held that 2 Rev. Stat. N. Y. 330, § 86, did not authorize the guardian to sell to the cotenant, but only to join with the other tenants in common in a sale of the joint interest in the property; but that the cotenant might purchase in pro-

ceedings under Rev. Stat. N. Y. 193, § 170, authorizing the sale of an infant's land for his benefit.

7. **Permitting Guardian to Purchase.** — A guardian of an infant, appointed by an alcalde, had the right, with the approval of the alcalde, to purchase his ward's property sold at auction by order of the alcalde on the petition of the guardian. *Braly v. Reese*, 51 Cal. 447.

**Permitting Life Tenant to Purchase.** — Where unproductive land devised for life, remainder over to the issue of the life tenants, is sold for reinvestment, in proceedings instituted under Civ. Code Ky. (Carroll's), § 491, which provides that, in an equitable action by the owner of a particular estate of freehold, in possession, against the owner of the reversion or remainder, though he be an infant, real property may be sold for investment of the proceeds in other real property, it is proper for the chancellor to permit the life tenants to bid therefor. *Blankenbaker v. Blankenbaker*, (Ky. 1889) 12 S. W. Rep. 708.

8. "As a matter of wholesome practice such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights even of third persons as against the first purchaser." *Williams v. Harrington*, 11 Ired. L. (N. Car.) 623.

9. *Campbell v. Baker*, 6 Jones L. (N. Car.) 255.

c. WHAT TITLE PASSES — In General. — At a guardian's sale only such estate as the ward has in the land is sold.<sup>1</sup> The guardian's individual right in the land does not pass by such sale.<sup>2</sup>

After-acquired Title. — Nor will a subsequently acquired title inure to the purchaser.<sup>3</sup> But if at the time of a guardian's sale the infant has but an equitable title, and subsequently acquires a legal title, equity will compel a conveyance to the purchaser of the subsequently acquired legal title on the ground that the legal title was held in trust.<sup>4</sup>

Sale Subject to Charges and Incumbrances. — The purchaser takes the land subject to all charges to which it was subject in the hands of the ward.<sup>5</sup>

1. "A sale made by a guardian of his ward's land, under an order of the Probate Court, is a judicial sale, and, as a general rule, a purchaser at such sale acts at his peril. The guardian sells such estate only as his ward has in the land, and the purchaser must make inquiry as to the title, and the authority of the guardian to sell. The guardian makes no warranty of title for his ward, and if he covenants for title, he only binds himself personally. The rule *caveat emptor* applies to such sales. *Gwynn v. McCauley*, 32 Ark. 97." *Black v. Walton*, 32 Ark. 324. See also *supra*, VI. 7. b. (6) *False Representations*. And see generally, article JUDICIAL SALES.

Estates Tail. — In *Massachusetts*, under the statute of 1791, c. 60, the guardian of a person *non compos*, on being duly licensed therefor, could sell in fee simple the estate tail of his ward during his life, for the payment of his debts, and by such sale the estate tail was extinguished and the remainder barred. *Williams v. Hichborn*, 4 Mass. 189.

2. Dower Right of Guardian. — A deed by a guardian of infants, of the right of such infants in land, does not convey the guardian's right of dower. *Jones v. Holloper*, 10 S. & R. (Pa.) 326.

3. Inheritance of Additional Interest. — Where, subsequent to a guardian sale, an additional interest vests in the ward as the forced heir of his mother, such additional interest does not pass to the purchaser. *Erwin v. Garner*, 108 Ind. 488.

Subsequent Patent from United States. — Where a ward subsequently acquired from the government of the United States a patent to the premises which had been sold by his guardian under the statute, such subsequently acquired

independent title did not inure to the benefit of the purchaser at the guardian's sale, nor was the ward estopped by his guardian's deed from setting up such subsequent title. *Young v. Lorain*, 11 Ill. 625.

4. *Young v. Dowling*, 15 Ill. 482. The same thing was intimated in *Young v. Lorain*, 11 Ill. 624.

5. *Hunt v. Hunt*, 65 Barb. (N. Y.) 577; *Person v. Merrick*, 5 Wis. 231; *State v. Clark*, 28 Ind. 138; *Shaffner v. Briggs*, 36 Ind. 55.

Equity of Redemption Only Is Sold. — Where a guardian was authorized to sell and convey all the "right, title, and interest" of an infant in and to certain lands which had descended to her from her ancestor subject to a mortgage thereon, and did sell to the purchaser all the right, title, and interest of the infant in such lands, it was held to be a clear sale and conveyance of the equity of redemption of the infant in such lands, and nothing more; that the purchaser took the land subject to the incumbrances of the mortgage and without any claim upon the infant or the estate of the ancestor in respect to such mortgage; and that the special guardian had no right to pay any portion of the proceeds of the sale upon such mortgage. *Hunt v. Hunt*, 65 Barb. (N. Y.) 577.

Removal of Incumbrances. — A guardian cannot, on selling the land of the ward, bind the ward's estate for the removal of incumbrances on such lands. *Person v. Merrick*, 5 Wis. 231.

Lien Accruing After Filing Petition for Sale. — A purchaser takes subject to a lien placed on the land between the time of filing the petition of the guardian for sale and the actual sale under the petition. *Shaffner v. Briggs*, 36 Ind. 55.

**8. Report and Confirmation of Sale** — *a*. **NECESSITY.** — A sale by a guardian under an order of court must be reported to and confirmed by the court, and until this is done no title passes by virtue of such sale.<sup>1</sup> This is in accordance with the general rule

**Effect of Subsequent Sale by Administrator.** — Where, after a sale by the guardian of the ward's land, the same land is sold upon the application of the administrator of the ancestor, to pay debts, the guardian is not authorized to protect the title of the purchaser at his sale by buying in the land at the administrator's sale. *State v. Clark*, 28 Ind. 138.

**Rights of Incumbrancers.** — The rights of incumbrancers are not affected by a guardian's sale. *Cool v. Higgins*, 23 N. J. Eq. 308. See also *Matter of Steele*, 19 N. J. Eq. 120; *Matter of Heaton*, 21 N. J. Eq. 221.

**Opening to Let In After-born Children.** — Where the title to land is vested in infants subject to open and let in after-born children, a purchaser at a guardian's sale of such land takes subject to the same contingencies. *Downin v. Sprecher*, 35 Md. 482.

**Ignoring Co-owner in Proceedings.** — Where the guardian of one of several joint owners of an estate petitioned for the sale of the whole of it, without noticing the existence of another tenant in common, the purchaser obtained title to the part of the petitioner, but not as to that of the owner not named. *Bryan v. Manning*, 6 Jones L. (N. Car.) 334; *Erwin v. Garner*, 108 Ind. 488.

1. *Alabama.* — Rev. Code Ala., §§ 2434, 2436.

*Arkansas.* — *Guynn v. McCauley*, 32 Ark. 97; *Alexander v. Hardin*, 54 Ark. 480; *Ambleton v. Dyer*, 53 Ark. 224; *Reid v. Hart*, 45 Ark. 41.

*Illinois.* — *Rogers v. Higgins*, 48 Ill. 215; *Young v. Dowling*, 15 Ill. 482; *Ayers v. Baumgarten*, 15 Ill. 444; *Young v. Keogh*, 11 Ill. 642; *Spring v. Kane*, 86 Ill. 580; *Mulford v. Stalzenback*, 46 Ill. 303; *Chapin v. Curteneus*, 15 Ill. 427; *Rawlings v. Bailey*, 15 Ill. 178; *Musgrave v. Conover*, 85 Ill. 374; *Matter of Harvey*, 16 Ill. 127; *Miller v. McMannis*, 104 Ill. 421; *Hart v. Burch*, 130 Ill. 426.

*Indiana.* — *Maxwell v. Campbell*, 45 Ind. 360; *aliter* under the special act involved in *Davidson v. Koehler*, 76 Ind. 399.

*Iowa.* — *Ordway v. Smith*, 53 Iowa 589; *Dohms v. Mann*, 76 Iowa 723;

*McMannis v. Rice*, 48 Iowa 362; *Wade v. Carpenter*, 4 Iowa 365.

*Michigan.* — *Jenness v. Smith*, 58 Mich. 280; *Winslow v. Jenness*, 64 Mich. 84.

*Mississippi.* — *State v. Cox*, 62 Miss. 786.

*Missouri.* — *Bone v. Tyrrell*, 113 Mo. 175; *Valle v. Fleming*, 19 Mo. 454; *Henry v. McKerlie*, 78 Mo. 416. *Aliter* under the Act of Feb. 8, 1825, in *Robert v. Casey*, 25 Mo. 584; *McVey v. McVey*, 51 Mo. 407; *Fenix v. Fenix*, 80 Mo. 32.

*New Jersey.* — *Titman v. Riker*, 43 N. J. Eq. 122.

*New York.* — *Battell v. Torrey*, 65 N. Y. 294; *Stilwell v. Swarthout*, 81 N. Y. 109; *Rea v. M'Eachron*, 13 Wend. (N. Y.) 465; *Ellwood v. Northrup*, 106 N. Y. 172; *Aldrich v. Funk*, 48 Hun (N. Y.) 367.

*North Carolina.* — *Dula v. Seagle*, 98 N. Car. 458; *In re Dickerson*, 111 N. Car. 108; *Mebane v. Mebane*, 80 N. Car. 34; *Latta v. Vickers*, 82 N. Car. 501; *Brown v. Coble*, 76 N. Car. 391; *England v. Garner*, 90 N. Car. 197.

*Ohio.* — *Foresman v. Haag*, 36 Ohio St. 104. But see *Stall v. Macalester*, 9 Ohio 19.

*Texas.* — *Graham v. Hawkins*, 38 Tex. 628; *Harrison v. Ilgner*, 74 Tex. 86; *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143.

*United States.* — *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 129.

**Purchaser Liable for Rents and Profits.** — The purchaser who acquires possession of land under a guardian's sale which is never approved by the Probate Court will be liable for rents and profits. *Ambleton v. Dyer*, 53 Ark. 224.

**Distinction Between Sales in Equity and Guardian's Sales.** — A sale under a valid decree of a court of equity, in other respects regular, cannot be impeached on the ground alone that the master failed to make report to the court and obtain a decree of confirmation. But the better practice is to report such sale and have it confirmed. The rule is different in guardian's sales, as the statute requires a confirmation of them before the title passes. *Miller v. McMannis*, 104 Ill. 421.

**Approval Relates Back.** — Land owned



governing all judicial sales, that a bidder at such sale acquires no rights until his proposition is accepted by the court.<sup>1</sup>

**A Sale Without Such Confirmation** will not constitute color of title,<sup>2</sup> nor will it pass even an equitable title.<sup>3</sup> Failure to have the sale approved is a defect which equity cannot relieve against.<sup>4</sup>

by an insane person and not taxable during his ownership cannot be taxed to his grantee till the conveyance by his guardian has actually been made and approved by the court, although such conveyance related back and took effect two years before. *Ordway v. Smith*, 53 Iowa 589.

**No Deed Without Confirmation.** — Until confirmation the functions of the curators are not final, and the purchaser can get no deed. *McVey v. McVey*, 51 Mo. 407.

**Strict Conformity to Statute.** — In *Battell v. Torrey*, 65 N. Y. 297, the court said that the statute was in derogation of the common law, and that the list of things necessary to be done before a conveyance by which "a sale, leasing, or other disposition of the infant's real estate could be made" must be strictly complied with. Each of the requirements of the statute was complied with except the one requiring a report and confirmation of the sale, which was disregarded, and the court held the sale void.

**Conveyance by Minor After Coming of Age.** — Where the guardian's sale is never reported or confirmed, the purchaser cannot maintain his title against a subsequent conveyance made by the minor after coming of age. *Titman v. Riker*, 43 N. J. Eq. 122.

**Private Sale.** — A private sale should be reported for confirmation before making a deed. *Maxwell v. Campbell*, 45 Ind. 360.

**Order Dispensing with Confirmation.** — A decree directing a commissioner to sell lands, receive the purchase money, and make title, without requiring a report and confirmation of the court, is irregular. *Dula v. Seagle*, 98 N. Car. 458.

An order directing a sale to be made for not less than a named sum, and directing the guardian to make a conveyance, is not a final decree and does not dispense with a subsequent confirmation. *In re Dickerson*, 111 N. Car. 108.

"It is a fatal error in the decree that it directs the conveyance to be made on the payment of the purchase money,

without directing that the sale shall first 'be notified to and approved by' the court." *U. S. Bank v. Ritchie*, 8 Pet. (U. S.) 145.

**A Formal Direction to Make Title** is not always necessary. *In re Dickerson*, 111 N. Car. 114.

Where the purchase money has been paid, the purchaser ordinarily has a right to a deed as a matter of course and without an order to make title. *Flemming v. Roberts*, 84 N. Car. 532.

1. *Dula v. Seagle*, 98 N. Car. 458. See article JUDICIAL SALES.

2. *Young v. Dowling*, 15 Ill. 482.

3. *Young v. Dowling*, 15 Ill. 482; *Bone v. Tyrrell*, 113 Mo. 175.

**Facts Supporting Equity for a Title.** — "The four facts upon which an equity for a title, as here contended for, rests, are: an order of sale, a sale made by the curator under it, payment of the purchase money, and an approval of the sale by the court." *Bone v. Tyrrell*, 113 Mo. 175.

**Equity for Return of Purchase Money.** — "When the sale has not been approved, no title, either legal or equitable, passes to the purchaser. The equity open to him proceeds upon the assumption of a void sale, and is for a return of the purchase money, and reimbursement for the benefits received by the heirs, and for improvements which enhance the value of their land; the extent of this equity to be ascertained by an account of his expenditures and receipts. This equity suspends the right of recovery until the amount coming to him shall be ascertained and paid. It is administered upon the theory that the title has not passed to the purchaser, but that he has a charge or lien for his outlays and improvements incurred by him in good faith. \* \* \* It does not spring from or depend upon the law of estoppel; neither does it exclude the purchaser from lawfully claiming the title under the law of estoppel when sufficient facts are present in his case to support a title by estoppel." *Henry v. McKerlie*, 78 Mo. 416. See also *infra*, VI. 11. *Setting Aside Sale*.

4. In the case of *Young v. Dowling*, 15 Ill. 481, which was a bill to enjoin

**b. TIME.**—The sale is usually required to be reported to the court at the first term next after it is made.<sup>1</sup> Sometimes the order directs when the report is to be made.<sup>2</sup> The approval of the sale at the same term at which the sale takes place is premature, irregular, and erroneous, but not void,<sup>3</sup> and the title will

an ejectment suit for lots in the city of Galena, it appeared that the property had been sold by the guardian, but he failed to report the sale to the court and have it approved. The bill prayed that the sale be confirmed, but it was held that a court of equity was powerless to afford relief. The court there said that there was a clear distinction between the defective execution of a power conferred by an individual and a power conferred by statute; that in the former class of cases, a court of equity would carry out the intention of the person who gave the power, and of the agent who defectively executed it, but that it was otherwise with the defective execution of statutory powers; that whatever formalities are required by a statute must be complied with, otherwise the defect cannot, or at least will not, perhaps, be helped by a court of equity, as that tribunal never dispenses with the regulations prescribed by statute, at least when they constitute the apparent policy of the statute. See also *Rogers v. Higgins*, 48 Ill. 215. But see *Rea v. M'Eachron*, 13 Wend. (N. Y.) 465, where in a similar case the court said that the remedy of the purchaser is by application to chancery for confirmation.

1. See the codes and statutes of the various states. See also *Hoel v. Coursey*, 26 Miss. 511.

In *Mulford v. Beveridge*, 78 Ill. 455, the statute being silent touching the stage of the proceedings at which the report was to be made, the order directed the guardian to "report such sale to this court for confirmation and approval before the same shall be completed."

In *Spellman v. Dowse*, 79 Ill. 66, it was said that the report should be at the term next after the sale.

**Confirmation Relates Back.**—Regularly, confirmation should precede making a deed, but if it succeeds the confirmation will relate back to the deed and sanction it. *Dawson v. Helmes*, 30 Minn. 107.

2. *Butler v. Stephens*, 77 Tex. 599; *Mulford v. Beveridge*, 78 Ill. 455.

**Collateral Attack.**—The sale is not

open to collateral attack upon the ground that the order of confirmation was not made at the term at which the guardian had been ordered to make the report, and that the time of sale was extended without the issuance of any additional citation. *Butler v. Stephens*, 77 Tex. 599.

3. In *Henry v. McKerlie*, 78 Mo. 416, all the Missouri decisions upon this point, which were very conflicting, were reviewed by Martin, C., in an exhaustive opinion, and their result was stated as follows: "When the sale has been prematurely approved in the Circuit Court, as this is a court of general jurisdiction the sale is valid, and the equity of the purchaser is for a perfect title and will defeat recovery in ejectment. *State v. Towl*, 48 Mo. 148; *Castleman v. Relfe*, 50 Mo. 583; *Bobb v. Barnum*, 59 Mo. 394. When the sale has been prematurely approved in the Probate Court, this fact was, by the earlier decisions, regarded as equivalent to no approval at all. The sale was regarded as absolutely void and passing no title, either legal or equitable. *Wohlien v. Speck*, 18 Mo. 563; *Speck v. Wohlien*, 22 Mo. 310; *Wolff v. Wohlien*, 32 Mo. 124; *Speck v. Riffin*, 40 Mo. 405; *Strouse v. Drennan*, 41 Mo. 289; *Mitchell v. Bliss*, 47 Mo. 353. Whatever equity inured to the purchaser depended upon such facts as are described by us in the second conclusion recited by us as applying to void sales [*i. e.*, an equity for a return of the purchase money, and reimbursement for the benefits received by the heirs and for improvements which enhance the value of their lands]. But by the most recent decisions of the Supreme Court this doctrine, which first rose in the case of *Speck v. Wohlien*, 22 Mo. 310, and which for a long time prevailed in this state, has been overruled, and such sales are now held to be as valid as if the approval had been in the Circuit Court, on the ground that the same presumptions of validity must be entertained in respect to the judgments and orders of the Probate Court in matters of the administration of estates as are accorded to the judgments and

pass until the sale be set aside on appeal or by direct proceedings instituted for that purpose. So also it has been held that a failure to approve a sale at the proper term will not prevent a valid confirmation at a subsequent term. And sales have been sustained where the confirmation was not made until many years thereafter.<sup>1</sup>

**Nunc Pro Tunc.** — An order of approval may be entered *nunc pro tunc*.<sup>2</sup>

**c. SUFFICIENCY OF REPORT.** — The guardian's report of sale should correctly set out all his proceedings under the order of sale.<sup>3</sup>

orders of the Circuit Court. *Johnson v. Beazley*, 65 Mo. 250; *Sims v. Gray*, 66 Mo. 614; *Fisher v. Bassett*, 9 Leigh (Va.) 119; *Wilkerson v. Allen*, 67 Mo. 502; *Den v. Hammel*, 18 N. J. L. 75; *Hahn v. Lilly*, 34 Cal. 391. It thus appears that the doctrine of *Speck v. Wohlson* is a thing of the past and has given place to a more just and rational doctrine, which cannot fail to have a good effect upon this class of litigation. While the doctrine prevailed that a premature approval in the Probate Court was no approval at all, the courts, in their efforts to escape the injustice of the doctrine, commenced to hold that the sale might be approved twelve and thirteen years after it had taken place, so as to pass a valid title to the purchaser. *McVey v. McVey*, 51 Mo. 406."

1. *McVey v. McVey*, 51 Mo. 406, holding that where the approval is irregular the sale may be again approved even after the lapse of thirteen years; *Johnson v. Cooper*, 56 Miss. 608, holding that where report and confirmation were made at a term subsequent to the proper one and without notice, the sale is not void, but passes title, and the most that can be said against such sale is that it is still *in fieri*, so far as to entitle parties in interest to move the court to set it aside for reasons which they might have urged at the time it was confirmed, and disapproving the dictum to the contrary in *Learned v. Matthews*, 40 Miss. 220; *Matter of Harvey*, 16 Ill. 127, holding that the lapse of seventeen years will not prevent a confirmation and approval of a sale where the delay was not owing to any defect or bad faith in the guardian, but arose from a mistake; *Hoel v. Courtery*, 26 Miss. 511, holding that where the confirmation was made more than six years after the sale, and without notice, the

sale must be treated, to say the least, as voidable, if not absolutely void; *Spellman v. Dowse*, 79 Ill. 66, holding that a motion for an order approving the sale and the order are a part of the original proceeding, that it makes no difference if the motion is made upon the report presented several years after the sale is made, and that any objection may accordingly be taken upon the hearing of the motion that could have been made at the term next after the sale; *Wilkerson v. Allen*, 67 Mo. 508, holding a sale valid where a report should have been made at the regular November term, but was not in fact made until the adjourned November term.

2. *Moore v. Davis*, 85 Mo. 464; *Atkinson v. Atchison*, etc., R. Co., 81 Mo. 50.

A sale was made by a guardian, of the land of his ward, in 1867; in 1873, pending a controversy involving its title, the purchaser moved the court to have entered, *nunc pro tunc*, on the minutes of the court, the judgment which appeared from the entries on the docket of the county judge and from parol evidence offered to have been rendered, confirming the sale. It was held that there was no error in overruling the motion. *Calloway v. Nichols*, 47 Tex. 327.

3. In *Mulford v. Beveridge*, 78 Ill. 455, the court said that there was no fixed rule as to what portion of the proceedings the guardian should report, the statute being silent.

**Construction of Report.** — In *Persinger v. Jubb*, 52 Mich. 304, the guardian reported two parcels of land sold, one belonging to each of her wards, for a round sum named. This was claimed to be a report that the two were sold together for the one sum, but the court said: "While this may be the most

**Signature.** — Failure of the guardian to sign the report does not render the sale void.<sup>1</sup>

**d. HEARING OF REPORT — FACTS INFLUENCING DETERMINATION — (1) In General — Defects in Proceedings.** — On the coming in of the report the court has the right to review the whole proceeding about to terminate before it, and may refuse to confirm the sale for any good and sufficient reason.<sup>2</sup> Any irregularity in the proceedings should be brought to the notice of the court before confirmation.<sup>3</sup>

natural and obvious construction of the report, it is not a necessary construction. The report was made to a judge having power to inquire into the facts, and who was required in the performance of his judicial duty to do so; and we cannot say that he did not find that the parcels were separately sold. He seems at any rate to have satisfied himself in respect to the sale, and to have confirmed it accordingly; and we discover nothing that should necessarily have precluded this action."

**Reporting Bids.** — In *Illinois* it is not usual to report bids to the court. The practice is, unless otherwise directed in the order of sale, to strike the property off to the highest bidder. *Comstock v. Purple*, 49 Ill. 170, *overruling* on this point *Dills v. Jasper*, 33 Ill. 273.

See *Hill v. Hill*, 58 Ill. 239, where both these cases are explained.

**Presumption of Correctness.** — The report of a guardian, when approved by the court, will be regarded as *prima facie* correct, on an accounting, and the burden of proof to show error is on him who assails it. *Warfield v. Warfield*, 74 Iowa 184. *Citing* *Latham v. Myers*, 57 Iowa 519; *Brewer v. Stoddard*, 49 Iowa 279.

**Report of Amount of Proceeds Not Conclusive.** — The guardian's report upon oath of money received upon a sale of real estate is not conclusive upon the ward; the court may and must, like a court of equity, call for proofs and allow or reject the report at discretion. *In re Steele*, 65 Ill. 322.

1. *Stewart v. Bailey*, 28 Mich. 251; *Ellsworth v. Hall*, 48 Mich. 407.

**Signature Added by Amendment.** — The defect in failing to sign the report may be supplied by seasonable amendment under order of the Probate Court, under Comp. Laws Mich., § 4622. *Ellsworth v. Hall*, 48 Mich. 407.

**Sufficiency of Signature.** — It is no objection that the report is signed "J. B., Curator, by G. Z.," where the

record shows that the report was made by the curator. *Exendine v. Morris*, 8 Mo. App. 383.

**2. Impeaching Order of Sale.** — This is true although the reason may reach back to and impeach the order of sale itself. "Not only has the court this right, but it is in the nature of a duty which cannot be escaped by pretending that it is concluded by its own order, which constitutes only an intermediate step in the proceeding pending before it." *Fenix v. Fenix*, 80 Mo. 32. The sale involved in this case was an administrator's sale, and it was held that on the hearing of the report the heirs may show that there were no debts, or that there were personal assets sufficient to pay all debts, or any other fact tending to show that the order ought not to have been made.

In *Spellman v. Dowse*, 79 Ill. 66, it was held that the objection that the court had no jurisdiction to order a sale is properly raised on the motion for an approval of the sale, and if well taken the sale will not be approved.

**Setting Aside Sale on Motion of Amicus Curiae.** — Where a mother, in conjunction with the guardian of infants, presents a claim for their nurture, which is allowed, and proceeds thereupon to have the real estate of the deceased father sold and parceled out to the mother, in fraud of the children, the whole proceeding, even upon the motion of a stranger as *amicus curiae*, may be set aside and held void, and all participants in the transaction rebuked. *Matter of Guernsey*, 21 Ill. 443.

3. *Conover v. Musgrave*, 68 Ill. 58.

**Waiver by Failure to Object.** — The purchaser's failure to object to the confirmation of the sale of land was a waiver of his right to resist the payment of the purchase price on the ground that suit had been brought against him to recover a part of the land, process therein having been

(2) *Inadequacy of Price*.—Gross inadequacy of the sum paid may be sufficient to induce the court to withhold confirmation and to order a resale;<sup>1</sup> but land is not expected to bring its full value at such sales,<sup>2</sup> and it is not usual for the court to refuse to confirm a sale on the ground of inadequacy of price, unless accompanied by some circumstance of fraud, accident, mistake, or some great irregularity calculated to do injury.<sup>3</sup>

served on him before the commissioner's report of sale was confirmed. *Huber v. Armstrong*, 7 Bush (Ky.) 592.

One of the infant defendants having been over fourteen years of age when the bill was filed, it was irregular not to require her to file her answer. But the sale having been decreed, and it having been made more than six months after the decree, and confirmed without objection, it is too late for the purchaser eighteen months afterwards to object to the irregularity. *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

**Petition to Set Aside Sale.**—In an action against infants and their guardian to sell land owned jointly by the plaintiff with them, the plaintiff, after the sale, but before confirmation, filed an amended petition seeking to set aside the sale because of a mistake in the description of the land sold. The infant defendants, by their guardian, entered their appearance to the amended petition, but did not controvert the facts therein stated nor resist the relief sought; nor did the purchaser resist the setting aside of the sale. It was held that it was competent for the infants, by their guardian, to waive the filing of formal exceptions to the report of the sale and adopt the paper filed as an amended petition as exceptions. Therefore the court did not err in setting aside the sale or in entering a supplemental order for a resale, giving a true boundary, although the amended petition was filed more than sixty days after the original judgment, and therefore after the expiration of the time within which the Louisville Chancery Court has control over its judgments. *Johnson v. Johnson*, 88 Ky. 275.

**Purchaser's Motion to Quash—Effect of Confirmation by Infant on Attaining Majority.**—Where land of an infant had been sold under an order of court, on petition of his guardian, and the infant, on arriving at full age, filed a supplemental petition in court, affirming the sale, before a motion to quash

the sale on the ground of irregularity in the proceedings was filed by the purchaser, it was held that the motion to quash should be overruled, leaving the purchaser to present his case in answer to the petition filed by the ward on arriving at full age. *Gates v. Kennedy*, 3 B. Mon. (Ky.) 167.

1. *In re Dickerson*, 111 N. Car. 114; *Foushee v. Durham*, 84 N. Car. 56; *Sumner v. Sessoms*, 94 N. Car. 371.

**Question for Jury.**—In *Kentucky* it was early held that the reasonableness of price is a matter of fact to be left to the jury. *Beeler v. Young*, 1 Bibb (Ky.) 520.

2. *Carroll v. Booth*, 2 Tex. Unrep. Cas. 326; *Comstock v. Purple*, 49 Ill. 170.

3. *Comstock v. Purple*, 49 Ill. 170; *Ayers v. Baumgarten*, 15 Ill. 444. See generally article JUDICIAL SALES.

**Inadequacy Amounting to Sacrifice.**—In *Garrett v. Moss*, 20 Ill. 549, it was held that in order to set aside a sale because of inadequacy of price a case of sacrifice must be shown. In *Booker v. Anderson*, 35 Ill. 66, at page 87, the court explained what was meant by a sacrifice as held in *Garrett v. Moss*, 20 Ill. 549, saying that such sacrifice must amount to a fraud.

In *Sowards v. Pritchett*, 37 Ill. 517, it was held that where two-thirds of the value had been paid for the land, such inadequacy of price would not alone be ground to set aside the sale, but it would have its weight when considered with other evidence in preventing the approval of the master's report of sale.

**Purchaser Entitled to Benefit of Bargain.**—"While courts of justice will watch over these sales with a jealous eye, with a view to the discovery of fraud or of such gross irregularities as shall amount thereto, they will not, and ought not, when the order of the court has been faithfully observed, in the absence of fraud, disturb such sale. In this case a deed was actually made to the purchaser, the whole of

(3) *Confirming Sale for Benefit of Infant When Irregularities May Be Cured.*—The court has sometimes refused to set aside irregular but advantageous sales of minors' land where all the parties were before the court and a good title could be secured to the purchaser;<sup>1</sup> but an irregular sale will not be confirmed if the infants are injured by the sale,<sup>2</sup> and a court will not undertake to validate a void sale merely because beneficial to the infant.<sup>3</sup>

the purchase money having been paid, and it was sought to take the bargain from him by proceedings in court, instituted and carried on to a final order, without any notice to him. Such injustice is beyond comment. He had a right to the benefit of his purchase, though at a low price, for the whole public could have competed with him, and if there was a bargain in the land he was not the only one who could have secured it." *Comstock v. Purple*, 49 Ill. 167.

1. *Swan v. Newman*, 3 Head (Tenn.) 290; *Ex p. Kirkman*, 3 Head (Tenn.) 517; *Andrews v. Andrews*, 7 Heisk. (Tenn.) 236; *Daniel v. Leitch*, 13 Gratt. (Va.) 195; *Bobb v. Barnum*, 59 Mo. 394; *Howerton v. Sexton*, 90 N. Car. 586.

**Explanation of Rule.**—In *Swan v. Newman*, 3 Head (Tenn.) 290, the court said: "This being so, it might be unnecessary to consider the objections taken to the regularity of the proceedings under which the sale was made, because as between the purchaser and the infants, where we can see that the sale was advantageous to the latter, and that a loss would result from setting it aside, we would not do so for irregularities or defects which can be cured by decreeing the title to the purchaser, as we have all the parties before us. The purchaser can only claim the title, and that can be given to him notwithstanding there may be defects in the proceedings of such a character as that the infants would not be bound by them. But if it is clear to the court, as it is in this case, where the property has since the sale depreciated in value, or on any other account, that it is to the interest of the infants that the sale should be maintained, that will be done by a divestiture of their title in favor of the purchaser, and holding him to his contract. All he can demand is a good title, and if the court is able to give him that, he has no reason to complain that the proceedings were irregular;

that is nothing to him. This, of course, can only be done where the parties interested are all before the court, and a case is made out to give the court jurisdiction. Otherwise the court could not decree him a good title, and for that reason would not compel him to pay his money. The case of *Rowan v. Pope*, decided at the last term at Nashville, and to be reported in the next volume of reports, was very similar to this in its principle. The court will afford to the infants the proper protection by securing to them the benefits of an advantageous sale, and to the purchaser by securing to him a good title. That is all he expected when he purchased, and that we are able to give him by a decree investing him with the title of all the parties before us, both minors and adults."

**Illustration.**—When the guardian offered to file an amended petition, making the necessary allegations and the proper parties, for the purpose of curing any defects in the proceedings for the sale of his ward's land, the Circuit Court erred by sustaining the purchaser's exceptions to the sale, and also by sustaining a demurrer to the amended petition of the guardian. *Mahoney v. McGee*, 4 Bush (Ky.) 527, citing *Boyce v. Sinclair*, 3 Bush (Ky.) 264.

In Kentucky there is a statutory proceeding by which defects may be cured and the purchaser held to his bid. *Marshall v. Marshall*, 4 Bush (Ky.) 248; *Mahoney v. McGee*, 4 Bush (Ky.) 527; *Thornton v. McGrath*, 1 Duv. (Ky.) 350, holding the statute constitutional in spite of its retroactive effect; *Woodcock v. Bowman*, 2 Duv. (Ky.) 508, holding that a sale could be perfected and confirmed under the statute even after it had been declared void on appeal at the instance of the purchaser.

2. *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

3. *Andrews v. Andrews*, 7 Heisk. (Tenn.) 236, indicating the extent to

(4) *Discretion of Court.* — The court is vested with a sound legal discretion in regard to the approval of the sale, and it must be exercised in conformity to established principles.<sup>1</sup> Where the sale is fair and regular and for a sufficient price it will be approved.<sup>2</sup>

(5) *Appeal and Error.* — A decision approving or disapproving a guardian's report may be assigned for error.<sup>3</sup>

*e. WHAT AMOUNTS TO CONFIRMATION — SUFFICIENCY OF RECORD.* — The approval of the sale by the court should appear of record,<sup>4</sup> though it need not necessarily appear by a formal entry of an order of approval. It is sufficient if the approval can be gathered from the whole record,<sup>5</sup> and the equity for a title is then

which the court was disposed to carry the principle of *Swan v. Newman*, 3 Head (Tenn.) 290.

1. *Ayers v. Baumgarten*, 15 Ill. 444; *Gates v. Kennedy*, 3 B. Mon. (Ky.) 167.

"The Supreme Court has power to set aside and vacate a sale of lands made under a judgment upon a foreclosure of a mortgage, or pursuant to any order of the court by an officer thereof, and to order a resale, although there be no fraud, and the sale is in all respects regular." *Hale v. Clauson*, 60 N. Y. 341.

2. In *Ayers v. Baumgarten*, 15 Ill. 444, the court said: "That due notice was given of the sale, that the sale was made at the time and place and on the terms prescribed in the order, and that the purchaser performed the conditions of the sale, are uncontroverted facts. The allegation that the sale was hastily and collusively made is wholly unsupported by the evidence. There is nothing in the case to show the least fraud or negligence on the part of the guardian. On the contrary, it clearly appears that the sale was regularly and fairly conducted, and with due regard to the interests of the ward. The sale having been made in good faith, and the terms of the order having been complied with, the purchaser is entitled to hold the property unless the inadequacy of the price requires that the sale be set aside."

3. *Ayers v. Baumgarten*, 15 Ill. 446; *Matter of Guernsey*, 21 Ill. 443. But see *Hale v. Clauson*, 60 N. Y. 341.

In *Missouri* an appeal from the final order of the Circuit Court disapproving a sale which has been approved by the Probate Court before appeal to the Circuit Court may be taken to the Supreme Court. *Henry v. McKerlie*, 78 Mo. 416; *McVey v. McVey*, 51 Mo. 407.

In *Texas* the proceedings may be reviewed in the District Court by certiorari. *Carroll v. Booth*, 2 Tex. Unrep. Cas. 326.

In *McVey v. McVey*, 51 Mo. 407, it was held that an appeal would lie from the County Court to the Circuit Court, and that the only effect of the appeal would be to take the record of the County Court up to the appellate court in the same manner and to the same extent as in actions of certiorari.

4. *Valle v. Fleming*, 19 Mo. 454.

The report of the commissioner of the sale of the land described in the petition and the decree being lost, a copy was produced in which there appeared a discrepancy between the amount of land sold and the amount described in the petition and the decree; but the petition, the decree of sale, and the deed made to the purchaser at the sale all agreed in describing the land as 640 acres; the copy of the commissioner's report in the record stated that the commissioner appointed by the court to sell the real estate, etc., containing 640 acres, did, after giving notice, etc., proceed to sell the land; and the order confirming the sale stated that the report of the commissioner to sell the real estate described in the decree, having been examined by the court, was confirmed. It was held that these facts sufficiently showed a confirmation by the court of the sale of all the land specified in the petition, order of sale, and the deed. *Hanks v. Neal*, 44 Miss. 212.

5. *Moore v. Davis*, 85 Mo. 464; *Valle v. Fleming*, 19 Mo. 454; *Jones v. Manly*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 523; *Henry v. McKerlie*, 78 Mo. 416; *Gilbert v. Cooksey*, 69 Mo. 42; *Long v. Joplin Min., etc., Co.*, 68 Mo. 422; *Calloway v. Nichols*, 47 Tex. 327. See also *Jones v. Manly*, 58 Mo.

complete.<sup>1</sup> The approval of the guardian's report,<sup>2</sup> the approval of the deed,<sup>3</sup> the reception of the report and ordering the curator to account for the proceeds,<sup>4</sup> and even a deed made by a commissioner appointed by the court for that purpose,<sup>5</sup> have been held sufficient evidence of approval of the sale. But a confirmation will not be presumed from the mere fact of a sale and proof that the probate records were loosely kept.<sup>6</sup>

*f. EFFECT OF CONFIRMATION* — (1) *Effect to Cure Errors and Irregularities.* — An order of confirmation is a final judgment,

559, in which Sherwood, J., says: "Regularly, the approval by the court of the report of sale by the administrator ought perhaps to be entered of record. But it does not necessarily follow that if no formal entry is found reciting this, therefore the sale is void and liable to overthrow in a collateral proceeding."

**Evidence of Approval.** — In Moore v. Davis, 85 Mo. 464, the court said: "But in aid of the deed, and especially to show that the guardian's sale was approved by the County Court, the defendants read in evidence all the records set out in the statement, including the whole proceeding from the appointment of Welling as guardian; his application or petition for sale of the land; the order of sale; the advertisement; the sale; the report of sale, which is recorded at length in the records of the County Court; the indorsement on the back of the report by the clerk; and the entry of approval on the minutes. You will rarely find a proceeding of the kind more formal from its beginning to the end, and it unquestionably proves that the report was approved by the court. There was ample evidence here on which to base an application to the Probate Court for an entry *nunc pro tunc*."

In Calloway v. Nichols, 47 Tex. 327, the report of sale was duly returned, examined, and in fact confirmed by the court which ordered the guardian to make a deed to the purchaser, which facts were evidenced by entries on the judge's docket and by parol testimony, and the purchase money was paid. In a suit between the heirs and the purchaser involving title to the land, the jury were instructed to find for the heirs unless it was shown by the record that the sale by the guardian was confirmed by the court in an order entered of record. It was held that though the heirs would not be bound unless the sale was in conformity with

the statute, whether it was so made or not depended on the action of the court upon the report of the sale, and not upon the evidence by which that action is to be shown, the court saying that if the destruction of the record evidence, or the omissions or imprisonment of the clerk, be fatal to a title from the administrator or a guardian, no one would be safe in purchasing property sold by them.

1. Henry v. McKerlie, 78 Mo. 416; Alexander v. Hardin, 54 Ark. 480.

2. Exendine v. Morris, 8 Mo. App. 383.

In Iowa, under Laws of 1868, c. 68, the clerk was authorized, in the absence of the judge, to approve the sale and deed made by a guardian, and where the clerk so approved a sale and deed, and the judge afterwards approved the guardian's report of the sale, it was held that the approval by the judge of the report must have included an approval of the act of the clerk in relation thereto, and was a sufficient approval by the judge of the sale and deed. Bunce v. Bunce, 59 Iowa 533.

3. Wade v. Carpenter, 4 Iowa 361.

4. Pattee v. Thomas, 58 Mo. 163.

5. Edwards v. Powell, 74 Ind. 294 (in the absence of any evidence to the contrary).

6. Swenson v. Seale, (Tex. Civ. App. 1894) 28 S. W. Rep. 143.

**Destruction of Records in Civil War.** — In an action to enforce the liability of the sureties on the bonds of a purchaser at a guardian's sale, it appeared that all the records in the cause except the bonds in suit and the order book had been destroyed by the Union forces during the war. The purchaser had gone into possession and his title had never been questioned. The order book did not contain a decree confirming the sale, but the sale was held valid and the sureties liable. Redd v. Jones, 30 Gratt. (Va.) 123.



and is not open to collateral attack.<sup>1</sup> Such an order, therefore, will cure all merely formal defects and irregularities in the proceedings,<sup>2</sup> and the sale cannot thereafter be impeached collaterally for any such defect or irregularity.<sup>3</sup>

**Jurisdictional Defects.** — But confirmation will not cure defects in the proceedings which go to the jurisdiction of the court,<sup>4</sup> and

1. *Rogers v. Johnson*, 125 Mo. 203. See also *infra*, VI. 13. *Record—Collateral Attack.*

**Presumptions in Support of Confirmation.** — Where the affidavit of posting a notice of sale is insufficient, it will be presumed that before confirmation the probate judge had other proper evidence before him of the legal posting of such notice. *Schaale v. Wasey*, 70 Mich. 414.

After many years and after the destruction of the records it will be presumed in a collateral proceeding that the clerk recorded the guardian's report of sale on its approval. *Spring v. Kane*, 86 Ill. 580.

"The order of approval was a final judgment from which an appeal could have been taken, and was the judgment of a court having jurisdiction of the cause and over the parties, and is entitled in this collateral proceeding to the same favorable presumptions and intendments that are accorded to the judgments of Circuit Courts, and no more open to collateral attack." *Noland v. Barrett*, 122 Mo. 181. *Citing* *McVey v. McVey*, 51 Mo. 406; *Camden v. Plain*, 91 Mo. 117; *Price v. Springfield Real Estate Assoc.*, 101 Mo. 107; *Lingo v. Burford*, 112 Mo. 149.

2. *Alexander v. Hardin*, 54 Ark. 480; *Morton v. Carroll*, 68 Miss. 699; *Exendine v. Morris*, 76 Mo. 416; *Noland v. Barrett*, 122 Mo. 181; *Brown v. Christie*, 27 Tex. 73; *Alexander v. Maverick*, 18 Tex. 179; *Graham v. Hawkins*, 38 Tex. 628; *Edwards v. Halbert*, 64 Tex. 667; *Butler v. Stephens*, 77 Tex. 599; *Gager v. Henry*, 5 Sawy. (U. S.) 237.

3. **Confirmation Conclusive until Regularly Reversed.** — The irregularity of the proceedings is a question for the court to which the report is made for approval, and its determination is conclusive until regularly reversed. *Fitzgibbon v. Lake*, 29 Ill. 165; *Curtiss v. Brown*, 29 Ill. 201; *Shoemate v. Lockridge*, 53 Ill. 503; *Gardner v. Maroney*, 95 Ill. 552; *Kingsbury v. Powers*, 131 Ill. 182.

The confirmation of a sale made by the guardian under orders of the Probate Court is conclusive where the record does not show affirmatively that the jurisdiction did not attach. *Butler v. Stephens*, 77 Tex. 599. *Citing* *Edwards v. Halbert*, 64 Tex. 667; *Robertson v. Johnson*, 57 Tex. 62.

**Examples of Defects Cured by Confirmation.** — If a sale not made at the time required by law is improperly confirmed, it is nevertheless valid when collaterally attacked. *Brown v. Christie*, 27 Tex. 73. See also *Graham v. Hawkins*, 38 Tex. 628.

Where lands of infant heirs have been sold subject to widow's dower and the sale has been confirmed, it cannot be attacked collaterally by showing irregularity in the way in which the dower interest was sold and conveyed and errors in the division of the proceeds between the widow and the minors. *Morton v. Carroll*, 68 Miss. 699.

A sale cannot be questioned collaterally for an error in the adjournment thereof. *Gager v. Henry*, 5 Sawy. (U. S.) 237.

**Confirmation of Sale by Married Woman.** — A sale by a guardian who is a married woman is valid against collateral attack after confirmation if the sale was prior to the passage of section 3484 of Mansfield's Ark. Digest, which provides that the marriage of a female guardian shall operate as a revocation of her guardianship. *Alexander v. Hardin*, 54 Ark. 480.

**Confirmation of Sale by Person Without Authority.** — The court may confirm and adopt a sale made by a person without authority to sell, so as to give the purchaser a good title. *Ex p. Kirkman*, 3 Head (Tenn.) 517. *Contra*, *Seaverns v. Gerke*, 3 Sawy. (U. S.) 353.

4. *Bethel v. Bethel*, 6 Bush (Ky.) 65; *Meddis v. Fenley*, 98 Ky. 432; *Dawson v. Helms*, 30 Minn. 107; *Carter v. Culbertson*, 100 Mo. 269; *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3; *Glassgow v. McKinnon*, 79 Tex. 116; *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

consequently will not protect the sale from collateral attack upon any of such grounds. What defects are jurisdictional and what are merely errors and irregularities have been already pointed out in connection with the discussion of the proceedings to which they refer, and need not be here repeated.

(2) *Effect to Pass Title*. — Although, as has been seen, where the sale has not been approved, no title, either legal or equitable, passes to the purchaser,<sup>1</sup> the confirmation of itself does not divest the infant of his title. The legal title does not pass until a deed is executed.<sup>2</sup> The confirmation, however, gives the purchaser an equity for a legal title.<sup>3</sup>

"No invalid sale can be sanctified on its face. *Carder v. Culbertson*, 100 Mo. 269.

by a mere confirmation of the commissioner's report." *Bethel v. Bethel*, 6 Bush (Ky.) 65.

**Illustrations of Defects Not Cured by Confirmation.** — Under a statute declaring a purchase by a guardian at his own sale void, confirmation of such sale will not validate it, and subsequent *bona fide* purchasers from the guardian acquire no title as against the infant. *O'Donoghue v. Boies*, 92 Hun (N. Y.) 3.

Where the Probate Court has no authority to order a sale of land owned jointly by the estate of another for the purpose of partition, a confirmation of a sale made under such an order will not give it validity. *Glasgow v. McKinnon*, 79 Tex. 116.

In Wisconsin the confirmation does not invalidate the sale if any of the proceedings specified in Rev. Stat., § 3919, were omitted. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537.

In Minnesota an order of confirmation of a guardian's sale adjudicates only that the sale was legally made and fairly conducted, and that the sum paid was not disproportionate to the value of the property sold, or, if disproportionate, that a greater sum cannot be obtained. Hence such order is proof of no other facts nor of any proceeding prior thereto. *Dawson v. Helmes*, 30 Minn. 107.

Confirmation is no proof that the person who executed the conveyance was the legally appointed guardian. *Burrell v. Chicago, etc., R. Co.*, 43 Minn. 363.

In Missouri the Probate Court has no jurisdiction to sell real estate of a minor for less than three-fourths of its appraised value. The approval of such a sale, therefore, is *coram non jure*, and a deed showing such facts is void

on its face. *Carder v. Culbertson*, 100 Mo. 269.

1. See *supra*, VI. 8. u. *Necessity*.

2. *Alabama*. — *Doe v. Jackson*, 51 Ala. 514.

*Arkansas*. — *Alexander v. Hardin*, 54 Ark. 480.

*California*. — *Scarf v. Aldrich*, 97 Cal. 360.

*Illinois*. — *Mulford v. Beveridge*, 78 Ill. 455.

*Iowa*. — *Ordway v. Smith*, 53 Iowa 589.

*Kansas*. — *Bradford v. Larkin*, 57 Kan. 90.

*Massachusetts*. — *Richmond v. Gray*, 3 Allen (Mass.) 25.

*Missouri*. — *Henry v. McKerlie*, 78 Mo. 416; *Bone v. Tyrrell*, 113 Mo. 175.

*New York*. — *Hyatt v. Seeley*, 11 N. Y. 52.

*North Carolina*. — *Williams v. Har- ington*, 11 Ired. L. (N. Car.) 616.

*Ohio*. — *Stall v. Macalester*, 9 Ohio 19.

But see *Hurt v. Long*, 90 Tenn. 447, to the effect that a decree divesting the infant's title and vesting it in the purchaser is sufficient.

Where the decree of the court authorizing a guardian to sell real estate of his ward directed him to report such sale to the court for approval and confirmation before the sale should be completed, and a sale was made, reported, and approved, and, subsequent to such approval, a deed was executed by the guardian, to be delivered to the purchaser upon his securing the purchase money as required by the decree, the interest of the ward was thereby vested in such purchaser, subject to be divested in case of nonpayment or refusal to secure the purchase money as required by the decree. *Mulford v. Beveridge*, 78 Ill. 455.

3. *Alexander v. Hardin*, 54 Ark. 480; *Henry v. McKerlie*, 78 Mo. 416, *review-*

g. **OPENING BIDDINGS FOR ADVANCE.** — It was the English practice to open the biddings at a master's sale before confirmation of the report, upon the offer of a reasonable advance on the sum bid at the sale and the payment of the expenses of the purchaser; and the party applying to have the biddings opened is required to deposit or secure the amount of such advance and expenses.<sup>1</sup> But this practice has not been generally adopted in this country.<sup>2</sup>

9. **Payment of Purchase Price.** (See also article JUDICIAL SALES)—*a.* **TO WHOM MADE.** — Payment of the purchase price of infants' lands should usually be made to the guardian,<sup>3</sup> as he, and not the judge or clerk of the court, is the proper custodian of the money.<sup>4</sup>

*b.* **ENFORCEMENT — Jurisdiction.** — The court ordering the sale has jurisdiction over the purchaser to compel the payment of the purchase price.<sup>5</sup>

*ing* all the *Missouri* cases in an exhaustive opinion by Martin, C. See also *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Min., etc., Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42; *Burden v. Johnson*, 81 Mo. 318; *Moore v. Davis*, 85 Mo. 464; *Sherwood v. Baker*, 105 Mo. 472; *Maxwell v. Campbell*, 45 Ind. 360; *McCulloch v. Estes*, 20 Oregon 349.

Equity for title must be pleaded in order to be available as a defense in an action of ejectment. *Henry v. McKerlie*, 78 Mo. 416.

1. *Upton v. Ferrers*, 4 Ves. Jr. 700; *Anonymous*, 6 Ves. Jr. 513; *Macclesfield v. Blake*, 8 Ves. Jr. 214.

2. *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Duncan v. Dodd*, 2 Paige (N. Y.) 99; *Cooper v. Crosby*, 8 Ill. 506; *Ayers v. Baumgarten*, 15 Ill. 447; *Comstock v. Purple*, 49 Ill. 169. See also article JUDICIAL SALES.

In *North Carolina* a properly secured proposition, made before confirmation of sale, to increase the price ten per cent. is sufficient to reopen bidding. *Dula v. Seagle*, 98 N. Car. 458; *Blue v. Blue*, 79 N. Car. 69; *Pritchard v. Askew*, 80 N. Car. 86; *Atty.-Gen. v. Roanoke Nav. Co.*, 86 N. Car. 408.

3. In *Kentucky* a payment by the purchaser of the proceeds of the sale of an infant's real estate to one who, after the decretal sale, and after the removal of the former guardian, becomes the statutory guardian is good and sufficient, although he may not have executed bond in the Circuit Court as required of the guardian instituting

the proceedings for the sale, under the statute.

In *Delaware* the practice of both the Orphans' Court and the Court of Chancery contemplates that, in a case of a sale not on credit, the purchase money be paid to the trustee before his return of the sale, and that it be deposited by him to the credit of the court. *Downs v. Rickards*, 4 Del. Ch. 416.

In *Maryland*, by the Code, art. 16, §§ 45-48, the authority of the trustee making a sale under a decree of equity of real estate of which an infant is the owner in fee, subject to her mother's life estate in one-half thereof, to pay the proceeds over to the guardian of the infant, and the power of the Orphans' Court to control their disposition are taken away, and it is made the duty of the court which decreed the sale to supervise their investment. *Gill v. Wells*, 59 Md. 492.

4. *State v. Steele*, 21 Ind. 207.

**Accounting by Guardian.** — Under a statute making it compulsory on a guardian to return an account of money received from the sales of real estate, he has no right to wait the order of the court for that purpose, but if he is commanded to account he must obey or be subject to a judgment for contempt. *In re Steele*, 65 Ill. 322.

5. **Land Remains in Custodia Legis.** — Land sold under decree of court remains *in custodia legis* until the final disposition of the case by payment of the purchase money and execution of title by the regular order of the court, and all who claim title, mediately or

**Procedure.** — The payment of the purchase price is enforced against the purchaser in various modes, as by judgment on motion<sup>1</sup> in the court ordering the sale, or by a rule to show cause why he should not pay the purchase money into court,<sup>2</sup> or by an ordinary action in a court of competent jurisdiction.<sup>3</sup>

**Resale at Purchaser's Risk.** — Where the purchaser at a guardian's sale fails to pay the purchase money, the court may direct the property to be resold at the bidder's risk and expense,<sup>4</sup> but in

immediately, through the first judgment of the court and before the final disposition of the cause, must claim subject to the rights of the parties to the original suit and to the orders of the court made or to be made in that suit. *Lord v. Merony*, 79 N. Car. 14.

**Jurisdiction Retained until Final Disposition.** — Where proceedings are taken in the Circuit Court in Chancery of the county in which an infant resides for the sale of his land in another county, the court retains jurisdiction until the matter is fully disposed, and may enforce the rights of the infant against the purchasers by entertaining a supplemental petition of the guardian filed for that purpose. *Matter of Axtell*, 95 Mich. 244.

**In Minnesota** an action against the purchasers to recover the purchase price is exclusively within the jurisdiction of the District Court and not of the Probate Court. *Peterson v. Baillif*, 52 Minn. 386.

**1. In Tennessee** a judgment of a County Court by motion against a purchaser of property under a decree of that court must recite all the facts necessary to give the court jurisdiction and to authorize a judgment. A judgment entitled in the name of the commissioner to sell *versus* the purchaser and the securities for the purchase notes, and describing the plaintiff as commissioner in "this cause" — not in the original cause — is void. The record of the original cause cannot be looked to in aid of the judgment. The judgment must recite the appointment of the commissioner to sell, by what court made, by what authority he sold, in what suit, for whose benefit and for what purpose, that the proper parties are before the court, and the order or decree for sale. *Rucker v. Moore*, 1 Heisk. (Tenn.) 727.

**Exclusiveness of Remedy by Motion.** — Where land belonging to an infant was sold by a clerk and master under decree of a court of equity which directed

title to be retained until payment of the purchase money, and a note for the purchase money was executed by the purchaser to the clerk and master as guardian of the infant (he having become guardian subsequent to the sale), who thereupon made title to the purchaser, and thereafter strangers to the decrees made in the original cause became *bona fide* purchasers of the land with notice of the nonpayment of the purchase money by the original purchaser at the master's sale, and the note on settlement with the guardian had become the property of the ward, it was held that the ward could not maintain a separate action against the purchasers of the land to subject the same to the payment of the note, but was limited to her remedy by motion in the original cause. *Lord v. Merony*, 79 N. Car. 14. See also *Lord v. Beard*, 79 N. Car. 5.

**2. Defense to Rule to Show Cause.** — A purchaser at a commissioner's sale of infant's estate in lands may show, in answer to a rule to show cause why he should not pay the purchase money into the court, that the requirements of the Rev. Stat. Ky., c. 86, art. 3, governing such sales, have not been complied with, which being done he is entitled to be discharged and to have his bonds canceled and surrendered. *Barrett v. Churchill*, 18 B. Mon. (Ky.) 387.

**3.** The general guardian refusing to collect the purchase price, an action for its recovery may be pursued in the District Court by the minors through a guardian *ad litem*. *Peterson v. Baillif*, 52 Minn. 386.

**4.** *Hill v. Hill*, 58 Ill. 240; *Comstock v. Purple*, 49 Ill. 170; *Dills v. Jasper*, 33 Ill. 273; *Matter of Yates*, 6 Jones Eq. (N. Car.) 212; *Gross v. Percy*, 2 Patt. & H. (Va.) 483; *Clarkson v. Read*, 15 Gratt. (Va.) 288.

**Procedure on Resale.** — Where a purchaser at a sale under a decree in chancery refuses to complete his pur-

every such case, before making the order of resale at the purchaser's risk, he should be called upon to show why he has failed to complete his purchase and allowed an opportunity so to do.<sup>1</sup>

**10. Deed.** — As to the necessity of a deed to pass a legal title, see *supra*, VI. 8. f. (2) *Effect to Pass Title*. As to essentials of a guardian's deed, see title *Guardian and Ward*, Am. and Eng. Encyc. of Law (2d ed.).

**11. Setting Aside Sale** — *a. GROUNDS.* — A guardian's sale may be set aside in a direct proceeding after confirmation, for misdescription of the premises sold in the proceedings,<sup>2</sup> or for nonpayment of the purchase money,<sup>3</sup> or for fraud.<sup>4</sup>

chase, in order to charge him with any deficiency arising on a resale the master should report the sale and refusal, and after confirmation of the report a motion should be made, and notice thereof served upon the purchaser, that he be ordered to complete his purchase by a certain specified time, or, in default thereof the property be resold at his risk. And in such case, on failure to pay the purchase money or to show cause therefor, the order of resale should direct the property to be resold at such delinquent bidder's risk and expense. In some instances, where the purchaser is a party to the suit and is entitled to share in the proceeds arising from the sale, the court will reserve the question by whom the costs and expenses of the resale and the deficiency are to be borne. The case of *Comstock v. Purple*, 49 Ill. 158, *overrules* only so much of the case of *Dills v. Jasper*, 33 Ill. 273, as relates to the receiving and reporting of bids by the master to the court, and the effect thereof, and leaves untouched all that portion of it in regard to the course of proceedings where the purchaser fails to comply with his purchase. *Hill v. Hill*, 58 Ill. 240.

1. *Hill v. Hill*, 58 Ill. 240.

2. *Deford v. Mercer*, 24 Iowa 118, holding that the sale might be set aside where the land was described as "the southwest quarter of the northwest quarter" of section five, whereas the proper description was "the southwest quarter of the northeast quarter" of section five, unless the ward was estopped therefrom by accepting the proceeds of sale with knowledge of the error.

3. In *Weems v. Masterson*, 80 Tex. 45, the plaintiff claimed the superior title, notwithstanding the sale, upon

the alleged nonpayment of the purchase money, the guardian's sale being on credit and the purchase money notes reserving a vendor's lien. Suit to rescind was brought thirty-three years after the sale. It was held that the plaintiff had lost her right to rescind, from the great lapse of time.

4. *Reynolds v. McCurry*, 100 Ill. 356, holding that a sale may be set aside in equity where there are abundant means of support and no ground for selling, especially where the sale was pursuant to an unlawful combination between the guardian and the widow to convert the estate to their own use; *Wohlscheid v. Bergrath*, 46 Mich. 46, holding that it is fraud in law, whatever the intent, for a guardian to petition in his ward's name, without the latter's authority, for leave to sell land for the payment of debts of the ward's ancestor, and to include an invalid claim and to represent a sale, when made, as a cash sale when no cash is paid.

Where one procures the appointment, by a probate court, of a guardian for a minor child, without the consent or knowledge of the father or other friends of such child, for the purpose of secretly obtaining title, for his own benefit, to the minor's lands, such probate proceedings, not being on behalf or in the interest of the minor, are a fraud upon the minor's rights, and he may have them annulled and vacated. The fact that the lands sold at the guardian's sale, under such proceedings, for their full value, does not affect the minor's equities; the doctrine that fraud and damage must concur does not apply to such a case. No one can be forced to submit to a sale at other people's estimate of value. *Tong v. Marvin*, 26 Mich. 35.

**Stifling Competition.** — Where the purchaser is a party to an agreement stifling competition the sale may be set aside.<sup>1</sup>

**Incompetent Purchaser.** — Where the land was sold to the wife of the guardian, in contravention of the statute, the sale may be set aside.<sup>2</sup>

**More Inadequacy of Price** is not sufficient ground for setting aside the sale,<sup>3</sup> though where the proceedings are irregular, or fraud is charged, it may become a controlling consideration.<sup>4</sup>

**Impropriety of Selling.** — That the sale was not in fact for the benefit of the infant,<sup>5</sup> or that the evidence of the propriety of selling the land was insufficient,<sup>6</sup> forms no ground for setting aside the sale.

**b. METHOD.** — The method of setting aside a sale after con-

1. *Devine v. Harkness*, 117 Ill. 145, holding that a sale may be set aside in equity where by agreement the purchaser prevented another from bidding at the sale, who otherwise would have bid a greater sum.

**Bidder Threatening to Litigate with Any Purchaser.** — In *Coffey v. Coffey*, 16 Ill. 141, the court held that the conduct of the successful bidder at the sale in setting up a claim to the land and threatening to litigate it with any purchaser was such unfairness and fraud in the sale as to warrant a decree setting the sale aside.

2. *Hampton v. Hampton*, 9 Tex. Civ. App. 497.

3. *Dickerman v. Burgess*, 20 Ill. 281; *Watt v. McGalliard*, 67 Ill. 513; *Ayers v. Baumgarten*, 15 Ill. 444; *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136; *Sumner v. Sessoms*, 94 N. Car. 371; *Williams v. Pollard*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020; *Carroll v. Booth*, 2 Tex. Unrep. Cas. 326.

"It would be hazardous to impeach confirmed judicial sales upon the ground of inadequacy of price; and if it can be done in any case, it must undoubtedly be a very strong one of deceitful practice on the court." *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136.

**Illustrations.** — In *Watt v. McGalliard*, 67 Ill. 513, a sale of land worth \$3500 for \$384.70 was sustained.

In *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307, a sale of land worth \$6,000 for \$427.42, under a judgment against an infant rendered without the appointment of a guardian *ad litem*, was set aside.

**Effect of Inadequacy of Price Before and After Confirmation.** — But inadequacy of price may be sufficient ground for re-

fusing to confirm a sale, although it is no ground for annulling a deed in an action brought to try the legal title. *Sumner v. Sessoms*, 94 N. Car. 371.

See also *supra*, VI. 8. *Report and Confirmation of Sale.*

4. In *Dickerman v. Burgess*, 20 Ill. 281, the court said: "But where, as in this case, the requirements of the statute were spurned — where there was no public vendue, no bidders, and no outcry — gross inadequacy of price, such as is here exhibited, ought to have a most decided influence and be, in fact, a controlling element."

See also the cases cited in preceding note.

5. In a proceeding by one after coming of age to show cause against a decree under which his land had been sold during his infancy, if the court which pronounced the decree had jurisdiction of the subject and the parties, if its proceedings were regular and in accordance with the requirements of law, and the decree is sustained and justified by the evidence then introduced, the complainant will not be allowed, against a *bona fide* purchaser, to go out of the record to show that upon facts and events arising subsequent to the rendition of the decree his interests were not promoted by the sale of the real estate. *Walker v. Page*, 21 Gratt. (Va.) 636.

6. The omission of the two witnesses justifying in the original cause as to the propriety of selling the land, to state fully the facts and circumstances in support of their opinions, as required by Code Md., art. 16, § 37, forms no ground for reversing or vacating the decree upon a bill of review. *Gregory v. Lenning*, 54 Md. 52.

firmation is usually by bill in equity<sup>1</sup> or civil action for that purpose.<sup>2</sup>

**Imposing Terms.** — The court may impose terms in setting aside a sale.<sup>3</sup>

**c. RETURN OF PURCHASE MONEY.** — Ordinarily, when a guardian's sale is set aside, a purchaser in good faith is entitled to have the purchase money, together with the amount expended by him for taxes and permanent improvements, refunded, and such items may be charged upon the land.<sup>4</sup> In such cases the

1. *Deford v. Mercer*, 24 Iowa 118; *Devine v. Harkness*, 117 Ill. 145; *Dickerman v. Burgess*, 20 Ill. 281; *Watt v. McGalliard*, 67 Ill. 513; *Reynolds v. McCurry*, 100 Ill. 356; *Conover v. Musgrave*, 68 Ill. 58 (bill in equity to enjoin purchaser from asserting title).

**Federal Jurisdiction.** — The other conditions of jurisdiction being satisfied, a Circuit Court of the United States has jurisdiction in equity to set aside a sale of an infant's land fraudulently made by his guardian, under authority derived from a Probate Court, and may give such relief therein as is consistent with equity. *Arrowsmith v. Gleason*, 120 U. S. 86.

**A Bill of Review** may be maintained to set aside a sale under an original bill in equity. *Gregory v. Lenning*, 54 Md. 52.

2. *McKeever v. Ball*, 71 Ind. 398; *Weems v. Masterson*, 80 Tex. 45; *Williams v. Pollard*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1020; *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307.

**Jurisdiction of County Court over Proceedings.** — In a proceeding in the County Court by wards to set aside a sale of their land by their guardian to his wife, because in violation of Rev. Stat. Tex., art. 2582, prohibiting a direct or indirect purchase by a guardian of his ward's property, and because no consideration was paid to the guardian by his wife, the question whether the land was not in fact the property of the wife, having, in the first place, been bought with her separate money and title taken in the name of the wards, and whether the purpose of the order under which the guardian sold was not to place the title where it belonged, cannot be inquired into, though persons claiming title through the guardian's sale, by deed from the wife, are made parties defendant; the County Court having no jurisdiction to adjudicate title to real estate. *Hampton v. Hampton*, 9 Tex. Civ. App. 497.

**Motion in the Cause or New Action.** — Where an action has been determined by final judgment, a new action, and not a motion in the cause, is the proper method to attack the judgment for fraud. *Smith v. Gray*, 116 N. Car. 314; *Carter v. Rountree*, 109 N. Car. 29; *Fowler v. Poor*, 93 N. Car. 466. But where the object is to set aside the judgment for irregularity, although the action has been determined and a final judgment rendered, a motion in the cause, and not a new action, is the proper manner of proceeding. *Fowler v. Poor*, 93 N. Car. 466.

3. *Fulbright v. Cannefox*, 30 Mo. 425; *Powell v. Gott*, 13 Mo. 458; *Hampton v. Hampton*, 9 Tex. Civ. App. 497. See also *infra*, VI. 11. *c. Return of Purchase Money.*

4. *Brandon v. Brown*, 106 Ill. 520; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352; *Stewart v. Bailey*, 28 Mich. 251; *Blodgett v. Hitt*, 29 Wis. 169; *Mohr v. Tulip*, 40 Wis. 66; *Aronstein v. Irvine*, 48 La. Ann. 301; *Cole v. Johnson*, 53 Miss. 94; *Gaines v. Kennedy*, 53 Miss. 103; *Burleigh v. Bennett*, 9 N. H. 15; *Hatcher v. Briggs*, 6 Oregon 31; *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307; *Washburn v. Carmichael*, 32 Iowa 475; *Lyon v. Vanatta*, 35 Iowa 521.

**The Doctrine of Caveat Emptor** is applied to judicial sales for the protection of those conducting them, and not for the benefit of heirs and legatees repudiating them. *Brandon v. Brown*, 106 Ill. 519.

**Enjoining Ejectment for Land Purchased at Voidable Probate Sale.** — One claiming under a purchase at a guardian's sale may maintain a bill in equity to enjoin the execution of the judgment in ejectment until the heirs shall pay the money paid at the sale, on the allegation that the purchase money had been paid over to the guardians of the minors, and received by the wards on attaining majority, in their respective

rents and profits of the land since the sale may be allowed as an offset against the amount paid by the purchaser.<sup>1</sup> Where, however, it does not appear that the guardian paid the money to the ward, or used it for his benefit, the purchaser has no equity for its return as against the ward.<sup>2</sup> In order to sustain such an

proportions. *Gaines v. Kennedy*, 53 Miss. 103; *Douglas v. Bennett*, 51 Miss. 680. See also *Cole v. Johnson*, 53 Miss. 94.

In *Minnesota* the lien given by the Act of March 3, 1864, to a purchaser at an executor's, administrator's, or guardian's sale held void, is no defense in an action of ejectment by a ward. *Montour v. Purdy*, 11 Minn. 384.

**Action for Money Had and Received.**—An action for money had and received will lie to recover back such payment from the ward. *Burleigh v. Bennett*, 9 N. H. 15.

**Recovery in Reconvention**—*Louisiana*.—The purchaser may set up his claim in reconvention. *Aronstein v. Irvine*, 48 La. Ann. 301.

**Necessity of Pleading Equity.**—The equity for the return of the purchase money must be pleaded in order to be available. *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

**Alleging Tender of Purchase Money.**—A petition to set aside a guardian's sale is not demurrable for failure to allege a tender of repayment of the purchase money where the petition does not show affirmatively that the purchaser did not take possession, as if the purchaser took possession he would be liable for rents and profits which might be offset against the purchase money. *Washburn v. Carmichael*, 32 Iowa 475.

**Enforcing Return in Ejectment.**—"We have repeatedly decided that when a minor disaffirms a judicial sale by bill in equity, he must return, or offer to return, what he has received, if it be in his power." Repudiating by action of ejectment is in effect the same as by bill in equity, and no court exercising equitable powers will allow a party to do this and also to receive the proceeds of such sale not yet paid over to him. *Brandon v. Brown*, 106 Ill. 520.

**Mississippi Statute.**—In *Mississippi* the matter is regulated by the Act of Feb. 11, 1873 (Acts 1873, 41). The statute made two changes in the law as it existed before its passage, in regard to the rights of purchasers at void or voidable probate and chancery sales.

First, a distribution of the money to the heirs or devisees creates the charge. If the money has been paid to the legal guardian of a minor, the requirement has been met; whereas, such payment (without the statute) would have no effect on the legal rights of the ward, unless he had actually received the money, or had, after attaining majority, adopted an expenditure of it for his use. Second, the statute creates a charge on the land for reimbursement of the money; whereas, the existing law made the receipt of the money operate as an estoppel on the heir. *Gaines v. Kennedy*, 53 Miss. 103.

1. *Wichita Land, etc., Co. v. Ward*, 1 Tex. Civ. App. 307; *Washburn v. Carmichael*, 32 Iowa 475.

"The most that it [a court of equity] can do is to decree a return of the purchase money, and order an account of rents, profits, and improvements, and adjudge the land subject to a lien for the difference, and this is done only when such equity is pleaded." *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

2. *Bone v. Tyrrell*, 113 Mo. 175.

**As Against Bona Fide Sub-purchasers.**

—Under Rev. Stat. Tex., art. 2582, making it unlawful for a guardian to become the purchaser of any property of the estate sold by him, and providing that if he does purchase it the sale shall be declared void and set aside in proceedings therefor, the sale may be set aside though in the meantime the guardian has conveyed the property to another. Notwithstanding the conveyance to the third person, the sale may be set aside without conditions where the ward received no benefit from the sale. The fact that the ward has recourse on the guardian's bond does not interfere with his right to have the sale set aside. *Hampton v. Hampton*, 9 Tex. Civ. App. 497.

**Alleging Tender.**—The rule requiring a minor attacking a sale to allege a tender of the return of the purchase money does not apply where it is averred in his petition that he has never received from his guardian or



equity he must trace the fund to some appropriation or use beneficial to the ward.<sup>1</sup>

**12. Irregularities in Proceedings — a. WHO MAY TAKE ADVANTAGE OF.** — No one can take advantage of irregularities in the proceedings upon a guardian's sale except the ward and those claiming under him,<sup>2</sup> or one whose interests are affected injuriously by the proceedings.<sup>3</sup> A mere stranger cannot do so,<sup>4</sup> nor a person claiming under a title adverse to that of the ward.<sup>5</sup>

**b. PROTECTION OF PURCHASERS.** — It is the policy of the law to sustain all judicial sales, regardless of slight and minute

otherwise any portion thereof. *Lyon v. Vanatta*, 35 Iowa 521.

**Restoration Not a Condition Precedent.** — In *Louisiana* an antecedent tender of the purchase price is not required. *Aronstein v. Irvine*, 48 La. Ann. 301.

Where a guardian under a void decree sells the land of his ward and appropriates the purchase money to his own use, the ward will not be required to restore to the purchaser the price paid by him as a condition precedent to having the sale set aside. *Reynolds v. McCurry*, 100 Ill. 356.

1. *Douglas v. Bennett*, 51 Miss. 680.

2. *Goldsmith v. Gilliland*, 23 Fed. Rep. 645.

On a bill of review filed by the heirs of deceased infants, to set aside a sale of the real estate of said infants, made in their lifetime under a decree passed upon the application of the mother of said infants, as their guardian, under sections 36 and 37 of article 16 of the Code, it was held: (1) That the infants themselves, if they were living, would have the right to impeach the decree if proper grounds were alleged and shown for such impeachment; and any substantial cause, such as fraud in obtaining the decree, or the nonobservance of those requirements prescribed by the statute to confer jurisdiction to pass the decree, or any matter that clearly showed that an improper decree had been made against them, though not obtained by fraud, collusion, or surprise, might be made ground for impeaching the decree by original bill in the nature of a bill of review. (2) That the complainants as privies in blood to the deceased infant defendants in the original decree would have the right to take advantage of, and urge as a ground of objection to the decree, any matter that would be open and available to the infants if they

were living and taking proceedings against the decree themselves. *Gregory v. Lenning*, 54 Md. 52.

3. *Kenniston v. Leighton*, 43 N. H. 309; *Marvin v. Schilling*, 12 Mich. 356; *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136.

The power of a guardian in the sale of his ward's estate can be questioned by a third person only where the rights of such person depend upon the existence and due exercise of that power. *Mason v. Wait*, 5 Ill. 127.

4. *Kearney v. Vaughan*, 50 Mo. 284; *Kenniston v. Leighton*, 43 N. H. 312.

**Chancery Court Exceeding Power.** — If a chancery court exceeds its power in relation to a sale of an infant's estate, such excess is not a naked assumption of power, and their action in such case not being a nullity, but, if void, only relatively so, strangers cannot disregard it. *Kearney v. Vaughan*, 50 Mo. 284.

5. *Meikel v. Borders*, 129 Ind. 529, holding that persons claiming an adverse title under the ancestor cannot, if the wards permit the sale to stand, attack it because of irregularities in the proceedings, as they are not injured thereby. *Marvin v. Schilling*, 12 Mich. 356, holding that under Comp. Laws Mich., § 3092, a person claiming adversely to the title of the ward could not contest the validity of the sale on the ground that the petition for license was defective, nor upon the ground that the sale was a fraud upon the ward; but that if there was anything wrong in the proceedings it could be inquired into by the ward or any one claiming under him at the proper time, and that a third person could not drag the ward's rights into court in a litigation between himself and the purchaser. See also *Curtis v. Campbell*, 54 Mich. 340; *Pfirman v. Wattles*, 86 Mich. 259.

defects.<sup>1</sup> There are two facts which the purchaser must ascertain at his peril, viz.: that the court had jurisdiction of the subject matter and parties,<sup>2</sup> and that there is an order or decree authorizing the sale.<sup>3</sup> But where these two facts appear, the title of a *bona fide* purchaser will be protected, no matter what errors or irregularities may intervene.<sup>4</sup> Where the court has jurisdiction the purchaser need not look beyond the order or decree of sale.<sup>5</sup> Illustrations of irregularities held not to affect *bona fide* purchasers will be found below in the notes.<sup>6</sup>

1. *Thornton v. McGrath*, 1 Duv. (Ky.) 350, holding that the word "void" as used in the statutes authorizing the sale of infants' real estate, and in the decisions of the Kentucky court upon those statutes, should be considered as meaning "voidable" only; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 105; *Pattee v. Thomas*, 58 Mo. 163; *Tederall v. Bouknight*, 25 S. Car. 275. See generally article JUDICIAL SALES.

**Reason for Rule.** — "There is a thought well worthy of consideration, which is, whether the uncertainty of these sales by administrators and guardians does not prevent the property selling at a fair rate, and whether upholding them would not promote the interests of the heirs and minors themselves." While their interests should be preserved, "it is possible for both the lawmaker and the judge to surround the proceedings with small technicalities, which are detrimental to all who are concerned." *Morrow v. Weed*, 4 Iowa 77.

2. *Tederall v. Bouknight*, 25 S. Car. 280.

3. *Strouse v. Drennen*, 41 Mo. 289. See generally article JUDICIAL SALES.

4. *Illinois*. — *Young v. Lorain*, 11 Ill. 625; *Stow v. Kimball*, 28 Ill. 93; *Goudy v. Hall*, 36 Ill. 313; *Moore v. Neil*, 39 Ill. 256; *Mulford v. Stalzenback*, 46 Ill. 303; *Myer v. McDougal*, 47 Ill. 278; *Bowen v. Bond*, 80 Ill. 351; *Allman v. Taylor*, 101 Ill. 186; *Spring v. Kane*, 86 Ill. 580; *Conover v. Musgrave*, 68 Ill. 58; *Fitzgibbon v. Lake*, 29 Ill. 177; *Johnson v. Johnson*, 30 Ill. 215.

*Michigan*. — *Marvin v. Schilling*, 12 Mich. 356; *Howard v. Moore*, 2 Mich. 226; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433; *Coon v. Fry*, 6 Mich. 506; *Woods v. Monroe*, 17 Mich. 238; *Osman v. Traphagen*, 23 Mich. 80.

*Missouri*. — *Strouse v. Drennan*, 41 Mo. 289.

*North Carolina*. — *Leary v. Fletcher*,

1 Ired. L. (N. Car.) 261; *Fowler v. Poor*, 93 N. Car. 466; *Morris v. Gentry*, 89 N. Car. 252.

*Oregon*. — *Walker v. Goldsmith*, 14 Oregon 125.

*Pennsylvania*. — *Morrison v. Nellis*, 115 Pa. St. 41.

*South Carolina*. — *Tederall v. Bouknight*, 25 S. Car. 280; *Trapier v. Waldo*, 16 S. Car. 276.

*Tennessee*. — *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435.

5. *Fitzgibbon v. Lake*, 29 Ill. 165; *Mulford v. Stalzenback*, 46 Ill. 303; *Marquis v. Davis*, 113 Ind. 219; *Seward v. Didier*, 16 Neb. 62; *McPherson v. Cunliff*, 11 S. & R. (Pa.) 422; *Alexander v. Maverick*, 18 Tex. 179; *Gri-gnon v. Astor*, 2 How. (U. S.) 339; *Thompson v. Tolmie*, 2 Pet. (U. S.) 162.

6. **Misapplication of Proceeds — Effect.** — A *bona fide* purchaser is not affected by a misapplication of the proceeds by the court or guardian. *Orman v. Bowles*, 18 Colo. 463; *Mulford v. Stalzenback*, 46 Ill. 303; *Fitzgibbon v. Lake*, 29 Ill. 165; *Mulford v. Beveridge*, 78 Ill. 455; *Allman v. Taylor*, 101 Ill. 186; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365; *Knotts v. Stearns*, 91 U. S. 638.

In *Indiana* it seems that the validity of the sale, where irregularities or errors have intervened, may turn upon the due application of the proceeds. In *Dequindre v. Williams*, 31 Ind. 445, it was held that where a guardian who has received his appointment from a court of superior jurisdiction having authority to make such appointment and jurisdictions of guardians' petitions to sell lands, but without jurisdiction to make the particular appointment, sells land of his wards under an order of such court to one who purchases and pays for such land, relying in good faith on such order, such purchaser will be protected in the title so acquired, provided the guardian applies the proceeds properly. This case was cited and applied in

**The Question What Defects Are Jurisdictional** rendering the sale subject to collateral attack, and what are mere errors and irregularities not affecting the validity of the sale, has already been considered in the various sections of this article where the subjects of such defects are especially considered.

**Question of Law.** — The regularity of the proceedings is usually a question of law for the court.<sup>1</sup>

**The Title Acquired by a Bona Fide Purchaser** will be upheld where the court had jurisdiction, although the decree has been afterwards reversed for manifest error.<sup>2</sup> A *bona fide* purchaser from a *mala*

Decker v. Fessler, (Ind. 1896) 44 N. E. Rep. 658. But in *Marquis v. Davis*, 113 Ind. 219, it was held that where a guardian, in a proceeding by him to sell his ward's real estate, files an additional bond, which is approved by the court and a sale is ordered and made, the ward cannot, upon a failure of the guardian to account for the proceeds, avoid the sale and recover the land from the purchaser, even though the latter knew that the surety in the bond was in failing circumstances.

**A Mistake as to the Interest of Parties** cannot be taken advantage of to defeat the title of the purchaser after decree and the expiration of the time allowed for appeal. *Gilmore v. Rodgers*, 41 Pa. St. 120.

**Sale of More Land than Necessary.** — A sale will be held valid although the guardian may have sold more than was necessary to effect the objects of the sale. A purchaser is bound to look no further than to the guardian's authority, and has no control over the exercise of his discretion while acting within the limits of that authority. *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 261.

**Failure to Render Account of Guardianship.** — The purchaser is not required to see that the guardian renders a true account of his guardianship. *Mulford v. Beveridge*, 78 Ill. 455.

**Disqualification of Members of Family Meeting.** — A purchaser of minors' property ordered sold by the advice of a family meeting is not required to inquire into the personal qualifications of the members of the meeting but need only look to the regularity of the proceedings and the order homologating the same. *Lemoine v. Ducote*, 45 La. Ann. 857.

**Appointment of Improper Person as Guardian.** — The appointment of an improper person as guardian is not abso-

lutely void, because the court has jurisdiction to make the appointment as against a purchaser from the appointee, but is a mere irregularity where there is no fraud or intentional wrongdoing. *Kramer v. Mugele*, 153 Pa. St. 493. And see *Dull's Appeal*, 108 Pa. St. 604.

**Failure to Give Bond on Appointment.** — Failure of the guardian to give a general bond upon his appointment will not invalidate a sale subsequently made by him to a *bona fide* purchaser. *Cuyler v. Wayne*, 64 Ga. 78; *Watts v. Cook*, 24 Kan. 278; *Hunt v. Insley*, 56 Kan. 213. See also *supra*, VI. 2. b. (1) *Legal Guardian*.

1. *Weems v. Masterson*, 80 Tex. 45, holding that whether probate proceedings were regular (by which is meant in accordance with the laws regulating sales of a minor's property by a guardian in obedience to the orders of a Probate Court) is not a question of fact when there is no controversy as to the existence or contents of the orders indorsed in evidence, and that it is improper to submit the issue to the jury without an instruction applicable to the orders.

2. *Allman v. Taylor*, 101 Ill. 185; *Hobson v. Ewan*, 62 Ill. 148; *Wadhams v. Gay*, 73 Ill. 415; *Goudy v. Hall*, 36 Ill. 313; *Thompson v. Doe*, 8 Blackf. (Ind.) 336; *Crain v. Parker*, 1 Ind. 374; *Singleton v. Cogar*, 7 Dana (Ky.) 479; *McKee v. Hann*, 9 Dana (Ky.) 526, holding that where property of infants has been sold under a decree upon petition, and been sold again by the purchaser, the appellate court will not direct a restitution of the property upon reversing the decree, even though the decree is void, nor will it go on to regulate the ultimate consequences of the reversal; *Gregory v. Lenning*, 54 Md. 55 [citing *Booth v. Rich*, 1 Vern. 295; *Bennett v. Hamill*, 2 Sch. & Lef. 566;

*fide* purchaser will be protected.<sup>1</sup>

c. CURATIVE STATUTES. — In pursuance of the policy to sustain judicial sales, it has been expressly enacted in a number of states that a guardian's sale shall not be avoided for any irregularity in the proceedings, provided certain enumerated proceedings have been duly taken.<sup>2</sup> A type of such statutes is given in the notes.<sup>3</sup>

Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; Lloyd v. Johnes, 9 Ves. Jr. 65; Elliott v. Knott, 14 Md. 134; Newbold v. Schlens, 66 Md. 585; Castleman v. Relfe, 50 Mo. 583; Shields v. Powers, 29 Mo. 315; Fithian v. Monks, 43 Mo. 502; State v. Laurens, 45 Mo. 492; Sutton v. Schonwald, 86 N. Car. 198.

In Shields v. Powers, 29 Mo. 315, the court said: "We do not see a distinction taken between the reversal of judgments against infants and those against adults. The case of Wyatt v. Mansfield, 18 B. Mon. (Ky.) 779, is an anomalous one and founded on statutes with which we have no familiarity."

**Restitution on Reversal.** — In Mitchell v. Hardie, 84 Ala. 349, the court said: "The general rule is that a party to an erroneous judgment or decree, purchasing at a judicial sale, acquires only a defeasible title, which falls with its subsequent reversal. Marks v. Cowles, 61 Ala. 299; McDonald v. Mobile L. Ins. Co., 65 Ala. 358. The land was sold under the decree of sale made by consent, and purchased by the solicitors of complainant. The sales were confirmed by the consent of the solicitors and the guardian *ad litem*. The solicitors of record of the party obtaining the decree are charged with the knowledge of its erroneous character, and purchased subject to the risk of losing the title by the subsequent reversal of the decree. They are not in a position to claim the protection afforded to *bona fide* purchasers without notice. On a bill of review the court has power to do complete justice, and to put the party complaining in the same condition in which he was at and prior to the rendition of the decree in the former suit. The decree having been carried into execution, the land sold, conveyances executed, and the purchasers put into possession, a simple reversal of the decree would fall far short of doing complete justice. To this end it is essential that the sales made under the decree be vacated, the conveyances annulled, and the purchasers be held to

account for the rents and profits. McCall v. McCurdy, 69 Ala. 65."

In Virginia the Code, § 3425, provides that if a sale is made under order of court six months after the decree, and is duly confirmed, it shall not be affected though such decree or order be afterwards set aside. A purchaser who brings himself within the provision of this statute is not affected by irregularities in the proceeding to obtain the sale. Lancaster v. Barton, 92 Va. 615.

1. Fowler v. Poor, 93 N. Car. 466; Worthington v. Dunkin, 41 Ind. 515.

2. See the codes and statutes of the various states.

3. Hill's Anno. Laws Oregon, 1892, § 3132, is as follows: "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear, (1) that the guardian was licensed to make the sale by a county court of competent jurisdiction; (2) that he gave a bond that was approved by the county judge; (3) that he took the oath prescribed in this chapter; (4) that he gave notice of the time and place of sale as prescribed by law; and (5) that the premises were sold accordingly at public auction, and are held by one who purchased them in good faith."

See also How. Stat. Mich., § 6102; Comp. Stat. Neb., c. 23, § 64; Rev. Stat. Wis., § 3919; Cooper v. Sunderland, 3 Iowa 114.

In North Carolina the Code, § 387, cures irregularities in the service of process on infants in proceedings prior to March 14, 1879. Smith v. Gray, 116 N. Car. 312. See also, as to construction of this provision of the code, Fowler v. Poor, 93 N. Car. 466; Cates v. Pickett, 97 N. Car. 21; Stancill v. Gay, 92 N. Car. 462; Perry v. Adams, 98 N. Car. 167; Harrison v. Harrison, 106 N. Car. 282.

The Effect of These Statutes is that a guardian's sales cannot be collaterally attacked except for a failure to comply with one or more of the enumerated particulars,<sup>1</sup> and, conversely, that the sale may be attacked for a failure in respect to any one of the enumerated particulars.<sup>2</sup>

**Validity.** — Statutes of this character are valid.<sup>3</sup>

A Distinction is usually made in these statutes between cases where the person questioning the sale claims under the ward and those where the claim is adverse to him.<sup>4</sup>

1. *Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Hubermann v. Evans*, 46 Neb. 784; *Goldsmith v. Gilliland*, 10 Sawy. (U. S.) 613.

Where the validity of a guardian's sale of real estate, made pursuant to Comp. Laws Mich., 1857, c. 101, was attacked by a party claiming under the ward, all the proceedings leading to the issuance of the license to sell were conclusively presumed to be valid and proper. *Blanchard v. De Graff*, 60 Mich. 107; *Schaale v. Wasey*, 70 Mich. 414. See also *Dexter v. Cranston*, 41 Mich. 448.

**Jurisdictional Defects Not Cured.** — Statutes of the type now under consideration do not and cannot operate to confer jurisdiction otherwise entirely wanting. *Wells v. Steckleberg*, (Neb. 1897) 70 N. W. Rep. 242, where this principle was applied to a sale made on application of one who had not legally qualified as guardian, and the sale was held void. To the same effect, see *Seaverns v. Gerke*, 3 Sawy. (U. S.) 354.

2. *Davis v. Hudson*, 29 Minn. 27; *Montour v. Purdy*, 11 Minn. 384; *Cooper v. Sunderland*, 3 Iowa 114.

**Reason of Rule.** — In *Hobart v. Upton*, 2 Sawy. (U. S.) 302, *Deady, J.*, said: "On behalf of the plaintiff it is maintained that each of the five particulars contained in the proviso to section 20 of the act is essential to the validity of a sale under it, and that unless it appears from the proof that all these things were had and done, as against the plaintiff, the sale is invalid. This position, it seems to me, must be conceded. When the act declares that a sale by a guardian 'shall not be avoided on account of any irregularity in the proceedings, provided it shall appear,' etc., as above stated, it in effect declares that if these things, or any of them, do not appear, such sale may be avoided on account of such irregularity, or, in other words, that it is invalid and does not affect the title

of the ward." In this case the sale was held absolutely void because not made upon notice of the time and place thereof, and at public auction.

3. Mere irregularities of proceedings, though of so grave a character as to render a judicial proceeding inoperative, may be deprived of their fatal consequences by subsequent legislation. *McCulloch v. Estes*, 20 Oregon 349.

In Wisconsin a curative act dispensing with notice has been held invalid. *Mohr v. Porter*, 51 Wis. 487.

4. In *Goldsmith v. Gilliland*, 10 Sawy. (U. S.) 615, it was held that General Laws of Oregon 740, §§ 20-22, taken together, provide that if the party contesting the validity of a guardian's sale claims under the ward it must appear, among other things, that the guardian gave a bond to the approval of the county judge; but if the person questioning such a sale claims adversely to the title of the ward, then it is only necessary that it should appear that the guardian was authorized to make the sale, and that "he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the premises."

Comp. Laws of Mich., § 3092, provides that if the validity of a sale made by a guardian shall be drawn in question by any person claiming adversely to the title of the ward, or claiming under any title which is not derived from or through the ward, the sale shall not be deemed void on account of any irregularity in the proceedings, provided it shall appear that the guardian was licensed to make the sale by a probate court having jurisdiction, and that he did accordingly execute and acknowledge in legal form a deed for the conveyance of the premises. Under this statute it was held that a person claiming adversely to the title of the ward could not contest the validity of the sale on the ground that the peti-

The Primary Requisite in These Curative Acts is that the guardian must be licensed to make the sale by a probate court of competent jurisdiction.<sup>1</sup> The words "probate court of competent jurisdiction" have been held to signify "the probate court whose jurisdiction it is proper to invoke in the particular case in hand," and do not refer to the steps preliminary to the obtaining of a license.<sup>2</sup>

**Statutory Conditions Precedent.**—As has been seen, these statutes also usually enumerate, as conditions precedent to their application, the giving of the special sale bond, the notice of sale, and the taking of the prescribed oath, and sales have been held void for failure to comply with the statute in each of these particulars.<sup>3</sup> On the other hand, where each of the steps enumerated in the

tion for the license to sell was defective. *Marvin v. Schilling*, 12 Mich. 356. See also *supra*, VI. 12. *a. Who May Take Advantage of.*

1. See the codes and statutes of the various states.

2. *Montour v. Purdy*, 11 Minn. 384, holding that where the license is granted by the Probate Court which appointed the guardian it is immaterial whether any such preliminary steps were taken or not; *Mohr v. Porter*, 51 Wis. 487, where it was said that the words "the County Court having jurisdiction," as used in Rev. Stat. 1858, c. 94, § 62, subd. 1, meant merely the County Court having jurisdiction of the estate, and a sale was sustained, although no notice to the parties interested adversely to the petition had been given. But see *supra*, VI. 7. *a. Notice of Sale.*

In *Hubermann v. Evans*, 46 Neb. 784, the court said: "The words 'competent jurisdiction,' as used in the section, mean the court which has the power or authority conferred upon it by the law to hear and determine the particular application, and whose jurisdiction it was proper to invoke in that instance. The statute has expressly conferred the power upon the District Court of the county where the guardian was appointed, or a judge of such court, to license the sale of real estate of the ward for certain specified purposes. Where a guardian of minors is appointed by the County Court of Douglas county, the District Court of no other county in the state could lawfully order the sale of the real estate belonging to such minors, and should it do so the order and sale thereunder would be absolutely void, and their invalidity could be asserted in a collateral proceeding. What the legislature

intended was that the sale must have been authorized by the proper forum, *i. e.*, the District Court of the county, wherein letters of guardianship were granted, or by the judge of such court. Orders of sale made or rendered by such court or judge, upon application for license to sell real estate by a guardian, cannot be impeached collaterally, because, however erroneous they may be, they are not void. A *bona fide* purchaser at a guardian's sale under a license issued by a court of competent jurisdiction is not bound to look beyond the license, but takes a good title which cannot be impeached collaterally, and is not affected by any irregularities in the proceedings except for the matters enumerated in said section 64. See also *Rumrill v. St. Albans First Nat. Bank*, 28 Minn. 202; *Howard v. Moore*, 2 Mich. 226; *Coon v. Fry*, 6 Mich. 506; *Woods v. Monroe*, 17 Mich. 238; *Cooper v. Sunderland*, 3 Iowa 114; *Harris v. Lester*, 80 Ill. 307; *Reynolds v. Schmidt*, 20 Wis. 374; *Ackerson v. Orchard*, 7 Wash. 377; *Overton v. Cranford*, 7 Jones L. (N. Car.) 415.

In *Iowa*, however, a contrary conclusion has been reached, and it is held that in the absence of a petition and notice the court ordering the sale is not "a court of competent jurisdiction," within the meaning of the statute. *Frazier v. Steenrod*, 7 Iowa 339. See also *Ryder v. Flanders*, 30 Mich. 341.

3. **Failure to Give Bond.**—*Weld v. Johnson Mfg. Co.*, 84 Wis. 537; *Goldsmith v. Gilliland*, 10 Sawy. (U. S.) 613.

**Failure to Give Notice.**—*Hobart v. Upton*, 2 Sawy. (U. S.) 304.

**Failure to Take Oath.**—*Cooper v. Sunderland*, 3 Iowa 114. See also *supra*, VI. 6. *Oath.*

statute has been complied with, the sale has been sustained in spite of numerous defects and irregularities in other respects.<sup>1</sup>

**Purchasers in "Good Faith."** — These curative statutes are enacted for the protection of purchasers in good faith only, and the term "good faith," in this connection, is used in contradistinction to bad faith, and not in the technical sense in which it is applied to conveyances of title, in which latter sense a party wholly free from moral *mala fides* is still frequently held not to be a *bona fide* purchaser.<sup>2</sup>

**13. Record — Collateral Attack.** — Probate courts are courts of record,<sup>3</sup> and in the case of a proceeding by a guardian to sell his ward's land, the record should properly show the existence of every fact upon which the validity of the sale depends.<sup>4</sup> Thus the record should show the necessity or propriety of the sale,<sup>5</sup> that notice of the application was duly given,<sup>6</sup> that the guardian

**1. Defective Petition.** — It is immaterial whether there was or was not a proper petition for license to sell. *Davis v. Hudson*, 29 Minn. 27; *Montour v. Purdy*, 11 Minn. 384; *Schaale v. Wasey*, 70 Mich. 417; *Toll v. Wright*, 37 Mich. 93; *Dexter v. Cranston*, 41 Mich. 448; *Ellsworth v. Hall*, 48 Mich. 408; *Blanchard v. De Graff*, 60 Mich. 107, holding that even the making and filing of a petition by the guardian need not be shown. But see *Ryder v. Flanders*, 30 Mich. 341.

**Supplying Defects in Petition at Hearing.** — Code Civ. Pro., Cal., § 1537, applicable to sales of infants' lands, provides that a failure to set forth in the petition the facts showing the sale to be necessary, as required by section 1781, will not invalidate the proceeding, if the defect be supplied at the hearing, "and the general facts showing such necessity be stated in the decree." A decree of sale recited that "on such hearing the said guardian was examined on oath, and after a full examination, it appearing to this court that it would be for the benefit of said minor that said real estate be sold, and the proceeds of said sale be placed at interest, the said real estate being now unproductive, and liable to heavy taxes," etc. This was held a sufficient finding and statement of the "general facts" showing the necessity for sale. *Smith v. Biscailuz*, 83 Cal. 344.

**Irregularities in Appointment of Guardian.** — The sale cannot be collaterally attacked for irregularities in the appointment of the guardian. *Davis v. Hudson*, 29 Minn. 27; *Walker v. Goldsmith*, 14 Oregon 125.

**Error in Order of Sale.** — Sess. Laws Oregon, 1889, p. 69, § 3, providing that where sales by guardians of their wards' real estate have been made to *bona fide* purchasers for a valuable consideration, and have been confirmed by the court, all irregularities in obtaining the order of the court for the sale, and in making or conducting the same, shall be disregarded, cures error in an order for such a sale in specifying the place of sale. *McCulloch v. Estes*, 20 Oregon 349.

**Sale Not Confirmed.** — Confirmation of the sale is not essential to its validity under *Michigan* statutes. *Blanchard v. De Graff*, 60 Mich. 107.

**Failure of Infant to Answer.** — "The infant defendants having been all summoned, the failure to answer, by a guardian or otherwise, is only an error which would entitle them to a reversal. But it did not render the decree or the sale either void or voidable. This error is not included in the statutory grounds of avoidance." *Thornton v. McGrath*, 1 Duv. (Ky.) 350.

**Irregularities in Service of Process Are Cured.** — *Cates v. Pickett*, 97 N. Car. 21.

2. *Cole v. Johnson*, 53 Miss. 94.

3. *Ellsworth v. Hall*, 48 Mich. 408. And see *Revill v. Claxon*, 12 Bush (Ky.) 558.

4. It will be sufficient if the record shows these facts by reasonable intentment. *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284; *Valle v. Fleming*, 19 Mo. 454; *Moore v. Davis*, 85 Mo. 464; *Henry v. McKerlie*, 78 Mo. 416.

5. *In re Dickerson*, 111 N. Car. 108.

6. *Musgrave v. Conover*, 85 Ill. 374.

took the prescribed oath,<sup>1</sup> that the bond was given and approved by the court,<sup>2</sup> and that the sale was confirmed.<sup>3</sup> But by the present weight of authority the sale cannot be collaterally attacked merely because not all the facts and circumstances upon which jurisdiction depends appear of record.<sup>4</sup> Probate courts are now

1. *Wilkinson v. Filby*, 24 Wis. 441. *Blanchard v. De Graff*, 60 Mich. 107, holding that if the jury find especially that the required oaths were made and subscribed by the guardian before the sale, the failure to file or record them will not invalidate the sale.

2. *Myers v. McGavock*, 39 Neb. 845; *Pursley v. Hayes*, 22 Iowa 11.

3. *Moore v. Davis*, 85 Mo. 464; *Henry v. McKerlie*, 78 Mo. 416; *Callo-way v. Nichols*, 47 Tex. 327.

It is sufficient if the approval of the sale appear from the clerk's minutes. *Moore v. Davis*, 85 Mo. 464.

See also *supra*, VI. 8. *Report and Confirmation of Sale.*

4. *Wyatt v. Steele*, 26 Ala. 639; *State v. Scott*, 1 Bailey L. (S. Car.) 294; *Morford v. Dieffenbacker*, 54 Mich. 593; *Cox v. Thomas*, 9 Gratt. (Va.) 323; *Plume v. Howard Sav. Inst.*, 46 N. J. L. 211; *Weems v. Masterson*, 80 Tex. 45; *Poor v. Boyce*, 12 Tex. 443; *Lynch v. Baxter*, 4 Tex. 431. See also cases cited in next note.

**Contra.** — It has been held in a number of cases that the record must affirmatively show a substantial compliance with the statute, or the judgment will be subject to collateral attack. See *Haynes v. Meeks*, 20 Cal. 288; *Boland's Estate*, 55 Cal. 310; *Pryor v. Downey*, 50 Cal. 399; *Dennis v. Winter*, 63 Cal. 17; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Thayer v. Winchester*, 133 Mass. 447; *Ikelheimer v. Chapman*, 32 Ala. 680; *Learned v. Matthews*, 40 Miss. 210; *Whitmore v. Johnson*, 10 Humph. (Tenn.) 610; *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Chase v. Ross*, 36 Wis. 267. Compare *Irwin v. Scriber*, 18 Cal. 499.

"But instances are not wanting in which the doctrine is ruled both ways in the same state, under the same statute, and under circumstances presenting no essential difference." 1 Woerner on Administration, § 145.

**Tendency of Early Decisions.** — The plain tendency of the early cases in this country was to hold that probate courts were courts of inferior and limited jurisdiction, and that every fact necessary to confer jurisdiction must

appear of record. *Beckett v. Selover*, 7 Cal. 234; *New Haven First Nat. Bank v. Balcom*, 35 Conn. 358; *Singleton v. Cogar*, 7 Dana (Ky.) 479; *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Peters v. Peters*, 8 Cush. (Mass.) 543; *Harris v. Richardson*, 4 Dev. L. (N. Car.) 279; *Leary v. Fletcher*, 1 Ired. L. (N. Car.) 259; *Williams v. Harrington*, 11 Ired. L. (N. Car.) 620.

A superior court is presumed to act rightfully and within its jurisdiction, but an inferior court should set out the requisite facts to show its jurisdiction on the face of its proceedings. When the jurisdictional facts are stated on the face of the proceedings of an inferior court, this is taken as *prima facie* proof, or they are presumed as stated; but perhaps they may be contradicted, as by the papers in the cause, and in some instances by evidence *aliunde*, or may be proved by like evidence. *Cooper v. Sunderland*, 3 Iowa 114. See also *Dakin v. Hudson*, 6 Cow. (N. Y.) 221; *Messinger v. Kintner*, 4 Binn. (Pa.) 103; *Stoolfoos v. Jenkins*, 8 S. & R. (Pa.) 173; *Lipe v. Mitchell*, 2 Yerg. (Tenn.) 400.

In *Singleton v. Cogar*, 7 Dana (Ky.) 479, it was held that every fact prescribed by the statute authorizing the Circuit Court to license the sale of an infant's lands must appear of record or the decree will be *prima facie* erroneous.

In *Good v. Norley*, 28 Iowa 188, the court said: "In no case in this state has a guardian's or administrator's sale been held valid unless the record of the proceedings of the court ordering the sale disclosed the fact that the notice required by statute had been given. In *Little v. Sিনnett*, 7 Iowa 324; *Van Horn v. Ford*, 16 Iowa 581; *Pursley v. Hayes*, 22 Iowa 11; *Shawhan v. Loffer*, 24 Iowa 217, in addition to the cases above cited, and probably in some other cases that have escaped our attention, it is held that notice is sufficiently shown by the record in the respective cases to clothe the court, in each particular case, with jurisdiction of the persons of the parties interested adversely to the exercise of the power.



very generally regarded as courts of record, possessed of general and exclusive jurisdiction within their proper sphere,<sup>1</sup> and their proceedings are supported by the same presumptions as to jurisdiction and regularity, in the absence of anything appearing in the record to the contrary, as are those of any other court of general jurisdiction.<sup>2</sup>

Where the Record Is Silent as to the existence of jurisdictional facts, their existence or nonexistence may be shown by other evidence.<sup>3</sup>

In *Thornton v. Mulquinne*, 12 Iowa 549, the want of evidence of notice of the pendency of the petition is assigned as one ground for holding the proceedings void."

**Tendency of Later Decisions.** — "But the later cases, particularly when supported by statutes declaring the Probate Court to be a court of record, or similar provisions, are generally to the effect that if the subject-matter of the decree questioned in a collateral proceeding was within the jurisdiction given to the Probate Court, then the decree of the Probate Court is conclusive in the same sense as the decrees of other superior courts are conclusive, and that its decrees need not recite the facts upon which the jurisdiction depends, since these will be presumed in its favor." *Croswell, Executors and Administrators*, § 14.

1. *Gray v. Cruise*, 36 Ala. 561 [*compare Ikelheimer v. Chapman*, 32 Ala. 680]; *Irwin v. Scriber*, 18 Cal. 499; *Tant v. Wigfall*, 65 Ga. 412; *Tucker v. Harris*, 13 Ga. 7; *Wood v. Crawford*, 18 Ga. 526; *Plume v. Howard Sav. Inst.*, 46 N. J. L. 211; *Schlee v. Darrow*, 65 Mich. 362; *Hanks v. Neal*, 44 Miss. 212; *Overton v. Johnson*, 17 Mo. 449; *Bouldin v. Miller*, 87 Tex. 359; *Weems v. Masterson*, 80 Tex. 45; *Alexander v. Maverick*, 18 Tex. 179; *Guilford v. Love*, 49 Tex. 715; *Grignon v. Astor*, 2 How. (U. S.) 335.

2. *Arkansas*. — *Currie v. Franklin*, 51 Ark. 338; *Redmond v. Anderson*, 18 Ark. 449; *Borden v. State*, 11 Ark. 557.

*Indiana*. — *Horner v. Doe*, 1 Ind. 130; *Gerrard v. Johnson*, 12 Ind. 636; *Hawkins v. Hawkins*, 28 Ind. 71.

*Kansas*. — *Howbert v. Heyle*, 47 Kan. 58; *Higgins v. Reed*, 48 Kan. 273.

*Minnesota*. — *Dayton v. Mintzer*, 22 Minn. 393; *Davis v. Hudson*, 29 Minn. 27; *Curran v. Kuby*, 37 Minn. 330; *Menage v. Jones*, 40 Minn. 254; *Kurtz v. St. Paul, etc., R. Co.*, 61 Minn. 18.

*Missouri*. — *Sherwood v. Baker*, 105

Mo. 472; *Strouse v. Drennan*, 41 Mo. 300; *Carr v. Spannagel*, 14 Mo. App. 284.

*Nebraska*. — *Seward v. Didier*, 16 Neb. 58.

*Texas*. — *Bouldin v. Miller*, 87 Tex. 359; *Weems v. Masterson*, 80 Tex. 45.

But see *Ellwood v. Northrup*, 106 N. Y. 172.

When inferior courts have not transcended their powers, and their jurisdiction has actually attached, it will not be lost by irregularity in the mode of exercising it; and every intendment will be made in aid of the validity of proceedings under it, which will be regarded as equally conclusive with those of courts having superior and general jurisdiction. *Morrow v. Weed*, 4 Iowa 77. See also *Cooper v. Sunderland*, 3 Iowa 114.

**Modification of Rule by Curative Statutes.** — The general rule of presumption is somewhat modified by curative statutes of the kind considered *supra*, VI. 12. *c. Curative Statutes*. *Davis v. Hudson*, 29 Minn. 28; *Kurtz v. St. Paul, etc., R. Co.*, 61 Minn. 18.

Section 20 of the *Oregon Act* relating to the sale of lands of minors (*Oregon Laws*, p. 738), having provided that, in an action relating to lands sold by a guardian, where the ward contests the validity of the sale, the same shall not be avoided for irregularity in the proceedings provided certain particulars appear therefrom, the presumption in favor of the jurisdiction of the County Court and the lawfulness of its exercise is thereby qualified and restrained accordingly, so that if any of such particulars, *e. g.*, that the guardian gave notice of the time and place of the sale of the premises and sold them accordingly, do not appear from the record, the sale is invalid and void. *Gager v. Henry*, 5 Sawy. (U. S.) 237.

3. *Blanchard v. De Graff*, 60 Mich. 107.

In *Myers v. McGavock*, 39 Neb. 845, which was an action of ejectment, the

**Want of Jurisdiction Affirmatively Shown.** — Where the record affirmatively shows want of jurisdiction, the sale is void and may be collaterally attacked.<sup>1</sup>

**The Evidence in the cause need not be spread upon the records.**<sup>2</sup>

**Entries *Nunc Pro Tunc*.** — Entries of record may be made *nunc pro tunc*.<sup>3</sup>

**The Loss or Destruction of the Records of the proceedings will not, of course, invalidate the sale.**<sup>4</sup>

defendant claimed title by virtue of a guardian's sale and conveyance, and the court held that the fact of the approval of the bond by the judge of the court granting the license to sell might be proved by the best evidence obtainable, like any other fact. See also *Pursley v. Hayes*, 22 Iowa 11, holding that the failure of the county judge to enter of record its approval of the guardian's bond did not invalidate the title derived from the guardian's sale.

In *Calloway v. Nichols*, 47 Tex. 327, the court below charged the jury to find for the plaintiffs, irrespective of all other circumstances, unless it was shown by the record that the sale by the guardian had been confirmed by the court. On appeal this was held to be manifest error, for which judgment must be reversed.

1. *Musgrave v. Conover*, 85 Ill. 374; *Gager v. Henry*, 5 Sawy. (U. S.) 245.

By the better opinion, it is only where the record shows affirmatively the want of jurisdiction that the sale can be attacked collaterally. *Weems v. Masterson*, 80 Tex. 45; *Butler v. Stephens*, 77 Tex. 599; *Edwards v. Halbert*, 64 Tex. 667; *Robertson v. Johnson*, 57 Tex. 62; *Strouse v. Drennan*, 41 Mo. 300; *Carr v. Spannagel*, 4 Mo. App. 284.

2. *Pursley v. Hayes*, 22 Iowa 11; *Doe v. Wise*, 5 Blackf. (Ind.) 405; *Thaw v. Ritchie*, 136 U. S. 520.

3. See article RECORDS.

**Motion for Entry *Nunc Pro Tunc*.** — On motion for *nunc pro tunc* amendment of the record, the court cannot decide upon the validity of the title under the guardian's sale, but can only order the entry to be made or refuse it. *Uland v. Carter*, 34 Ind. 344.

The affidavits upon which a motion for entry *nunc pro tunc* is based should be filed before the motion is made. *Makepeace v. Lukens*, 27 Ind. 435.

**Sufficiency of Data to Justify an Amendment of Record.** — In *Uland v. Carter*, 34 Ind. 344, on appeal from a refusal to

amend the record *nunc pro tunc*, the Supreme Court, upon the evidence showing contemporaneous data consisting of papers in the case by which to amend the record in these particulars, ordered the court below to make the entry.

In *Makepeace v. Lukens*, 27 Ind. 435, it was held that as the record failed to show that the additional bond which the statute required before the sale was ordered was filed, an order of sale would have been irregular, and hence there was nothing in the prior proceedings authorizing the amendment asked.

**Appeal from *Nunc Pro Tunc* Entries.** — A proceeding for a *nunc pro tunc* order is part of the original cause of action, and auxiliary thereto, and may be brought up on appeal of that action. *Nunc pro tunc* entries made during the progress of a case cannot be appealed from as such, but may be brought up with the case when an appeal of such case is taken; but such entries made after the case has been determined may be appealed from without bringing up the entire case. In order to present the sufficiency of the evidence on a motion for a *nunc pro tunc* entry, a motion for a new trial is not necessary. *Harris v. Tomlinson*, 130 Ind. 426.

4. *Hare v. Hollomon*, 94 N. Car. 14, holding that in such case the recitals in the deed are evidence of the regularity of the proceedings; *Barry v. Clarke*, 13 R. I. 65, holding that the court may use the inventory to ascertain what realty the partition covered; *Walker v. Page*, 21 Gratt. (Va.) 637, holding that the recitals of the decree showing the proceedings to have been regular were sufficient to sustain the sale; *Spring v. Kane*, 86 Ill. 580, holding that oral proof of publication of notice of the application for an order of sale was sufficient, after a lapse of twenty years and the destruction of the records, in connection with a recital in

**14. Appeal.** — An appeal ordinarily lies from the action of the court in proceedings for the sale of an infant's lands,<sup>1</sup> and the sale may be set aside for error and irregularities in the proceedings.<sup>2</sup> On appeal the record should show affirmatively compliance with the statute, or the proceedings will be held erroneous.<sup>3</sup>

**VII. MORTGAGE OF INFANTS' REALTY — 1. In General.** — Much the same considerations are applicable to mortgages of infants' realty as are applicable to proceedings for a sale, and, indeed, the two matters are often coupled in the same statute. There is the same conflict of authority as to the inherent power of the court to authorize a mortgage<sup>4</sup> as has been seen to exist in the case of applications to sell,<sup>5</sup> and statutes authorizing a mortgage of an infant's lands are perhaps even more strictly construed than statutes authorizing a sale.<sup>6</sup> Thus, it seems that a statute merely

a proved copy of the decree that it appeared to the court that proof was made by publication, to prove that the requisite notice was given, and also that it will be presumed that the clerk filed the guardian's petition according to his duty; *Whitney v. Sprague*, 23 Pick. (Mass.) 198, holding that a certificate by the clerk corroborated by long undisturbed possession and other slight circumstances was sufficient to prove that license had been duly granted.

1. *Power v. Barbee*, 8 Dana (Ky.) 154; *Bunce v. Bunce*, 59 Iowa 533; *Adkins v. Sidener*, 5 Ind. 228.

An appeal lies from a final decree upon a petition to complete the specific performance by infant heirs of their ancestor's contract for the sale of lands. It is a special proceeding within section 11 of the Code. *Hyatt v. Seeley*, 11 N. Y. 52.

2. *Bunce v. Bunce*, 59 Iowa 533, holding that a general averment in regard to the necessity of the sale in the petition would be sufficient on appeal; *Power v. Barbee*, 8 Dana (Ky.) 154, holding that the mere fact that the sale appears to have been indiscreet will not authorize the Court of Appeals to set aside such sale; *Adkins v. Sidener*, 5 Ind. 228, holding that the fact that the petition of a guardian to sell real estate of his ward was filed, the appraisers appointed and sworn, the appraisal made and returned, and the order of sale made on the same day, while calculated to raise suspicion, was not sufficient to justify setting aside the order of sale on appeal.

**Objections Not Raised Below.** — The sufficiency of the proof of posting notice cannot be raised for the first

time in the Supreme Court. *Dexter v. Cranston*, 41 Mich. 448.

3. *Martin v. Starr*, 7 Ind. 226; *Robbins v. Robbins*, 2 Ind. 74.

In a case where the records of the Probate Court were not before the appellate court, but it sufficiently appeared that the Probate Court had jurisdiction, it was held that, in the absence of proof to the contrary, it would be presumed that the proceedings were regularly conducted. *Schlee v. Darrow*, 65 Mich. 362.

4. **New York.** — In New York a court of equity has no inherent power to direct a mortgage of the real property of infants; its power in this respect is purely statutory. *Losey v. Stanley*, 147 N. Y. 560.

**Montana.** — In Montana, the court, while refusing to determine whether in the absence of statute it could empower a guardian to mortgage the real estate of his ward for the purpose of raising money for the ward or for his support and maintenance, held that the absence of a statute authorizing a guardian to mortgage his ward's lands did not render void a mortgage given by a guardian under an order of the District Court, by which no new debt was created, but merely an exchange of one creditor for another effected and an advantageous extension of time and reduction of interest secured. *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101.

5. See *supra*, VI. 1. a. *Inherent Chancery Jurisdiction*, and cases there cited.

6. *Battell v. Torrey*, 65 N. Y. 294.

In *Losey v. Stanley*, 147 N. Y. 560, it was held that where the proceedings were not in conformity to the general

authorizing a sale confers no jurisdiction upon the court to authorize a mortgage,<sup>1</sup> but this is not free from doubt.<sup>2</sup>

The Proceedings to Obtain an Order of Mortgage are substantially the same as those to obtain an order of sale. Thus there must be a petition to the proper court,<sup>3</sup> describing the land.<sup>4</sup> So there must be an order of court authorizing the mortgage,<sup>5</sup> a special bond filed and approved,<sup>6</sup> and the mortgage must be reported to

statute for the sale or mortgage of an infant's lands, the mortgage would be void, and that therefore the vested interests in remainder of infants that are not included in a trust estate for life cannot be included in a mortgage by the trustee under direction of the court by virtue of the proviso added by the Laws of 1886, c. 257, as an amendment to the 65th section of the statute of uses and trusts (1 Rev. Stat. 730), whereby a trustee, under direction of the court or judge, may in a proper case be allowed to mortgage or sell the real estate held in trust.

**Irregularities Not Jurisdictional.**—Where the statutory steps are taken by a guardian to procure the decree for leave to mortgage the real estate of his ward, so as to confer jurisdiction on that court, such decree, however erroneous, is not void. Until it is reversed on appeal, or otherwise set aside, a mortgage given thereunder will be binding, and the duty will rest upon the guardian to pay the interest accruing upon the mortgage indebtedness. *Kingsbury v. Powers*, 131 Ill. 184,

1. *Trutch v. Bunnell*, 11 Oregon 59, *overruling* 5 Oregon 504. See also *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Williams v. Woodard*, 2 Wend. (N. Y.) 492; *Ferry v. Laible*, 31 N. J. Eq. 574; *Coutant v. Servoss*, 3 Barb. (N. Y.) 141.

2. Thus in *Middleton v. Parke*, 3 App. Cas. (D. C.) 149, it was held that the Act of Maryland of 1798, c. 101, sub-c. 15, § 20, which denied to the Orphans' Court any incidental power or constructive authority, did not deny such authority as is necessarily implied in that which is expressly granted, and therefore, having the power to order the sale of an infant's real estate under certain circumstances, subject to the ratification of its order by the equity court, the Orphans' Court had the implied power to mortgage it.

3. A petition for an order of sale confers no jurisdiction upon the court to authorize a mortgage. *McMannis v. Rice*, 48 Iowa 361.

4. **Omission of Description Supplied by Reference to Other Proceedings.**—In *West v. Cochran*, 104 Pa. St. 482, an administrator had petitioned for an order to sell lands to pay debts of the decedent. The petition contained a description of the lands. The guardian of minor heirs obtained a rule to set aside the order of sale on the ground that the money could be raised by a mortgage and the estates of the minors saved to them. He then applied by a petition for an order to borrow the necessary amount by a mortgage of the minor's interests, but failed to describe the lands in such petition. It was held in a subsequent action of ejectment on the mortgage, that the various petitions and orders of court were so connected that the omission in the guardian's petition of any description of the real estate mortgaged and of a list of creditors were supplied by a reference to the prior proceedings.

5. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313. See also the cases cited generally in this section.

**Construction of Order.**—An order of court authorizing a mortgage of infant's lands to raise money to be laid out in erecting buildings on the premises does not authorize the trustee to contract for the erection of buildings to be paid for by a mortgage on the premises executed to the contractor and having several years to run. *Pitcher v. Carter*, 4 Sandf. Ch. (N. Y.) 1.

**Appeal and Error.**—In *Illinois* a writ of error will not lie from the Supreme Court to review the action of the County Court. Foreclosure of a mortgage, and much less the giving of leave by the County Court to a guardian to mortgage his ward's lands, does not involve a "freehold," within the meaning of the section relating to appeals and writs of error. *Kingsbury v. Sperry*, 119 Ill. 279.

6. *Higgins v. Reed*, 48 Kan. 279, holding that failure to give the required bond was an error for which the proceedings might be reversed, but

and confirmed by the court.<sup>1</sup>

**Amount, Interest, and Time.** — Where the statute requires the Probate Court to determine the amount, rate of interest, and length of time for which the mortgage is to be given, a noncompliance renders the mortgage void.<sup>2</sup>

**Implied Restriction.** — The power to mortgage is always subject to the implied restriction, controlling the discretion and power of both the guardian and the court, that the indebtedness secured by the mortgage must arise out of and have some necessary connection with the management of the ward's estate.<sup>3</sup>

**The Insanity of the Guardian** will not affect the validity of the mortgage.<sup>4</sup>

that it did not render them void. See also *Watts v. Cook*, 24 Kan. 278.

In *Leedom v. Lombaert*, 80 Pa. St. 381, it was held that the statute requiring such bond was directory and the want of it would not avoid the mortgage. It was further held, that a bond indorsed by two associate justices "Approved," and filed in the Orphans' Court, was conclusive evidence of the approval, and parol evidence that it was not approved was inadmissible; and that it would be presumed that the bond was examined and passed on as part of the proceedings before it was approved and filed.

1. *Dohms v. Mann*, 76 Iowa 723; *Ordway v. Smith*, 53 Iowa 591; *McMannis v. Rice*, 48 Iowa 362; *Wade v. Carpenter*, 4 Iowa 365.

In *Battell v. Torrey*, 65 N. Y. 294, in proceedings under the statute to sell or mortgage real estate of an infant, which resulted in a mortgage, it was held that the mortgage executed was void because the provisions of the statute were not complied with. The court said: "The right to execute such a mortgage is, by the statute authorizing such proceedings, made to depend upon a confirmation by the court of the agreement reported; then, in the language of the statute, 'if it be confirmed, a conveyance shall be executed under the direction of the court.'" The court further said: "A report by the guardian stating his agreement to mortgage, and the terms of it, was his plain duty, and then it would have become the duty of the court, the discharge of which might have greatly benefited the infant, to consider whether the time and place of payment of the principal and interest would be as beneficial to the infant as some other disposition of its property."

This case was cited with approval in *Ellwood v. Northrup*, 106 N. Y. 172.

2. Under Comp. Laws Mich. 1871, § 4626, a mortgage given by a guardian upon the property of his ward is void where the Probate Court nowhere in the course of the proceeding has specified or determined, as required by the statute, the amount, rate of interest, or length of time for which the mortgage was authorized to be given. *Edwards v. Taliafero*, 34 Mich. 13. In this case the court said: "The petition was simply for leave to raise five hundred dollars; no rate of interest or time when to become due was mentioned either in the petition or order, nor was there any report or order of confirmation afterwards, so that the Probate Court did not in any manner or at any time pass upon these questions. Under such circumstances, we are of opinion that the plaintiff acquired no title under the mortgage given by the guardian."

3. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313. In this case a mortgage to secure the payment of bonds given by the guardian for money borrowed to pay off existing incumbrances upon the ward's lands and to improve such property by replacing thereon buildings which had been destroyed by fire was sustained.

In *Kingsbury v. Powers*, 131 Ill. 183, it was held that the County or Probate Court, exercising chancery power in that respect, was empowered to authorize a guardian to borrow money for the prevention of irreparable injury to the estate, and to mortgage the lands of the ward for that purpose.

In *In re Jackson*, 21 Ch. Div. 786, a mortgage for the purpose of paying the cost of necessary repairs was authorized.

4. *Grier's Appeal*, 101 Pa. St. 415.

2. **Form of Mortgage.** — The mortgage should comply with any statutory provisions as to form.<sup>1</sup> It may be in the form of a deed of trust instead of a technical mortgage,<sup>2</sup> and may be signed in the name of the guardian.<sup>3</sup>

A Power of Sale inserted in the mortgage has been held void.<sup>4</sup>

**Redemption.** — The mortgage need not expressly recognize the right of redemption after sale.<sup>5</sup>

3. **Foreclosure — Defenses.** — On a bill to foreclose a mortgage given by the guardian on his ward's real estate, the ward may interpose every objection that may be found thereto.<sup>6</sup>

1. A mortgage by a guardian, of the lands of his ward in fee, the statute permitting him to mortgage only until the majority of the ward, is void so far as the interests of the ward are involved. *Merritt v. Simpson*, 41 Ill. 391. See also *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313.

2. *Middleton v. Parke*, 3 App. Cas. (D. C.) 149; *Foster v. Young*, 35 Iowa 27.

3. *Trutch v. Bunnell*, 5 Oregon 504.

**Defective Signature.** — When a decree of the equity court ratifying an order of the Orphans' Court authorizing a guardian to mortgage an infant's real estate was passed, and the guardian, who was the mother of the infant and widow, executed a deed of trust on the property which recited the decree and purported to be executed in compliance therewith, although the given name of the grantor varied slightly from the true name of the guardian, and the deed was signed as "widow," it was held in a suit in ejectment by the ward to recover the property from a purchaser under proceedings foreclosing the deed of trust, fourteen years after foreclosure, that the execution of the deed of trust by the guardian was a valid exercise of the authority given her to mortgage, and the purchaser at the foreclosure sale took a good title. *Middleton v. Parke*, 3 App. Cas. (D. C.) 149.

4. "The next question is, is the power of sale contained in the mortgage valid? We think not. The statutes prescribe that a court of probate, before granting the petition of a guardian for leave to sell the real estate of his ward, shall give notice of the pendency of the petition, and that if the petition is granted, the court shall take fresh security from the guardian. No such notice is required before granting a petition for leave to mortgage. No notice was given in the case at bar.

To hold, therefore, that a guardian, having obtained leave to mortgage, is thereby authorized to insert a power of sale in the mortgage, would be to hold that a court of probate can do thus indirectly, without notice and without taking any fresh security, what it is not permitted to do directly until after notice, and on condition that it shall take fresh security." *Barry v. Clarke*, 13 R. I. 67.

But see *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313.

5. Because such right of redemption exists by statute as a rule of property, whether recognized or not in the mortgage. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313.

6. If improper items are included in the account they may be deducted from the mortgage debt. *Kingsbury v. Powers*, 131 Ill. 184. See also *Kingsbury v. Sperry*, 119 Ill. 279.

A collateral attack on an order for the mortgaging of infants' real estate can be made in an action brought to foreclose the mortgage where the order was made without jurisdiction, in a proceeding by a trustee for a life estate which did not include the infants' interest in remainder, although a guardian *ad litem* was appointed for the infants, and consented to the order. *Losey v. Stanley*, 147 N. Y. 560.

An order of the court authorizing a mortgage of an infant's lands to raise money to be paid out in erecting buildings on the premises does not authorize the trustee to contract for the erection of buildings to be paid for by a mortgage on the premises, executed to the contractor and having several years to run. In a suit simply to foreclose such a mortgage, the court, on declaring it invalid, cannot enforce the contractor's claim to be reimbursed for his service and material. *Pitcher v. Carter*, 4 Sandf. Ch. (N. Y.) 1.

**Parties.** — Both the guardian and the ward are necessary parties to foreclosure proceedings.<sup>1</sup>

**A Sale on Foreclosure** must be confirmed by the court.<sup>2</sup>

**Action to Invalidate.** — After a mortgage has been foreclosed in an action to which the ward has been made a party, he cannot maintain an action to invalidate it and set aside the title of the purchaser at the foreclosure sale.<sup>3</sup>

**Condition Postponing Foreclosure.** — In chancery it is a common practice to impose a condition that the mortgage shall not be foreclosed until the infant shall arrive at the age of twenty-two years, so as to give him one year after arriving at full age to raise funds to pay the mortgage.<sup>4</sup>

**VIII. LEASE OF INFANTS' LANDS.** — At common law the guardian of an infant had authority to lease his ward's lands for the term of his guardianship without any order of court,<sup>5</sup> but any excess of a lease beyond that term was void at the election of the successor or of the ward on coming of age.<sup>6</sup> Chancery, however, had jurisdiction to authorize a lease for a longer term when manifestly for the advantage of the infant.<sup>7</sup>

1. *Kingsbury v. Sperry*, 119 Ill. 279.

2. Any sale made on a decree of foreclosure may at any time before confirmation be set aside for good cause, and will not be binding upon the guardian or ward until confirmed by the court. *Kingsbury v. Sperry*, 119 Ill. 279.

3. *Dohms v. Mann*, 76 Iowa 723. In this case the court stated that the mortgage would have been held void if the objection had been raised at the proper time, for the reason that it had not been reported to and confirmed by the court. But the court further held that the validity of the mortgage was necessarily involved in the foreclosure proceedings; and that the decree thereon rendered involved a finding that all steps necessary to the validity of the mortgage had been taken, and the matter had thereby become *res judicata*.

But before foreclosure a ward may maintain a bill in equity to review the order of the County Court granting leave to give such mortgage, and thereby take advantage of every objection that might be urged on writ of error if one were allowed. *Kingsbury v. Sperry*, 119 Ill. 279.

4. 2 Barb. Ch. Pr. 215; *Battell v. Torrey*, 65 N. Y. 298.

5. *Stoughton's Appeal*, 88 Pa. St. 198.

A guardian has no power without judicial sanction to sell his ward's

estate, but he may lease it, and a contract made by a guardian by which the other party thereto should continue in possession of land belonging to the ward, on the condition of paying annually a contingent sum, to be fixed by a commissioner, for the support of the ward, might be upheld as a lease without the aid of court. *Richardson v. Richardson*, 49 Mo. 29. See also Am. and Eng. Encyc. of Law (2d ed.), title *Guardian and Ward*.

6. *Connecticut*. — *Welles v. Cowles*, 4 Conn. 189; *Palmer v. Cheseboro*, 55 Conn. 114.

*Illinois*. — *Clark v. Burnside*, 15 Ill. 62.

*Iowa*. — *Alexander v. Buffington*, 66 Iowa 360.

*Maryland*. — *Magruder v. Peter*, 4 Gill & J. (Md.) 323.

*Missouri*. — *Richardson v. Richardson*, 49 Mo. 29.

*New Jersey*. — *Snook v. Sutton*, 10 N. J. L. 133.

*New York*. — *Emerson v. Spicer*, 46 N. Y. 594; *People v. Ingersoll*, 20 Hun (N. Y.) 316; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150.

*England*. — *Rex v. Oakley*, 10 East 491.

See *Muller v. Benner*, 69 Ill. 108, for statutory regulations.

7. *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 167; *Mills v. Dennis*, 3 Johns. Ch.

**Statutory Regulations.** — The matter is now, however, very generally regulated by statute, and the proceedings under such statutes are substantially the same as in the case of sales and mortgages.<sup>1</sup> Thus a special bond<sup>2</sup> and the approval of the lease by the court<sup>3</sup> are usually required, *inter alia*. The lease should be in writing.<sup>4</sup>

**A Bona Fide Purchaser** for value of the leasehold interest will be protected.<sup>5</sup>

(N. Y.) 370; *Talbot v. Provine*, 7 Baxt. (Tenn.) 502; *Thompson v. Mebane*, 4 Heisk. (Tenn.) 377.

**Building Leases.** — In *Cecil v. Salisbury*, 2 Vern. 224, the lords commissioners declared that the court had often decreed building leases for sixty years of infants' estates, when for their benefit.

**Leases with Privilege of Renewal.** — Under 2 Rev. Stat. N. Y. 1829, p. 194, §§ 170-175, the Court of Chancery had power to lease property for twenty-one years with covenants of renewal for three successive terms of twenty-one years. *Gomez v. Gomez*, 147 N. Y. 195.

**Lease Pending Sale.** — An estate ordered to be sold is under the protection of the court, and may be rented until a sale can be effected. *Williams's Case*, 3 Bland (Md.) 200.

**Chancery Ousting Probate Court of Jurisdiction.** — Where the Probate Court first obtains jurisdiction of the estate of an infant by the grant of letters of guardianship, it will retain the same after the filing of a bill for partition of the ward's lands, and if found advisable to lease the property sought to be divided, the guardian, under the direction of the Probate Court, will have ample power to act as respects the interest of the minor, and the fact that the adult tenants in common may refuse to co-operate with the guardian, so that the entirety of any portion of the property cannot be leased, will not afford a sufficient reason for a court of equity to interfere and oust the Probate Court of its jurisdiction by appointing a receiver. *Ames v. Ames*, 148 Ill. 322.

**1. Parties to Proceeding.** — The *New York Code Civ. Pro.*, § 2349, authorizes a proceeding to lease an infant's lands to be brought by "any relative" of the infant. Under this statute, when the proceedings are instituted by a guardian, it is proper to make "any relative" a party to the proceeding. *In re Stafford*, 3 Misc. Rep. (N. Y. C. Pl.) 106.

**Discretion of Court.** — "The statute intended, when it provided for an application to the court by the guardian or other party interested, a submission of the questions involved to the sound discretion of the court, otherwise the proceeding would be an idle form." *In re Stafford*, 3 Misc. Rep. (N. Y. C. Pl.) 106.

**Appeal.** — Where the uncle of a ward was in effect made a party to the proceeding by an order requiring notice to be given to him of the hearing, and that he be heard, he may except to the report and may appeal. *In re Stafford*, 3 Misc. Rep. (N. Y. C. Pl.) 106.

2. *Wann v. People*, 57 Ill. 202.

3. In *Illinois Rev. Stat.* 1874, c. 64, § 23, provides that the guardian may lease real estate of the ward upon such terms for such length of time not extending beyond the majority of the ward as the county court shall approve. Under this statute it has been held that a lease executed by a guardian in behalf of his wards for a term not exceeding their majority is valid unless disapproved by the Probate Court. "All that can reasonably be claimed under this statute is that a lease made by a guardian may, when it is submitted to the Probate Court, be rejected and set aside by the court. Such a lease is not, however, void, but voidable merely. It may be regarded as binding until the court should examine it and refuse approval." *Field v. Herrick*, 101 Ill. 110.

4. *Sawyers v. Zachery*, 1 Head (Tenn.) 21.

5. *Anderson v. Ammonett*, 9 Lea (Tenn.) 1, holding that a decree of a court of chancery confirming a lease of an infant's realty is so far binding on the infant that he cannot, by bill of review, an original bill, or other proceeding, impeach it to the prejudice of a *bona fide* purchaser for value of the leasehold interest before suit is brought.



**IX. SALE OF INFANTS' PERSONALTY.** — A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of court,<sup>1</sup> and the power of chancery to sell an infant's personality has never been doubted.<sup>2</sup> In some states, however, an order of court is required by statute.<sup>3</sup>

**X. ADOPTION OF CHILDREN — 1. Definition, Origin, and Nature.** — Adoption May Be Defined as the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature.<sup>4</sup>

**Judicial Character.** — Statutes regulating adoption have been enacted in almost all the states of the Union, and under their provisions in many states, adoption is effected by decree of the probate or other like court made on petition of the person desiring to make the adoption. Proceedings under statutes of this class are clearly judicial.<sup>5</sup> In many states, however, the statu-

1. Woodward v. Donally, 27 Ala. 198; Humphrey v. Buisson, 19 Minn. 221; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150; Fletcher v. Fletcher, 29 Vt. 98; Wallace v. Holmes, 9 Blatchf. (U. S.) 67.

See Am. and Eng. Encyc. of Law, title *Guardian and Ward*.

2. Shumard v. Phillips, 53 Ark. 43.

3. Washabaugh v. Hall, 4 S. Dak. 168.

A guardian cannot mortgage his ward's stock and agricultural implements or his future crops so as to bind the ward. Sample v. Lane, 45 Miss. 556.

In California an order of the court is necessary for the guardian to sell any portion of the ward's estate. Kendall v. Miller, 9 Cal. 591; De La Montagnie v. Union Ins. Co., 42 Cal. 290. These two cases were cited with approval in Scarf v. Aldrich, 97 Cal. 366.

In Texas, under Rev. Stat., art. 2193, where personality is sold under an order of the County Court to pay debts, the sale is void unless confirmed by the court. Harrison v. Ilgner, 74 Tex. 86.

**Assignment without Leave of Provision for Temporary Support.** — When the estate of infants is in the hands of executors, and the order is made by the Probate Court to pay to the mother (who is also the guardian of the infants), in her own right, and also as guardian, a sum of money, the order is an appropriation of the money for the immediate use of the heirs, and the guardian may assign the same without leave of the Probate Court, and the assignee may maintain an action

against the executors to recover the money. Schmidt v. Wieland, 35 Cal. 343.

**Counterclaim in Action to Avoid Sale.** — In an action to recover a minor's personality sold to pay debts, where the sale was void because not confirmed by the court, the purchaser can set up as a counterclaim, in a special answer, the payment of the purchase price and its application to the payment of debts against the ward's estate. Harrison v. Ilgner, 74 Tex. 86.

4. See 1 Am. and Eng. Encyc. of Law (2d ed.), title *Adoption of Children*.

**It Is of Civil Law Origin,** and in the United States exists solely by virtue of express statutory provision. "The act of adopting a child is not of common-law origin, but was taken from the civil law and introduced here by statute." Furgeson v. Jones, 17 Oregon 209. See also Morrison v. Sessions, 70 Mich. 297; Ballard v. Ward, 89 Pa. St. 358.

5. Abney v. De Loach, 84 Ala. 393; Luppie v. Winans, 37 N. J. Eq. 245.

In Louisiana, since the Act of 1872, No. 31, providing for the manner of adopting children before a notary public, an act of adoption is valid, though not authorized by judicial sanction, a notarial act being the only act now required. Vollmer's Succession, 40 La. Ann. 593.

**Proceeding in Rem.** — The adoption of a minor child is in the nature of a proceeding *in rem*. Van Matre v. Sankey, 148 Ill. 536.

**Appointment of Guardian Ad Litem.** — Under Gen. Stat. Mass., p. 110, if the parents of the child to be adopted are

tory mode of adoption is by simple deed, or agreement recorded in a prescribed manner, and under these statutes there is nothing of a judicial nature in the proceedings.<sup>1</sup>

**2. Jurisdiction — Conformity to Statute.** — Statutes authorizing and providing for the adoption of children being in derogation of the common law, it is often said that a strict compliance with their provisions is essential or the court will be without jurisdiction to enter a decree.<sup>2</sup> But it seems that they should not be so strictly construed as to defeat their beneficent purpose, and it has accordingly been often held that a substantial compliance will be sufficient.<sup>3</sup>

**Consent as Prerequisite to Jurisdiction.** — Statutes of adoption are founded on consent, and when a consent is required to be given the court has no jurisdiction without it.<sup>4</sup> The statutes usually require consent of the parents, if living, or of the guardian, or next friend; and sometimes, also, the consent of the child.<sup>5</sup>

**Courts Exercising Jurisdiction.** — In most states jurisdiction to make a decree of adoption is conferred upon the probate court, or

dead, and the Probate Court, on the petition of the guardian of the child for leave to adopt it, which is assented to by the petitioner as guardian, makes a decree in accordance with the prayer of the petition, the fact that no guardian *ad litem* was appointed, even if such appointment should have been made, does not make the decree void, but voidable only, and it cannot be avoided by a stranger to the injury of the child. *Sewall v. Roberts*, 115 Mass. 262. See also *Van Matre v. Sankey*, 148 Ill. 553, where in a similar case the court said: "While it might have conformed more nearly to the practice in this state, after the appointment of the petitioner as guardian to have formally appointed a guardian *ad litem* or 'a next friend,' who, under the statute, could have given the required consent, the failure to do so would, at most, be an irregularity only, which would not subject the decree to collateral attack."

1. See *Abney v. De Loach*, 84 Ala. 393; *Vollmer's Succession*, 40 La. Ann. 593; *Fosburgh v. Rogers*, 114 Mo. 122.

2. *California*. — *Ex p. Clark*, 87 Cal. 641; *Matter of Jessup*, 81 Cal. 408.

*Connecticut*. — *Johnson v. Terry*, 34 Conn. 259.

*Illinois*. — *Wallace v. Rappleye*, 103 Ill. 229; *Keegan v. Geraghty*, 101 Ill. 26.

*New Jersey*. — *Luppie v. Winans*, 37 N. J. Eq. 245.

*Oregon*. — *Furgeson v. Jones*, 17 Oregon 204.

A statute providing a mode by which

a parent may give his child to another for the purpose of adoption implies that it cannot be legally done in any other way. *Johnson v. Terry*, 34 Conn. 259.

3. *Alabama*. — *Cofer v. Scroggins*, 98 Ala. 342; *Abney v. De Loach*, 84 Ala. 393.

*California*. — *Matter of Williams*, 102 Cal. 70.

*Kansas*. — *Renz v. Drury*, 57 Kan. 84.

*New York*. — *People v. Bloedel*, (Buffalo Super. Ct.) 4 N. Y. Supp. 110.

*Vermont*. — *Bancroft v. Bancroft*, 53 Vt. 9.

*Wyoming*. — *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23.

4. *Furgeson v. Jones*, 17 Oregon 204; *Luppie v. Winans*, 37 N. J. Eq. 245.

5. See 1 Am. and Eng. Encyc. of Law (2d ed.), title *Adoption of Children*.

Consent of the parent may be dispensed with in most of the states, where he or she has been divorced for adultery or cruelty, or when he or she has been judicially deprived of the custody of the child. *Matter of Williams*, 102 Cal. 70; *Baker v. Strahorn*, 33 Ill. App. 59; *Winans v. Luppie*, 47 N. J. Eq. 302; *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23.

**The Mother of an Illegitimate Child** consented to its adoption before she became of age, and the adoption was thereupon decreed. It was held that her consent was sufficient to render the decree valid. *Matter of Bush*, 47 Kan. 264.

county court, or other like court of the county in which the child resides.<sup>1</sup>

**3. Petition.** — The court has no jurisdiction to make an order of adoption until invoked by a proper petition.<sup>2</sup> The petition should allege facts sufficient to show the jurisdiction of the court to make the order, and its propriety,<sup>3</sup> but it will not be construed technically.<sup>4</sup>

**By Husband and Wife Jointly.** — In some states a petition may be by husband and wife jointly.<sup>5</sup>

1. *Ex p.* Clark, 87 Cal. 638; *Rives v. Sneed*, 25 Ga. 612, holding that the jurisdiction of the court of the county in which the child resides is exclusive. *Weinhard v. Tynan*, 53 Ill. App. 17, holding that under the *Illinois* Act of 1867, the Circuit and County Courts have exclusive original jurisdiction to decree an adoption.

Where an application must be made to the court of the county where the parties reside, no other court has jurisdiction; and therefore a decree of adoption by any other is void, even though the parties appear before the court in person and submit to its jurisdiction. *Weinhard v. Tynan*, 53 Ill. App. 17.

**Permanent and Temporary Residents.** — In *Pennsylvania* the Act of May 4, 1855, provides that any person desirous of adopting any child as his or her heir may "present his or her petition to such court in the county where he or she may be resident, declaring such desire," etc. In an *Illinois* case arising under this statute, it was held, following the construction given by the courts of *Pennsylvania*, that the word "resident" includes both a permanent and temporary resident. *Van Matre v. Sankey*, 148 Ill. 536. See also *Sankey's Case*, 4 Pa. Co. Ct. Rep. 624, affirmed in *Wolf's Appeal*, (Pa. 1888) 13 Atl. Rep. 760, holding that a temporary resident is within the terms of the above statute.

**Jurisdiction Over Parties.** — The court must have jurisdiction over the parties seeking to adopt the child, over the child to be adopted, and over the natural parents, or the proceedings will be void. *Furgeson v. Jones*, 17 Oregon 204. See also *Lee v. Back*, 30 Ind. 148.

2. *Foley v. Foley*, 61 Ill. App. 577, holding that the petition described in Rev. Stat. Ill., c. 4, § 2, is jurisdictional, and that in the absence of such petition a decree of adoption is invalid and subject to collateral attack.

3. **A Form of Petition** under the *Pennsylvania* statute is set out in *Van Matre v. Sankey*, 148 Ill. 536. This form was approved in *Sankey's Case*, 4 Pa. Co. Ct. Rep. 624, affirmed on appeal, under the name of *Wolf's Appeal*, (Pa. 1888) 13 Atl. Rep. 760.

In *Arkansas* the petition under Act of February 25, 1885, must state the residence of the child and that of its parents, if the latter are living, or the adoption will be invalid. *Morris v. Dooley*, 59 Ark. 483.

In *Illinois*, where the mother's name and consent appear to have been given, a decree of adoption under Laws of 1887, p. 133, is valid upon collateral attack, although the petition fails to state that the petitioner is a resident of the county, and that the father is dead, or has abandoned the child. *Barnard v. Barnard*, 119 Ill. 92.

4. *Edds, Appellant*, 137 Mass. 346.

5. *Matter of Williams*, 102 Cal. 70. See also *Luppie v. Winans*, 37 N. J. Eq. 245.

To the effect that husband and wife may join in an application to adopt a child, although joint adoption is not expressly authorized by statute see also *Abney v. De Loach*, 84 Ala. 393; *Matter of Williams*, 102 Cal. 70.

As to the necessity of the consent of the other spouse, see 1 Am. and Eng. Encyc. of Law (2d ed.), title *Adoption of Children*.

In *Indiana*, under Act of March 12, 1855, it is not necessary for a wife to join in the petition of her husband to adopt a child. *Barnhizer v. Ferrell*, 47 Ind. 335. But under Rev. Stat. Ind., §§ 823-828, the wife may join. *Krug v. Davis*, 87 Ind. 590, followed in *Markover v. Krauss*, 132 Ind. 294.

In *Pennsylvania* it is not necessary for one spouse to join the other in adoption proceedings; and where a woman did not join her husband in proceedings for the adoption of a child, it was held that such child did not become her

**4. Notice.** — In some of the states, where a parent does not consent to the adoption of his child, and does not belong to one of the excepted classes, it is required that he shall be personally served with a copy of the petition or order, if found in the state, and if not, by publication made for a certain length of time in a newspaper printed in the county where the proceedings for adoption are had.<sup>1</sup>

The Record Should Show Notice to the parent in cases where required.<sup>2</sup>

**5. Hearing and Determination.** — It is provided in some states that on the hearing of the application all parties to the proceeding must be examined by the judge, who, if quite satisfied that the interests of the child would be promoted, shall make an order of adoption.<sup>3</sup>

child by adoption. *Nulton's Appeal*, 103 Pa. St. 286.

1. *Humphrey*, Appellant, 137 Mass. 84; *Furgeson v. Jones*, 17 Oregon 204; *Schiltz v. Roenitz*, 86 Wis. 31.

2. In *Lee v. Back*, 30 Ind. 148, it was held that a decree depriving the father of the custody of his infant child, without jurisdiction of the person of the father having been acquired by notice, is void.

**Abandonment by Father.** — Where the mother of the child is a party to adoption proceedings and gives her consent, the father, who has abandoned the child, is not entitled to notice of proceedings, nor is his consent to the adoption necessary. *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23, wherein the court said: "The 'parent' referred to in section 2279 is a parent who still possesses some right in, or to custody over, and control of, the child, which he or she can relinquish." See also *Barnard v. Barnard*, 119 Ill. 92.

In *Schiltz v. Roenitz*, 86 Wis. 31, it was held that a parent could not be deprived of the custody of his child by adoption proceedings based on his alleged abandonment of the child, where he had no notice of the proceeding and no opportunity to defend.

**Notice to the Father of an Illegitimate Minor** to the application for its adoption is not required by the statutes of *Massachusetts*; the written assent thereto of its guardian is sufficient. *Gibson*, Appellant, 154 Mass. 378.

In *Massachusetts*, under Pub. Stat., c. 148, § 4, notice of a petition for the adoption of a child is necessary in all cases where the written consent required by section 2 is not submitted to the court with the petition, even if a case is presented by the petition

which, if proved to exist, authorizes a judge of probate to decree the adoption without consent. *Humphrey*, Appellant, 137 Mass. 84.

**Notice to Child.** — Unless required by statute, no notice to the child is necessary, but the assent of its guardian will be sufficient. *Van Matre v. Sankey*, 148 Ill. 536.

3. *Schiltz v. Roenitz*, 86 Wis. 31, holding that in cases where the record does not show notice, the order of adoption is void and no defense to an action by the parent for the value of the child's services. But see, generally, articles JURISDICTION; PUBLICATION; SERVICE OF PROCESS.

**3. Examination of Parties.** — See Cal. Civ. Code, § 227. This provision is directory merely, and a failure to examine all the parties to the proceeding separately will not render the proceeding void. *Matter of Williams*, 102 Cal. 70. So also the examination of a child under the age of consent is not necessary. *Matter of Johnson*, 98 Cal. 531.

**Approval of Judge.** — An order indorsed on an agreement of adoption, reciting that the agreement of adoption is "hereby approved and ordered to be filed by the clerk," is sufficient under Cal. Civ. Code, § 227, which provides that the judge must make an order declaring that the child was thenceforth to be regarded and treated as the child of the person adopting. *Matter of Evans*, 106 Cal. 562.

A record on a detached piece of paper retained among the papers of the probate judge's office, showing his consent and approval of the adoption, is sufficient under a statute requiring the record of his approval of an agreement of adoption, but not prescribing the manner in which the record shall be

An Order of Adoption should declare that the child shall thenceforth be regarded and treated as the child of the person adopting.<sup>1</sup> And on joint application by husband and wife, the order may declare that the child be regarded as the child of both.<sup>2</sup>

**6. Review and Revocation.** — In many of the states, the adopting parent, or the person adopted, by his next friend, may appeal to a higher court to have the decree of adoption set aside.<sup>3</sup> The statutes of some of the states provide that a parent who has not given his consent to adoption proceedings, and was not served with notice thereof, may appeal from the decree of adoption within a specified time.<sup>4</sup> So, also, the proceedings may be set aside or revoked in a direct proceeding for that purpose.<sup>5</sup>

kept. *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23.

1. *Matter of Evans*, 106 Cal. 562. See also *Ex p. Clark*, 87 Cal. 638.

2. **Joint Adoption.** — *Matter of Williams*, 102 Cal. 70, decided under Cal. Civ. Code; § 221, which authorizes any adult person to adopt a child, except that neither a husband nor a wife may do so without the other's consent, but which does not expressly authorize a joint adoption. See also *supra*, X. 3. *Petition*.

**Entry Nunc Pro Tunc.** — An order of adoption ought not to be entered *nunc pro tunc* after a lapse of more than twenty years. *Weinhard v. Tynan*, 53 Ill. App. 17.

3. **Appeal by Next Friend.** — In *Murray v. Barber*, 16 R. I. 512, it was held that a child adopted by a decree of the Probate Court, on a petition alleging abandonment by the natural father, can appeal from such decree, the father acting as next friend for the appeal.

**Habeas Corpus — Exclusive Remedy.** — It was held in *Myers v. Myers*, 32 Ill. App. 189, that an appeal by the natural parent from a decree for the adoption of his child cannot be maintained in the absence of express statutory provision; and that the only remedy by such parent is by habeas corpus. See also *Ex p. Clark*, 87 Cal. 638, where adoption proceedings were attacked by habeas corpus on the ground of mistake. And see *People v. Paschal*, 68 Hun (N. Y.) 344, abstracted in following note.

**Next of Kin Cannot Appeal.** — Under a statute authorizing the adopting parent, or the person adopted, by his next friend, to appeal from a decree of adoption, it was held in *Gray v. Gardner*, 31 Me. 554, that upon the death of the

adopting parent his heirs or next of kin were not authorized to appeal from the decree of adoption. The court said: "Neither of these parties saw fit to appeal at the time the decree was passed. At that time, the petitioner living, it is clear the heirs presumptive had no right of appeal. They were not the petitioners, nor could they in any legal sense be the representatives of the petitioner. The adoption of the child would impose no duties or obligations upon them. Nor had they any vested rights as heirs which the adoption would interfere with; nothing in this respect of the prospect of which it was not entirely competent for the petitioner to deprive them, either by the adoption of an heir or in the various other methods known to the law. Nor are their rights increased by her death. If they are deprived of their inheritance, it is by an act of the ancestor legal and competent for her to perform, and by which they must abide. It is equally clear that they cannot appeal as representatives of the petitioner. Not as heirs, for as such they are acting and must act, if at all, in their own behalf and for their own interests. Not as administrators, if such they were, for the decree is the result of a completed act of the intestate." See also *Wolf's Appeal*, (Pa. 1888) 13 Atl. Rep. 760; *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23.

4. See statutes of the various states. See also *Furgeson v. Jones*, 17 Oregon 204.

5. **Habeas Corpus.** — In *New York* the Supreme Court has jurisdiction to take a child from its adopted parents by habeas corpus, notwithstanding Laws of 1884, § 12, which provides for an application to the Surrogate's Court for a rescission of an agreement of adoption.

**Collateral Attack.** — The judgment of a court of competent jurisdiction decreeing the adoption of a child fixes the status of both the adopted parent and the child, and is conclusive as against all collateral attacks by parties or their privies.<sup>1</sup>

**XI. APPRENTICESHIP — 1. Binding Out — Jurisdiction.** — At common law, and under the statutes of most states, apprenticeship is effected by a simple indenture, and there is nothing of a judicial character in the proceeding.<sup>2</sup> In some states, however, the approval of the court is necessary to the validity of the indenture.<sup>3</sup> And in the case of poor orphan children or the children of pauper parents, jurisdiction to bind them out as apprentices, or at least to supervise the indenture, is very commonly conferred upon the Probate, Orphans', or County Court, or upon justices of the peace.<sup>4</sup>

*People v. Paschal*, 68 Hun (N. Y.) 344. See also preceding note.

**A Decree of Adoption Will Not Be Vacated** on application of the administrator and collateral heirs of a deceased. *Sankey's Case*, 4 Pa. Co. Ct. Rep. 624.

An order of adoption will not be set aside in proceedings by the heirs after a delay of ten years. *Brown v. Brown*, 101 Ind. 340.

A decree of adoption will not be revoked on the petition of the person who adopted the infant and the consent of the next friend who consented to the adoption. *In re Theil*, 14 W. N. C. (Pa.) 422.

**Probate Court Cannot Revoke.** — It was held in *Matter of Bush*, 47 Kan. 264, that an order of the Probate Court permitting the adoption of a minor is conclusive so far as that court is concerned, and that such court can have no further jurisdiction in the matter. See also *Rives v. Sneed*, 25 Ga. 612.

*Contra.* — "There would seem to be nothing in the nature of a decree of adoption to take away the power of the Probate Court to revoke and annul it on the ground that it had been procured by fraud practiced upon the court. It is said generally in *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122, that it is impossible to deny the power of the Probate Court 'to correct errors arising out of fraud or mistake in its own decrees;' and the same thing is held in substance in *Gale v. Nickerson*, 144 Mass. 415. There is nothing in the statutes which places a decree of adoption on any different footing in this respect from that of other judgments and decrees of that court." *Tucker v. Fisk*, 154 Mass. 574.

**Appeal.** — Where the complaint is at the refusal of the court to set aside the

decree of adoption, as the Act of Assembly does not authorize an appeal, the review will be confined to the record only, and the evidence will not be reviewed. *Lewis's Appeal*, (Pa. 1887) 10 Atl. Rep. 126.

**1. California.** — *Matter of Johnson*, 98 Cal. 531.

*Illinois.* — *Van Matre v. Sankey*, 148 Ill. 536; *Barnard v. Barhard*, 119 Ill. 92.

*Indiana.* — *Brown v. Brown*, 101 Ind. 340.

*Maine.* — *Gray v. Gardner*, 81 Me. 554. *Massachusetts.* — *Sewall v. Roberts*, 115 Mass. 262.

*Wyoming.* — *Nugent v. Powell*, (Wyoming 1893) 33 Pac. Rep. 23. See also *People v. Bloedel*, (Buffalo Super. Ct.) 16 N. Y. Supp. 837.

*Compare Furgeson v. Jones*, 17 Oregon 204; *Lee v. Back*, 30 Ind. 148.

**2.** See 2 Am. and Eng. Encyc. of Law (2d ed.), title *Apprentices*.

**3.** *Morrill v. Kennedy*, 22 Ark. 324. See also *Baker v. Winfrey*, 15 B. Mon. (Ky.) 499.

Under Rev. Stat. Ind. 1881, § 5337, which makes the assent of the court having probate jurisdiction necessary to the validity of an indenture of apprenticeship of pauper children, such an indenture made by the superintendent of the county asylum, under the authority conferred by section 6092, and not approved by such judge, is void. *Owens v. Frager*, 119 Ind. 532.

**4. Probate Court.** — See *Owen v. State*, 48 Ala. 328; *Brinster v. Compton*, 68 Ala. 299; *Cockran v. State*, 46 Ala. 714; *Morrill v. Kennedy*, 22 Ark. 324.

**Orphans' Court.** — See *Charles v. Matlock*, 3 Cranch (C. C.) 230; *Lynch v. Ashton*, 3 Cranch (C. C.) 367; *Gody v. Plant*, 4 Cranch (C. C.) 670.

Jurisdiction is confined to residents of their respective counties;<sup>1</sup> and, being special and limited, it should affirmatively appear from the record.<sup>2</sup>

In *Bell v. English*, 4 Cranch (C. C.) 332, it was held that the Orphans' Court had power to bind out apprentices without indentures.

**County Courts.** — *Adams v. Adams*, 36 Ga. 236; *Rachel v. Emerson*, 6 B. Mon. (Ky.) 280; *Baker v. Winfrey*, 15 B. Mon. (Ky.) 499; *Thomas v. Newcom*, 1 Bush (Ky.) 83; *Chaudet v. Stone*, 4 Bush (Ky.) 210; *Brewer v. Harris*, 5 Gratt. (Va.) 285.

**Justices of the Peace.** — The power must usually be exercised by two justices. *Barrett v. McPherson*, 4 Cranch (C. C.) 475; *Charles v. Matlock*, 3 Cranch (C. C.) 230; *Hays v. Borders*, 6 Ill. 46; *May v. Bayne*, 3 Cranch (C. C.) 335; *Lynch v. Ashton*, 3 Cranch (C. C.) 367; *Gody v. Plant*, 4 Cranch (C. C.) 670.

Where two justices of the peace, acting under the statute relating to apprentices, bind out a poor child, the indenture need not in terms describe the child as a "poor child." It is enough that it appears from the description that the child is poor. *Hays v. Borders*, 6 Ill. 46.

**Alaska.** — It has been held that the United States District Court for the district of Alaska has no jurisdiction to apprentice a minor. *Ex p. Emma*, 48 Fed. Rep. 211.

**Overseers, Selectmen, etc.** — Jurisdiction to bind out poor orphans or the children of paupers is frequently conferred upon such officers as the overseers of the poor, selectmen, etc. See 2 Am. and Eng. Encyc. of Law (2d ed.) title *Apprentices*.

**Stipulation for Benefits — Duty of Court.** — The Tenn. Act of 1762 on the subject of apprentices merely fixes the minimum of benefits which the County Court shall require in the indenture. It is the duty of the court to require more, if more can be obtained; and a bond requiring more is valid. *Pinch v. Gore*, 2 Swan (Tenn.) 326.

**There Must Be Some Ground of Necessity** to authorize the binding out of orphan children by the County Court, such as that the mother is bringing them up in idle and immoral habits, or fails to keep them in reasonable comfort. *Baker v. Winfrey*, 15 B. Mon. (Ky.) 499.

In *Kentucky*, under a statute giving the County Court jurisdiction to bind

out infant children, it has been held that the court had no authority to bind the child where it appears that his father was qualified and willing to bring him up in moral courses. *Thomas v. Newcom*, 1 Bush (Ky.) 83. See also *Chaudet v. Stone*, 4 Bush (Ky.) 210; *Baker v. Winfrey*, 15 B. Mon. (Ky.) 499. See present statute in Ky. Stat. (1894), § 2591. See also *Adams v. Adams*, 36 Ga. 236; *Owen v. State*, 48 Ala. 328; *Brinster v. Compton*, 68 Ala. 299.

1. *Adams v. Adams*, 36 Ga. 236.

The Probate Court of a county in which an orphan has acquired a settlement has jurisdiction of the proceeding under a statutory provision that the judges of probate in their respective counties shall bind out as apprentices all orphans whose estates are of so small value that no person will educate and maintain them for the profits thereof. *Spears v. Snell*, 74 N. Car. 210.

**2. Record Must Show Jurisdiction.** — The records of the County Courts, in relation to binding out children, in certain cases, must show the facts from which their jurisdiction results, their jurisdiction being special and limited. *Freeman v. Strong*, 6 Dana (Ky.) 282.

In *Alabama*, under a statute providing that the judge of probate of each county may bind out as apprentices the children of any person unable to provide for their support, until the age of twenty-one years if a male and eighteen if a female, it has been held that the jurisdiction of a probate judge in any particular case sufficiently appears if it be stated in the indenture of apprenticeship itself that the parents of the child thereby bound out are unable to provide for its support. *Owen v. State*, 48 Ala. 328. See also *Brinster v. Compton*, 68 Ala. 299.

**Order Should Show Jurisdiction.** — An order of a County Court binding out a child as an apprentice should set forth all the facts required by law for giving jurisdiction to such court. *Small v. Small*, 2 Bush (Ky.) 45.

The jurisdiction of the County Court over orphans and poor children whose parents are unable to rear them properly is limited and special, and every order for binding a child as an apprentice should exhibit the facts required

**Application.** — It seems that the court may act upon application of the parents,<sup>1</sup> or even of its own motion, upon the facts conferring jurisdiction being brought to its attention.<sup>2</sup>

**Notice of the Proceeding,** however, is usually required to be given to the parent, guardian, or next friend of the minor,<sup>3</sup> though not always to the minor himself.<sup>4</sup>

**Minor's Presence in Court.** — It is usual to have the minor present in court, even though the statute does not require it.<sup>5</sup>

**Appeal and Review.** — It has been held that no appeal lies from an

by law for giving jurisdiction; and if the facts are not so stated the order is void. *Chaudet v. Stone*, 4 Bush (Ky.) 210.

1. In *Cockran v. State*, 46 Ala. 714, it was held that an order of the Probate Court apprenticing a minor on application of his mother, because she was unable to support him, was not void because the application was made by the mother, it not appearing that he had no father.

2. *Stone, J.*, delivering the opinion of the court in *Brinster v. Compton*, 68 Ala. 299, said: "The statute prescribes no form of proceedings for having an infant pauper apprenticed. The duty is confined to the judge of probate, and no machinery is furnished for putting his powers into exercise. Section 1737 of the code contemplates that he shall take action whenever the sheriff, a justice of the peace, or other civil officer of the county reports to him a minor under the age of eighteen years who is an orphan without visible means of support, or whose parents have not the means or who refuse to provide for the support of such minor; and he must apprentice all other such minors as may otherwise come to his knowledge. This, we are bound to hold, he may do *ex proprio motu*."

3. Code Ala. 1886, § 1474; *Cockran v. State*, 46 Ala. 714; *Brinster v. Compton*, 68 Ala. 299; *Mendall v. Ricketts*, 6 J. J. Marsh. (Ky.) 592; *Robarts v. Desforges*, 2 A. K. Marsh. (Ky.) 39; *Rachel v. Emerson*, 6 B. Mon. (Ky.) 280; *Curry v. Jenkins*, Hard. (Ky.) 501. See Ky. Stat. 1894, § 2592.

**Consent of Next Friend — Authority to Act.** — It is not necessary that the person who consents to an apprenticeship, as next friend to the minor, should have received an appointment as such from legal authority. An indenture executed by a minor, with the consent of his sister as next friend, was adjudged valid. *Com. v. Roach*, 1 Ashm. (Pa.) 27.

But the master of an apprentice cannot act as next friend, so as to give validity to an indenture executed by him as such. *Com. v. Kendig*, 1 S. & R. (Pa.) 366.

4. Under an Alabama statute it has been held that an order apprenticing a minor was not void because no notice was given to the minor, and no guardian *ad litem* appointed to represent him. The court said: "Provision is made for notifying the father of a minor, or the mother, if there is no father, of the proceedings to apprentice the child; \* \* \* but there is no such requisition of notice to the child, or even of its consent." *Cockran v. State*, 46 Ala. 714. See also *Brinster v. Compton*, 68 Ala. 299; and see Code Ala. 1886, § 1474.

In *Matter of Ambrose*, Phil. L. (N. Car.) 91, it was held that a County Court had no power to bind as apprentices persons who had no notice of the proceedings for that purpose.

**Service on Minor Sufficient.** — In exercising the jurisdiction conferred by section 3159, Miss. Code 1892, on boards of supervisors to bind out as apprentices poor orphans and children whose parents are unable to support them, it is only necessary that citation be served on the minor in person; sections 3430, 3501, Code 1892, requiring process for an unmarried minor to be served also on his father, mother, or guardian, applying only to process in courts proper where property rights are involved. *Jack v. Thompson*, 41 Miss. 49; *Moore v. Allen*, 72 Miss. 273.

5. *Owens v. Chaplain*, 3 Jones L. (N. Car.) 323; *Matter of Ambrose*, Phil. L. (N. Car.) 91; *Smith v. Elwood*, 4 Cranch (C. C.) 670.

In the indenture of an apprentice bound out by the Orphans' Court, it is not necessary to state that the apprentice was present. *Heinecke v. Rawlings*, 4 Cranch (C. C.) 699.



order of a county or a corporation court for binding out an apprentice.<sup>1</sup>

**2. Discharge.** — In the statutes of some states, provision is made for setting aside or discharging an indenture of apprenticeship by an order of court.<sup>2</sup>

**Appeal.** — It has been held that an appeal does not lie from an order discharging an apprentice.<sup>3</sup>

**3. Remedies.** — A summary remedy is provided by some statutes for breach of an indenture of apprenticeship;<sup>4</sup> but it has been held that such remedies are merely cumulative, and do not prevent the parties from suing on the covenants of the indenture.<sup>5</sup>

1. *Cooper v. Saunders*, 1 Hen. & M. (Va.) 413.

**Review on Complaint.** — The discretion exercised by justices of the peace or trustees of the poor, in binding out poor children, may be reviewed on complaint to the court or a judge in vacation. *Moody v. Benson*, 4 Harr. (Del.) 115.

**Review on Habeas Corpus.** — If a child not subject to be so dealt with is bound out by the ordinary, the indentures of apprenticeship will form no obstacle to restoring the child to its parent by writ of habeas corpus. *Comas v. Reddish*, 35 Ga. 236.

2. See *Ackerman v. Taylor*, 9 N. J. L. 65; *Schermerhorn v. Hull*, 13 Johns. (N. Y.) 270; *Powers v. Ware*, 2 Pick. (Mass.) 451.

The County Court has no authority to cancel an indenture of apprenticeship which has been properly granted, except for some of the causes enumerated in the statute. *Owens v. Chaplain*, 3 Jones L. (N. Car.) 323.

The court will discharge an apprentice for acts of the master injurious to his mind and morals, as for compelling him to work on Sundays. *Com. v. St. German*, 1 Browne (Pa.) 24. See also *Warner v. Smith*, 8 Conn. 14; *Berry v. Wallace*, Wright (Ohio) 657.

**Proceedings in Name of Apprentice.** — The proceedings for the release of an apprentice should be in his name, and not in that of his father. *McDaniel v. McGowen*, 3 T. B. Mon. (Ky.) 9; *Ackerman v. Taylor*, 9 N. J. L. 65.

**Discharge and Binding Again.** — The court, in discharging an apprentice, may order him to be bound to a new master. See *Smith v. Elwood*, 4 Cranch (C. C.) 670; *Negro Gusty v. Diggs*, 2 Cranch (C. C.) 210.

**Setting Aside Indentures — Parties.** — By the Md. Act of 1842, c. 25, suggestion being made by counsel in writing, the court may take proof and set aside

an apprentice's indentures although he was not made a formal party. *Lammott v. Maulsby*, 8 Md. 5.

3. *Smith v. Hubbard*, 11 Mass. 24; *Carmand v. Wall*, 1 Bailey L. (S. Car.) 209.

4. See *Berry v. Wallace*, Wright (Ohio) 657.

One who has arrived at full age may bind himself as an apprentice, and will, as such, be subject to the provisions of the acts in relation to apprentices. *Com. v. St. German*, 1 Browne (Pa.) 24.

But he is not subject to the summary remedy given by the act for breach of the contract. *Com. v. Sturgeon*, 2 Browne (Pa.) 205.

5. *Berry v. Wallace*, Wright (Ohio) 657.

**Action for Breach of Indenture — In Whose Name.** — Covenant will not lie in the name of an apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of court for binding out the apprentice, such indenture not being a statutory deed. The action can only be maintained on it in the names of the overseers who are parties to it. *Bullock v. Sebrell*, 6 Leigh (Va.) 560; *Brotzman v. Bunnell*, 5 Whart. (Pa.) 128; *Thorpe v. Rankin*, 19 N. J. L. 36.

But see *Poindexter v. Wilton*, 3 Munf. (Va.) 183, where it was held that the action ought not to be brought in the names of the overseers of the poor, but in the name of the apprentice. See also *Leech v. Agnew*, 7 Pa. St. 21.

A suit for breach of an indenture of apprenticeship, entered into between the apprentice, his father, and the master, may be brought in the name of the apprentice alone, after his coming of age. *McAdams v. Stilwell*, 13 Pa. St. 90. And see *McGinival v. Mong*, 5 Pa. St. 269.

**Infancy Is a Good Plea** to an action of covenant on indentures of apprenticeship. *McKnight v. Hogg*, 1 Treadw. (S. Car.) 117.

## INFORMATION AND BELIEF.

### I. IN GENERAL, 854.

### II. NOT GROUND OF DEMURRER, 855.

### III. ALLEGING FRAUD, 855.

#### CROSS-REFERENCES.

As to *Statements on Information and Belief in particular pleadings and proceedings*, see the particular titles in this work, as *AFFIDAVITS*, vol. 1, p. 322; *AFFIDAVITS OF MERITS*, vol. 1, p. 365; *ATTACHMENT*, vol. 3, pp. 21-24; *BILLS IN EQUITY*, vol. 3, p. 363; *CHANGE OF VENUE*, vol. 4, pp. 434, 435; *FRAUD*, vol. 9, p. 694; *INJUNCTIONS*, *infra*, p. 869, etc.

*Denials on Information and Belief*, see articles *ANSWERS IN CODE PLEADING*, vol. 1, p. 810; *ANSWERS IN EQUITY PLEADING*, vol. 1, p. 876.

**I. IN GENERAL.** — While it is a general rule of pleading under codes of procedure<sup>1</sup> that the allegations of a complaint or petition must be positively made,<sup>2</sup> still it is held that where the facts pleaded are not presumptively within the pleader's knowledge,<sup>3</sup> he may plead them upon information and belief.<sup>4</sup>

**1. Scope of Article.** — This article applies only to complaints and petitions under the code procedure. For other places where the subject of information and belief is discussed, see the cross-references above.

**2.** See article COMPLAINTS AND PETITIONS, vol. 4, p. 605.

*Truscott v. Dole*, 7 How. Pr. (N. Y. Supreme Ct.) 221, wherein the words "as the plaintiff is informed and believes" were held to be redundant and were stricken out.

**3. A Fact Peculiarly Within the Knowledge of the Pleader** should be alleged positively, and not on information and belief. *McConoughey v. Jackson*, 101 Cal. 265.

**4.** *Jones v. Pearl Min. Co.*, 20 Colo. 417.

**Action on Promissory Notes.** — In *St. John v. Beers*, 24 How. Pr. (N. Y. Supreme Ct.) 377, where the action was

on several promissory notes assigned to the plaintiff, he stated, upon information and belief, their execution by the defendant. On the defendant's motion to strike out the words "information and belief" the court said: "The plaintiff has very properly stated the making of the two notes on his 'information and belief.' They being payable to other persons and assigned to him, he could properly only state the making of them on his 'information and belief.'"

**Complaint Verified by Plaintiffs' Attorney.** — When the plaintiffs are nonresidents, and their complaint is verified by their attorney, an allegation of the facts of plaintiffs' copartnership capacity, "on information and belief," is sufficient. *Thackera v. Reid*, 1 Utah 238.

**Sufficient Allegation upon Information and Belief.** — A statement in the complaint that the plaintiff "is induced to

Such allegations render the complaint neither ambiguous nor evasive.<sup>1</sup>

**II. NOT GROUND OF DEMURRER.** — The objection that the averments of a complaint are made upon information and belief is not a ground of demurrer; it can be raised by motion only.<sup>2</sup>

**III. ALLEGING FRAUD.** — An allegation of fraud made upon information and belief cannot be sustained unless the facts upon which the belief is founded are stated in the pleading.<sup>3</sup>

believe, and does believe," a matter stated, is an allegation of fact upon information and belief, and is sufficient. *Dial v. Gary*, 24 S. Car. 572.

An allegation that the party "believes" a fact to exist, is equal to an allegation that the fact exists "as he believes;" and where the law allows a statement on belief, either form of expression is equally an allegation of such fact. *Howell v. Fraser*, 6 How. Pr. (N. Y. Supreme Ct.) 221.

**Averment of Belief Sufficient.** — In pleading facts not within the knowledge of the party, the matters need not be stated upon his information as well as belief; an averment of belief is sufficient. *Radway v. Mather*, 5 Sandf. (N. Y.) 654.

**Facts Must Be Directly Alleged.** — In an action to enforce the liability of a stockholder, a complaint alleging that the plaintiff "is informed and believes" that the defendant is, and was at the times mentioned, owner of the stock, was held not to charge sufficiently the defendant's ownership; the fact of his ownership of the stock should have been directly alleged either upon information or belief or otherwise. *Bank of North America v. Rindge*, 57 Fed. Rep. 279.

**Distinguishing Allegations on Information and Belief.** — It is not necessary in a complaint for the plaintiff to distin-

guish the allegations which are made on information and belief. *Ricketts v. Green*, 6 Abb. Pr. (N. Y. Supreme Ct.) 82.

1. *Thackera v. Reid*, 1 Utah 240; *Crane Bros. Mfg. Co. v. Reed*, 3 Utah 506.

2. *Carpenter v. Smith*, 20 Colo. 39; *Jones v. Pearl Min. Co.*, 20 Colo. 417; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Thackera v. Reid*, 1 Utah 238.

In *Stoutenburg v. Lybrand*, 13 Ohio St. 233, the court said: "Any pleading under the code, taken in connection with its proper verification, amounts to nothing more than a statement, under oath, of what the party pleading believes to be true. As a general rule, the proper mode is to state the facts directly and positively in the body of the pleading, and let the verification show that this statement is made as matter of belief only. But violations of this rule which do not affect the substance of the cause of action, or the grounds of defense, cannot be reached by demurrer. Under the 118th section of the code, the plaintiff below might, perhaps, upon motion, have had the words 'he is informed and believes' stricken out from the answer, as redundant. If he thought himself prejudiced by their insertion, this was his proper remedy."

3. See article FRAUD, vol. 9, p. 675.

## INFORMATIONS AND COMPLAINTS.

*In Criminal Procedure*, see the various specific criminal titles in this work, and the articles *INDICTMENTS*, *INFORMATIONS*; *AND COMPLAINTS*, *ante*, p. 344; *PRELIMINARY EXAMINATION*; and as to amendment of criminal informations, see article *AMENDMENTS*, vol. 1, p. 696 *et seq.*

*To Institute Contempt Proceedings*, see article *CONTEMPT*, vol. 4, p. 781.

*In Escheat Proceedings*, see article *ESCHEAT*, vol. 8, p. 3.

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## INFORMATIONS IN EQUITY.

BY CHARLES C. MOORE.

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### CROSS-REFERENCES.

See also articles *BILLS IN EQUITY*, vol. 3, p. 335; *INJUNCTIONS*, *post*, p. 869; *MANDAMUS*; *QUO WARRANTO*; *TRUSTS AND TRUSTEES*; and AM. AND ENG. ENCYCLOPÆDIA OF LAW (2d ed.), vol. 3, p. 475, title *ATTORNEY-GENERAL*.

**I. DEFINITION AND NATURE — 1. Information.** — A suit in equity by a private party is commenced by preferring a bill in the nature

of a petition.<sup>1</sup> When the suit is instituted on behalf of the state or of those who partake of its prerogative, such as idiots and lunatics, or those whose rights are under its particular protection, such as the objects of a public charity, the matter of complaint is offered to the court by way of information given by the proper officers of the state, and not by way of petition.<sup>2</sup>

**2. Information and Bill.** — It sometimes happens that the relator in an information has an interest in the matter in dispute, of the injury to which interest he has individually a right to complain.<sup>3</sup> In such a case his personal complaint is joined to and incorporated with the information given to the court by the officer of the state, and then they form together an information and bill, and are so termed.<sup>4</sup>

1. See article *BILLS IN EQUITY*, vol. 3, p. 335.

2. *Atty.-Gen. v. Moliter*, 26 Mich. 444, where the court said: "Assuming that it was competent for the attorney-general officially to interpose to obtain an injunction against the commission of unauthorized corporate acts, the regular course was to proceed by information conveying the facts to the court, and not by way of complaint in supplementary form, as in a bill. In such cases the attorney-general, as official representative of the state, undertakes to put the court in possession of facts which, when communicated in proper form, through the right official channel, impose upon the court determinate duties. He does not take the attitude or hold the language of an ordinary suitor. His intervention is purely official. He is not a 'complainant.' He does not 'petition.' He 'informs.' \* \* \* In the case at bar the representation to the court is not, as it should have been, on any conceivable theory an information, but is in the strict form of an ordinary bill, except that in the opening paragraph it names Mr. Lockwood as relator. It purports to have been signed by him conjointly with the attorney-general. The first sentence commences with the words 'your orator,' but subsequently, throughout, the expression takes the plural form of 'your orators.' The structure and phraseology import that the proceeding was considered as commenced and carried on as the joint bill of the attorney-general and Mr. Lockwood."

**Plaintiff's Interest in Subject-matter.** — If an information in the name of the state upon the relation of the attorney-general fails to show that the state has

any interest in the subject-matter of the proceeding, it cannot be sustained for the purpose of preventing threatened injury to the interests of individuals whose personal complaint is not joined to and incorporated with the information. *People v. Stratton*, 25 Cal. 242. See also *Atty.-Gen. v. Evart Booming Co.*, 34 Mich. 462.

**3. Dismissal of One, Retention of Other.** — If it should afterwards appear that the relator has no interest to be subserved and no ground for relief, the bill will be dismissed and the information retained. *Atty.-Gen. v. Parker*, 126 Mass. 221; *Atty.-Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 179; *Atty.-Gen. v. Vivian*, 1 Russ. 237.

And in *Atty.-Gen. v. Brown*, 1 Swanst. 305, it was said that "provided that the suit can be maintained by the attorney-general, the circumstance of his joining as relator a person who is not entitled to the equitable relief which he seeks will not vitiate the proceeding."

But if the pleading is virtually a bill in equity by the relator, and purports to be his bill, and not the information of the proper officer, whose name is merely signed thereto, it cannot be retained as an information. *State v. Lord*, 28 Oregon 529.

As to the retention of the bill upon dismissal of the information, see *Atty.-Gen. v. Federal Street Meeting-house*, 3 Gray (Mass.) 1; *Atty.-Gen. v. Evart Booming Co.*, 34 Mich. 462.

4. *Cooper Eq. Pl.* 107; *State v. Lord*, 28 Oregon 528; *People v. Stratton*, 25 Cal. 250; *Atty.-Gen. v. Parker*, 126 Mass. 221.

In *Atty.-Gen. v. Federal Street Meeting-house*, 3 Gray (Mass.) 1, the court alluded to the precedents for combining

**3. Resemblance to Bills in Equity.** — An Information is regarded and treated in its substantive characteristics as a bill in equity,<sup>1</sup> and

in one prosecution the vindication of private together with public rights, and proceeded to discuss the questions arising in that aspect of the complaint which was treated as a bill in equity to investigate and enforce the rights of parties aggrieved by a breach of the charitable trust therein set forth, as well as an information in behalf of the public. For other instances of a pleading treated as both an information and a bill, see *Atty.-Gen. v. Bristol*, 3 Madd. 319; *Atty.-Gen. v. Vivian*, 1 Russ. 226; *Atty.-Gen. v. Heelis*, 2 Sim. & S. 67; *Atty.-Gen. v. Catharine Hall*, 1 Jac. 381; *Atty.-Gen. v. Oglander*, 1 Ves. Jr. 247; *Atty.-Gen. v. Brown*, 1 Swanst. 265; *People v. North San Francisco Homestead, etc., Assoc.*, 38 Cal. 564; *People v. Jacob*, (Cal. 1886) 12 Pac. Rep. 222.

**For the Form of an Information and Bill** to restrain the obstruction of a navigable river, see *Atty.-Gen. v. Paterson, etc., R. Co.*, 9 N. J. Eq. 527.

In *Atty.-Gen. v. Ewart Booming Co.*, 34 Mich. 462, will be found the form of an information which had some of the features of a bill by the relator, but was so imperfect in this aspect that upon dismissal of the information as such on the merits, because there was no public grievance, the court held that the pleading could not be sustained as a bill and it was dismissed *in toto*.

**Interest of Relator.** — An information and bill cannot be supported in that character unless the relator has some individual interest in the subject-matter of the suit. *People v. Stratton*, 25 Cal. 250; *Atty.-Gen. v. William and Mary College*, 1 Ves. Jr. 243; *Atty.-Gen. v. Oglander*, 1 Ves. Jr. 246; *Atty.-Gen. v. East India Co.*, 11 Sim. 388, where a general demurrer was sustained; but as there was apparently a case for relief the court gave leave to amend for the purpose of converting the record into an information only; requiring also that the persons named as plaintiffs should remain on the record in the character of relators in order to be answerable for costs.

**"If the Relator Dies Pending the Action** no further proceedings can be had therein until a new relator is made a party to the record; for in a suit instituted by information and bill com-

bined the relator sustains both the character of plaintiff and relator." *People v. Stratton*, 25 Cal. 250. See also 1 Daniell Ch. Pr. (1st Am. ed.) 17.

1. *People v. Stratton*, 25 Cal. 242.

**Information as a Proceeding at Law** — *To Try Title to Real Estate.* — In *South Carolina* the Constitution confers jurisdiction upon the Supreme Court as follows: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the general assembly shall by law provide." By statute pure findings of fact by a circuit judge in a law case stand as a special verdict and are not reviewable in the Supreme Court. The statute (1 Rev. Stat., § 119) provides that "the attorney-general may, when in his judgment the interest of the state requires it, file and prosecute informations or other process against persons who intrude upon the lands, rights, or property of the state, or commit or erect any nuisance thereon." An information filed under this provision, where the substantial character of the controversy was an action for the recovery of real estate — "trespass to try title, pure and simple" — was held not to be a case in chancery, and the findings of fact by the trial court were not subject to review in the Supreme Court. *State v. Pacific Guano Co.*, 22 S. Car. 50.

**To Collect Penalties.** — In *Walsh v. U. S.*, 3 Woodb. & M. (U. S.) 341, it was held that under the Act of Congress of 1799, prohibiting smuggling (1 U. S. Stat. at L. 695, § 89), which provided that "all penalties accruing by any breach of this act shall be sued for and recovered with costs of suit, in the name of the United States of America, in any court competent to try the same," the penalties thus incurred could be recovered by an information filed by the district attorney on behalf of the United States. The court, premising that debt is the most usual remedy adopted, said that an information "is the most common form of proceeding for penalties in connection with revenue in England. It is at times called 'the king's action of debt.'" *Levy v. Burley*, 2 Sumn. (U. S.) 361; *U. S. v. Lyman*, 1 Mason (U. S.)

in every respect follows the nature of a bill except in its style.<sup>1</sup> The difference in form between an information and a bill consists merely in offering the subject-matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named, and in stating the acts of the defendant to be injurious to the state, or to those whose rights the state thus endeavors to protect.<sup>2</sup>

**Information and Bill.** — When the pleading is at the same time an information and bill, it is a compound of the forms used for each when separately exhibited.<sup>3</sup>

**II. USE OF INFORMATIONS.** — An information is commonly filed for the establishment or regulation of a public charity,<sup>4</sup> to enjoin a public nuisance or purpresture,<sup>5</sup> and in some cases on behalf of idiots and lunatics.<sup>6</sup> The destruction of a public franchise may be enjoined by information.<sup>7</sup> It seems also to have been used

282, and 499. \* \* \* And though debt may have been the most usual remedy adopted for the recovery of a penalty under the collection law of 1799, yet several cases exist in the books where the remedy was by information" [citing to the last point *U. S. v. The Virgin*, Pet. (C. C.) 7; *U. S. v. The Hunter*, Pet. (C. C.) 10; *U. S. v. Brant*, Pet. (C. C.) 14]. See also *Ward v. Tyler*, 1 Nott & M. (S. Car.) 22; and as to informations in purely criminal cases, see article INDICTMENTS, INFORMATIONS, AND COMPLAINTS, *ante*, p. 344.

1. *People v. Stratton*, 25 Cal. 242.

"Informations, however, differ from bills little more than in name and form, and therefore the same rules are in general applicable to both. Informations respecting charities constitute the most striking exception; for in these the court will not require the same strictness, either as to parties, or to pleadings, as is ordinarily required in bills. The other peculiarities of informations are too few to justify any distinct examination." Story Eq. Pl., § 8. See generally article BILLS IN EQUITY, vol. 3, p. 335.

"Unless in the instance of charities, an information by the attorney-general must have the same requisites, both in regard to matter and form, as the bill of a common person." Cooper Eq. Pl. 106. As to informations respecting charities, see article TRUSTS AND TRUSTEES.

2. Cooper Eq. Pl. 107.

3. Mitford Eq. Pl., c. 1, pt. 4.

4. See article TRUSTS AND TRUSTEES.

5. See article NUISANCES; and article INJUNCTIONS, *post*, p. 869.

**To Protect the Great Ponds.** — In *Atty.-Gen. v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, in speaking of what "perhaps" \* \* \* belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances," the court said: "The great ponds of the commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Atty.-Gen. v. Woods*, 108 Mass. 436; *Com. v. Vincent*, 108 Mass. 441. If a corporation or an individual is found to be doing acts without right the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney-general to restrain and prevent the mischief."

6. "Sometimes, too, informations have been exhibited by the attorney-general on the behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown, though the cases in which a bill is not the proper mode of obtaining relief, if such cases there be, are not to be clearly collected from the books." Cooper Eq. Pl. 104; *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 24. See *Thompson v. Thompson*, 6 Houst. (Del.) 225; *Norcom v. Rogers*, 16 N. J. Eq. 484. And see *post*, article INSANE PERSONS.

7. *Atty.-Gen. v. Detroit*, 71 Mich. 92,

in suits to cancel land patents,<sup>1</sup> and in one instance to foreclose a mortgage given to the government,<sup>2</sup> and in another instance to enforce rights reserved to the state in its deed of land.<sup>3</sup> The cases touching the right to file an information to prevent an alleged usurpation of powers by a corporation, or the misapplication of corporate funds not held to charitable uses, present questions relating rather to equitable jurisdiction than to the proper form of proceeding.<sup>4</sup>

**III. REQUISITES OF INFORMATIONS — 1. By What Authority and in What Name Filed — By Attorney-General.** — The proper person to institute proceedings by information is usually the attorney-general,<sup>5</sup>

a suit to restrain the defendant city from discontinuing a public market. See also *Hesing v. Atty.-Gen.*, 104 Ill. 292.

**1. Actions to Cancel Land Patents.** — In *California* it seems that actions to cancel land patents are instituted by information in the name of the state upon relation of the attorney-general. *People v. Center*, 66 Cal. 551; *People v. Stratton*, 25 Cal. 242; *People v. Jacob*, (Cal. 1886) 12 Pac. Rep. 222. Or in the name of the state upon the relation of the real parties in interest under an authorization of the attorney-general. *People v. Clark*, 72 Cal. 289.

In the federal courts the approved method of proceeding to set aside a patent for land granted by the United States is by ordinary bill in equity by and in the name of the United States. *U. S. v. Hughes*, 11 How. (U. S.) 552; *U. S. v. Stone*, 2 Wall. (U. S.) 525; *Mullan v. U. S.*, 118 U. S. 271; *Williams v. U. S.*, 138 U. S. 514; *U. S. v. Beebe*, 127 U. S. 338; *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307. See *U. S. v. Throckmorton*, 98 U. S. 61; *U. S. v. Minor*, 114 U. S. 233; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *U. S. v. Marshall Silver Min. Co.*, 129 U. S. 579; *Moffat v. U. S.*, 112 U. S. 24; *U. S. v. Trinidad Coal, etc., Co.*, 137 U. S. 160; *U. S. v. Gunning*, 18 Fed. Rep. 511. But where the proceeding was by information which was in substance a bill in equity, the court, though holding that a simple bill in equity would have been better, refused to dismiss for want of form. *U. S. v. Hughes*, 11 How. (U. S.) 552.

See generally article LAND PATENTS.

**2. *Benton v. Woolsey***, 12 Pet. (U. S.) 27.

**3. *Atty.-Gen. v. Williams***, 140 Mass. 329. See also *Atty.-Gen. v. Gardiner*, 117 Mass. 492.

**4.** See *Parker v. May*, 5 Cush. (Mass.) 340; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *Atty.-Gen. v. Detroit*, 26 Mich. 263; *Atty.-Gen. v. Moliter*, 26 Mich. 444; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *People v. Clark*, 53 Barb. (N. Y.) 171; *People v. Ingersoll*, 58 N. Y. 1; *People v. Brooklyn, etc., R. Co.*, 89 N. Y. 75; *People v. Ballard*, 134 N. Y. 269; *People v. Miner*, 2 Lans. (N. Y.) 396; *State v. Marion County*, 85 Ind. 489; *State v. Farmers' L. & T. Co.*, 81 Tex. 530; *U. S. v. Union Pac. R. Co.*, 98 U. S. 596.

**5.** In *Hunt v. Chicago, etc., R. Co.*, 20 Ill. App. 282, the court said: "One of the points raised on demurrer, and now presented for our consideration, is whether the attorney-general is authorized by law to prosecute this information. The counsel for the defendant in error, in maintaining the negative of this question, urges that the office of attorney-general, as it exists in this state, is a mere creature of the Constitution, and that all the powers and duties pertaining to the office are those expressly conferred by that instrument and the statutes passed in pursuance thereof. On the other hand it is contended that the attorney-general is an officer known to the common law, and exercising and performing various common-law powers and duties beyond those expressly prescribed by statute, among which is the power to prosecute informations and bills in chancery on behalf of the state, to prevent or abate purprestures and public nuisances. \* \* \* In England the office of attorney-general has existed from a very early period, and has been vested by the common law with a great variety of duties in the administration of government. The attorney-general was



and in whatever form the information is brought it should show upon its face in no uncertain manner that it is instituted and prosecuted by the proper law officer of the state.<sup>1</sup>

the law officer of the crown, and its only legal representative in the courts.

\* \* \* Upon the organization of governments in this country most if not all of the commonwealths which derive their system of jurisprudence from England adopted the office of attorney-general as it existed in England, as a part of the machinery of their respective governments. The prerogatives which pertain to the crown in England are here vested in the people, and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties by proper proceedings in the courts of justice is just as imperative here as there. The duties of such an office are so numerous and varied that it has not been the policy of the legislature to attempt the difficult task of enumerating them exhaustively, but they have ordinarily been content, after expressly defining such as they have deemed the most important, to leave the residue as they exist at common law, so far as applicable to our jurisprudence and system of government. \* \* \*

There is nothing in our present constitution or statutes which necessitates, in our opinion; a construction which would exclude the attorney-general from the exercise of common-law powers in addition to those conferred by the statute. \* \* \*

In other states it has been frequently held that where the duties of the attorney-general are prescribed by statute there are still common-law powers incident to the office which are not derived from statute. It is so held in *Parker v. May*, 5 Cush. (Mass.) 336, in relation to the power to institute a proceeding for the enforcement of a public charity. In *People v. Miner*, 2 Lans. (N. Y.) 396, it was held that the attorney-general has the powers belonging to that office at common law, and such additional powers as the legislature has conferred upon him." The case from which the foregoing quotation is taken was affirmed on appeal as to the power of the attorney-general, and the reasoning of the court expressly adopted in *Hunt v. Chicago Horse, etc., R. Co.*, 121 Ill. 638. See also *People v. Tweed*, 13 Abb. Pr. N.

S. (N. Y. Supreme Ct., 25; *People v. Vanderbilt*, 26 N. Y. 287; Atty.-Gen. v. *Moliter*, 26 Mich. 444; Atty.-Gen. v. *Detroit*, 26 Mich. 263; *Burbank v. Burbank*, 152 Mass. 254; U. S. v. *San Jacinto Tin Co.*, 125 U. S. 273; U. S. v. *Throckmorton*, 98 U. S. 61. And see the title *Attorney-General*, Am. and Eng. Encyc. of Law (2d ed.), vol. 3, p. 475.

**County Attorney.**—In *State v. Paris R. Co.*, 55 Tex. 76 it was held that suit can be instituted on behalf of the state only by the attorney-general or by his direction; and that a county attorney as such had no authority to institute a suit in the name of the state to enjoin the defendant from obstructing a public street.

After the abolition of the office of attorney-general in Massachusetts by the Act of 1843, and before its restoration in 1849, it was held that most of his duties vested in the district attorneys as the local prosecutors, and that a county attorney had authority to file a bill to establish and carry into effect a public charity. The opinion was expressed that the filing of an information in equity was "a power incident to the office of public prosecutor for the time being, whether an attorney-general or solicitor-general," etc.

**By Solicitor-General** when the attorney-general is under a disability to prosecute. See *U. S. v. American Bell Telephone Co.*, 128 U. S. 315.

1. *State v. Lord*, 28 Oregon 529, where the court said: "If permissible at all to bring the suit in the name of the state alone, the complaint or information should show upon its face that the appropriate law officer brings the same for or in behalf of the state. The proceeding in either form would fix the responsibility for the maintenance thereof upon that officer, and it is not believed that the mere affixing of his signature in his official capacity to a complaint or bill shown to be the bill of a private relator is sufficient to impress it with the functions and capacity of an information." See also *State v. Paris R. Co.*, 55 Tex. 76; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *U. S. v. Doughty*, 7 Blatchf. (U. S.) 424; *U. S. v. McAvoy*, 4 Blatchf.

**In What Name Filed.**—The most common form of instituting proceedings by information, it seems, has been in the name of the

(U. S.) 418; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *U. S. v. Throckmorton*, 98 U. S. 61; *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. (U. S.) 518; *Mowry v. Whitney*, 14 Wall. (U. S.) 434; *Western Pac. R. Co. v. U. S.*, 108 U. S. 510. And as to bills in equity in the name of the government, see article **BILLS IN EQUITY**, vol. 3, p. 335.

But in *Commissioners of Public Buildings v. Andrews*, 10 Rich. Eq. (S. Car.) 4, the formal consent of the attorney-general was indorsed upon the bill of the plaintiffs under his own signature, and it was held to be sufficient, especially after the defendant had pleaded to the merits.

In *Atty.-Gen. v. Rumford Chemical Works*, 32 Fed. Rep. 608, an information was filed to repeal letters patent for an invention. In the title the plaintiff was styled "The Attorney-General, upon the relation of George V. Hecker." In the stating part of the bill, "Informing, sheweth unto your honors George H. Williams, as he is attorney-general of the United States of America." The prayer was: "Your informant prays this honorable court to adjudge and decree." The subpoena required the defendants "to appear and answer the bill of complaint of George H. Williams, the attorney-general of the United States." The bill was signed by George H. Williams, attorney-general of the United States, by John A. Gardner, attorney of the United States in and for the District of Rhode Island. A demurrer was sustained and the information dismissed because the United States was not a party to the record. The court said: "It is perfectly clear that 'the attorney-general of the United States, as he is attorney-general,' has no authority as such, and in his own name, to file an information or commence proceedings by bill in equity. It is undoubtedly in the power of Congress to confer upon any public officer the authority to commence suits in his own name on behalf of the United States. \* \* \* No such authority to institute suits in his own name has been conferred by statute upon the attorney-general. In the absence of any such authority the information (if the court has jurisdiction to entertain it) should be in the

name of the United States, in the district in which the information is filed, 'in the name and behalf of the United States.' \* \* \* 'This court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff, by the district attorney of this district.' *U. S. v. Doughty*, 7 Blatchf. (U. S.) 425. \* \* \* In *Benton v. Woolsey*, 12 Pet. (U. S.) 27, where no objection was made to an information filed by the district attorney 'in behalf of the United States,' the court thought, in the absence of any objection, 'the United States may be considered the real party, though in form it is the information and complaint of the district attorney.' The usual and proper mode is for the district attorney to file an information in the name and in behalf of the United States, and probably only in that form could one be sustained, if objected to."

**Objection for Informality.**—In *Kenny v. Consumers' Gas Co.*, 142 Mass. 417, the suit, which was in its essential character an information and bill to restrain a municipal corporation from digging up a public street, was brought in the name of the attorney-general upon relation of a property owner, not on behalf of the commonwealth. The defendant filed a general demurrer without specifying any objections for informality, and the case was reserved for the consideration of the full court. Although the informality was alluded to by the court, the information was considered and dismissed upon its merits.

In *Commissioners of Public Buildings v. Andrews*, 10 Rich. Eq. (S. Car.) 4, a board of commissioners who were entitled by law to receive certain fines filed a bill in their individual names to subject certain real estate to the satisfaction of the fines, instead of proceeding in the name of the attorney-general on their relation. The court intimated that the plaintiffs, having a right to give a receipt and discharge for the fines, could properly maintain the suit, but without deciding that point it was held that the irregularity in bringing the suit should have been taken advantage of by plea in abatement, and that it was too late to object after pleading to the merits.

attorney-general on behalf of the state.<sup>1</sup> Less frequently they are brought in the name of the state upon the relation of the attorney-general.<sup>2</sup>

**2. With or Without a Relator.** — Where the suit immediately concerns the rights of the state alone the attorney-general usually proceeds purely by way of information, and without a relator.<sup>3</sup> When the suit does not immediately concern the rights of the state the attorney-general commonly depends on the relation of some person whose name is inserted in the information, and who is termed the relator<sup>4</sup> and is responsible for

1. *State v. Lord*, 28 Oregon 529. See *Hunt v. Chicago Horse, etc.*, R. Co., 121 Ill. 638; *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136.

See the numerous citations in this article wherein "Atty.-Gen." appears in the title of the case.

2. *State v. Lord*, 28 Oregon 529.

In *State v. Cunningham*, 81 Wis. 487, the suit was brought in the name of the state upon the relation of the attorney-general. See also *People v. Stratton*, 25 Cal. 242; *People v. Beaudry*, 91 Cal. 213, and cases there cited; *State v. Dayton, etc.*, R. Co., 36 Ohio St. 434; *U. S. v. Pittsburgh, etc.*, R. Co., 26 Fed. Rep. 113.

In *State v. Cunningham*, 82 Wis. 39, the action was brought in the name of the state by the attorney-general upon the relation of a citizen and taxpayer.

3. *Cooper Eq. Pl.* 101, 102; *State v. Shively*, 10 Oregon 267; *Atty.-Gen. v. Delaware, etc.*, R. Co., 27 N. J. Eq. 1, a suit to enjoin a purpresture and public nuisance, where the court said: "While in practice it is usual to name a relator, and the contrary course may tend to oppression, since, if there is no relator, the defendant can recover no costs, still in matters of purely public concern, as where the property of the state, owned by it in its political capacity, or where public rights in which no merely private interest is involved, are in question, the courts are open to the state without requiring security for costs." See also *Atty.-Gen. v. Williams*, 140 Mass. 329; *Kenney v. Consumers' Gas Co.*, 142 Mass. 421.

**By Statute** in *New York* the attorney-general is authorized in certain cases to maintain an action in the name of the people without a relator, for the judicial supervision of a business corporation, its officers, and members. See *People v. Ballard*, 134 N. Y. 269.

In *Tennessee* the attorney-general

was authorized by statute to file a bill in equity to declare the forfeiture of a charter of incorporation. See *State v. White's Creek Turnpike Co.*, 3 Tenn. Ch. 163.

4. *Story Eq. Pl.*, § 8; *State v. Shively*, 10 Oregon 267; *Atty.-Gen. v. Parker*, 126 Mass. 221; *State v. Dayton, etc.*, R. Co., 36 Ohio St. 434.

**Who May Be Relators.** — Informations may be brought on the relation of public corporations. See *Atty.-Gen. v. Tarr*, 148 Mass. 309; *Atty.-Gen. v. Cambridge*, 16 Gray (Mass.) 247; *Atty.-Gen. v. Butler*, 123 Mass. 304; *Atty.-Gen. v. Parker*, 126 Mass. 216; *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89. Or public boards. See *Bay State Brick Co. v. Foster*, 115 Mass. 431; *Atty.-Gen. v. Williams*, 140 Mass. 329; *District Atty. v. Lynn, etc.*, R. Co., 16 Gray (Mass.) 242; *Atty.-Gen. v. Woods*, 108 Mass. 436; *Atty.-Gen. v. Boston, etc.*, R. Co., 118 Mass. 345. Or private corporations. *Atty.-Gen. v. Merrimack Mfg. Co.*, 14 Gray (Mass.) 586; *Atty.-Gen. v. Clergy Soc.*, 8 Rich. Eq. (S. Car.) 190. Or private citizens. *State v. Dayton, etc.*, R. Co., 36 Ohio St. 434, an action instituted by the attorney-general, in the name of the state, to enjoin the defendant from obstructing a public road, where it was objected that the petition described the relators as citizens and trustees of a township, and that as such trustees they had no authority to act as relators. But the court said: "This may be conceded; but they were also citizens, and as such were competent relators. Moreover, as already remarked, it was competent for the attorney-general to institute the suit without a relator." See also *Hunt v. Chicago, etc.*, R. Co., 20 Ill. App. 282; *People v. Beaudry*, 91 Cal. 213; *State v. Cunningham*, 81 Wis. 440; *Atty.-Gen. v. Boston Wharf Co.*, 12 Gray (Mass.) 553.

costs.<sup>1</sup> But a relator is not in any case indispensable,<sup>2</sup> except, it seems, in informations on behalf of idiots and lunatics;<sup>3</sup> nor

**Charity Informations.** — In *Atty.-Gen. v. Ashburnham*, 1 Sim. & S. 394, it was said that before the passage of the Act of 59 Geo. III., c. 91, authorizing the attorney-general to file charity informations without a relator, "it was the settled practice of this court that the attorney-general could not proceed in an information respecting a charity without naming a relator, who might be answerable in costs to the defendants."

**Appeal Without a Relator.** — In *Atty.-Gen. v. Hane*, 50 Mich. 447, an information to abate a mill-dam as injurious to public health was filed by the attorney-general without a relator. The attorney-general appealed from a decree dismissing the bill on a plea to the jurisdiction. Upon dismissing the appeal the court said: "The case has proceeded without any relator responsible for costs, and no security has been given on appeal, and no one appears here to represent the state. We are not aware of any precedent for this practice. So far as we know, no case in equity can be appealed to this court without some one on the record to be responsible to the other party for the costs."

**Effect of Death of Relator.** — "Where, however, the suit is merely an information, the proceedings do not abate by the death of the relator; they can only abate by the death or determination of interest of the defendant. If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the suit is not abated, but the court will not permit any further proceedings till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly, otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed. Where, however, a relator dies, the application for leave to name a new relator must be made by the attorney-general, and not by the defendant, otherwise the defendant might choose his own prosecutor." 1 Daniell Ch. Pr. (1st Am. ed.) 17.

1. *State v. Shively*, 10 Oregon 267.

**The Main Object of Having a Relator** is to secure to the defendant the costs of the information if it should turn out that the information was improperly filed. *Atty.-Gen. v. Vivian*, 1 Russ. 236.

"They are important to the proceedings merely that there may be somebody responsible for costs in case it should appear that the information is unfounded." *Atty.-Gen. v. Parker*, 126 Mass. 221.

"If an information is brought in cases where the principal interest involved is a private one, the introduction of a relator is proper in order that he may be liable for costs." *Kenney v. Consumers' Gas Co.*, 142 Mass. 420.

"The propriety of naming a relator for this purpose, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot in a cause in the Exchequer. *Atty.-Gen. v. Fox* [not reported]. In that cause no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute." Mitford, Eq. Pl. (Tyler's ed.), p. 119, note 2.

2. *State v. Cunningham*, 81 Wis. 489; *People v. Stratton*, 25 Cal. 242; *People v. Ballard*, 134 N. Y. 277; *State v. Dayton*, etc., R. Co., 36 Ohio St. 434. See also *District Atty. v. Lynn*, etc., R. Co., 16 Gray (Mass.) 242; *Atty.-Gen. v. Williamson*, 60 L. T. 930; and cases cited in the preceding note.

"There is no doubt that, though a relator is commonly required for the purpose of securing costs, the attorney-general may, if he pleases, proceed without a relator." *Matter of Bedford Charity*, 2 Swanst. 520.

In *Atty.-Gen. v. Detroit*, 71 Mich. 92, the attorney-general filed his information in the nature of a bill in equity to restrain the city of Detroit from discontinuing a public market in that city, and the proceeding was sustained, though it seems that there was no relator.

3. "With respect to informations on behalf of idiots and lunatics, it seems that it is not only necessary that the lunatic should be a party, but it is also requisite that there should be a relator who may be responsible to the defendant for the costs of the suit." 1 Daniell

is it necessary for relators to have any interest in the subject of the suit <sup>1</sup> unless they seek relief for themselves.<sup>2</sup>

**IV. SIGNATURE TO INFORMATION.**—An Information must be signed by the attorney-general or other proper officer before the same can be filed.<sup>3</sup>

An Information and Bill is also signed by him as well as by counsel for the relator whose interest it subserves.<sup>4</sup>

**V. AMENDED, SUPPLEMENTAL, AND CROSS INFORMATIONS**—1. **Amendment of Information.**—Informations may be amended like ordinary bills in equity.<sup>5</sup> An information may be amended by converting it into a technical bill in equity,<sup>6</sup> and in a proper case a bill may be amended by adding the attorney-general as a party and converting it into an information and bill, or an information only.<sup>7</sup>

Ch. Pr. (1st Am. ed.), 17, citing *Atty.-Gen. v. Tyler*, 2 Eden 230, Dick. 378, where it appears that the lunatic had been made the relator, but that on a motion being made that a responsible relator should be appointed, Lord Nottingham directed that all further proceedings in the cause should be suspended until a proper person should be named as relator in his stead. See also *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 33.

1. *State v. Cunningham*, 81 Wis. 489, 82 Wis. 39; *Atty.-Gen. v. Vivian*, 1 Russ. 236, where Lord Gifford, M. R., said: "In *Atty.-Gen. v. Bucknall*, 2 Atk. 328, Lord Hardwicke says: 'It is not absolutely necessary that relators, in an information for a charity, should be the persons principally interested, for the court will take care, at the hearing, to decree in such a manner as will best answer the purposes of the charity; and therefore any persons, though the most remote in the contemplation of the charity, may be relators in these cases.' But I do not apprehend that it ever has been required of a relator to show that he has any interest in the relief sought."

2. See *supra*, I. 2. *Information and Bill*.

3. *Cooper Eq. Pl.* 104; *Atty.-Gen. v. Fellows*, 1 Jac. & W. 254. See *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273; *U. S. v. Throckmorton*, 98 U. S. 61; *Mullan v. U. S.*, 118 U. S. 271; *U. S. v. American Bell Telephone Co.*, 128 U. S. 315; *U. S. v. Beebe*, 127 U. S. 338; *Atty.-Gen. v. Rumford Chemical Works*, 32 Fed. Rep. 608; *U. S. v. Doughty*, 7 Blatchf. (U. S.) 424; *State v.*

*Lord*, 28 Oregon 528; and article **BILLS IN EQUITY**, vol. 3, p. 335.

4. See *Atty.-Gen. v. Paterson, etc.*, R. Co., 9 N. J. Eq. 536; *People v. North San Francisco Homestead, etc.*, Assoc., 38 Cal. 565; *People v. Clark*, 72 Cal. 289.

5. See 1 Daniell Ch. Pr. (6th Am. ed.), 415, 422; and, generally, article **BILLS IN EQUITY**, vol. 3, p. 335.

**Signature to Amendment.**—If an amended information is filed without the signature of the attorney-general, the court will order it to be taken off the file. *Atty.-Gen. v. Fellows*, 1 Jac. & W. 254.

6. *Thompson v. Thompson*, 6 Houst. (Del.) 225, where it was held that where an information was filed in the name of the attorney-general on the relation of a person to set aside a deed made to two of his children, on the alleged ground of imbecility and undue influence, the chancellor would refuse to hear the case in that form, but that he might, in his discretion, give leave to amend the information by converting it into a bill of complaint and filing it on behalf of such person in the name of his next friend.

7. *Saint Mary Magdalen College v. Sibthorp*, 1 Russ. 154; *Atty.-Gen. v. Dublin*, 38 N. H. 459. See also *Orford Union Congregational Soc. v. West Congregational Soc.*, 55 N. H. 463.

**Contra, Where Plaintiff Is Without Right.**—In *Davis v. New York*, 14 N. Y. 507, the plaintiff filed a bill to enjoin the defendant from constructing a railroad on a public highway, alleged to constitute a public nuisance, specially injurious to the plaintiff. At the trial, after all the evidence was given, the court

**2. Supplemental Information.** — There seems to be no reason why a supplemental information may not be filed where the circumstances would make a supplemental bill an appropriate pleading if the suit had been instituted by an ordinary bill in equity.<sup>1</sup>

**3. Cross Information.** — No legal proceedings regarding a public charity are binding upon the state unless the attorney-general is made a party thereto,<sup>2</sup> and where he is made a defendant he may file a cross-information or cross-bill touching the matter in the original bill if he seeks affirmative relief not obtainable by answer.<sup>3</sup>

**VI. CONDUCT OF CAUSE — 1. By Attorney-General.** — An information is exclusively the suit of the official agent, and must be prosecuted by his sanction and be guided and controlled by his judgment;<sup>4</sup> he is not required to act personally as counsel, but like every other party in a civil suit, he may appear and act by his attorney and counsel.<sup>5</sup>

held that the plaintiff had suffered no special injury and consequently could not maintain the action, but granted an order substituting the attorney-general as a party plaintiff, and then gave judgment for the relief prayed. The Court of Appeals reversed the judgment on the ground that the amendment was unauthorized alike by the Code of Procedure and the former practice in chancery.

1. A supplemental bill was filed in *Hunt v. Chicago, etc.*, R. Co., 20 Ill. App. 282.

2. *Burbank v. Burbank*, 152 Mass. 254. See also *Atty.-Gen. v. Newberry Library*, 150 Ill. 229; *Newberry v. Blatchford*, 106 Ill. 584; *Harvard College v. Theological Education Soc.* 3, Gray (Mass.) 280; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Orford Union Congregational Soc. v. West Congregational Soc.*, 55 N. H. 463. And see *Chamberlain v. Stearns*, 111 Mass. 267; *Theological Education Soc. v. Atty.-Gen.*, 135 Mass. 285; *Darcy v. Kelley*, 153 Mass. 433.

**As to Suits Involving Charitable Trusts,** see article TRUSTS AND TRUSTEES.

3. *Newberry v. Blatchford*, 106 Ill. 584, holding, however, that he cannot be permitted to file a cross-bill seeking no affirmative relief different from that sought in the original bill.

In *Stevens v. Stevens*, 24 N. J. Eq. 82, the attorney-general filed a cross-information for the construction of a will containing charitable bequests. See, generally, article CROSS-BILLS, vol. 5, p. 624.

4. *Atty.-Gen. v. Moliter*, 26 Mich.

450; *Parker v. May*, 5 Cush. (Mass.) 337; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273.

**The Attorney-General Has the Entire Control of the Proceedings,** and "he may interfere at any moment, and see that the cause is conducted by some one he has confidence in." *Atty.-Gen. v. Haberdashers' Co.*, 15 Beav. 402.

And in *Atty.-Gen. v. Ironmongers' Co.*, 2 Beav. 328, it was said that "the suit was so entirely under the control of the attorney-general that he might desire the court to dismiss the information, and that if he stated that he did not sanction any proceeding it would be instantly stopped;" and again, that "the suit is the suit of the attorney-general, and if he should desire the information to be dismissed, the court must dismiss it accordingly."

In *Hesing v. Atty.-Gen.*, 104 Ill. 292, the attorney-general withdrew his name from the information and asked that the suit be dismissed, and it was held that the relator could not prevent its dismissal.

5. *Parker v. May*, 5 Cush. (Mass.) 338. See also *Com. v. Boston, etc.*, R. Co., 3 Cush. (Mass.) 25.

In *State v. Anderson*, 29 La. Ann. 775, a criminal case, the court said: "It is not uncommon for the district attorney or the attorney-general to be assisted by other counsel; and if an assistant may appear, he may lead, or conduct the trial alone, by the permission of the district attorney or attorney-general."

**Employment of Counsel Regulated by Statute.** — In *New York* it was held that

**2. By Relator.** — Although in reality the relator sustains and directs the suit and is considered responsible to the court and the parties for the propriety of the suit and the conduct of it,<sup>1</sup> yet where the proceeding is by information purely the relator is not considered a party to the suit,<sup>2</sup> and he cannot of his own motion, or in his own name, take any step in the cause,<sup>3</sup> nor be heard as a party by counsel or in person.<sup>4</sup> But the attorney-general may allow the relator to conduct the case and be heard by counsel, who are then considered, however, as appearing for and on behalf of the attorney-general;<sup>5</sup> and the latter cannot be heard in argument to support views not in accordance with those

in view of the statutes regulating the employment of special counsel by the attorney-general, such authority could not be deemed to be vested in him as incident to his office. Hence, where the attorney-general appeared by special counsel at the trial of a case in which the statute gave him no authority to employ counsel, and the defendants objected, the court directed the case to stand over until the attorney-general or one of his lawfully authorized deputies should appear on behalf of the state. *People v. Metropolitan Telephone, etc., Co.*, 11 Abb. N. Cas. (N. Y. Supreme Ct.) 304. See also *Atty.-Gen. v. Continental L. Ins. Co.*, 88 N. Y. 572.

**Attorney-General Appearing for Defendants.** — In *Parker v. May*, 5 Cush. (Mass.) 337, Shaw, C. J., said: "Courts of equity have also suggested, and the suggestion is certainly entitled to great weight, upon the most obvious considerations of fairness and propriety, that the attorney-general or public prosecutor ought not to appear as counsel for adverse parties in such a suit."

In *Atty.-Gen. v. Ironmongers' Co.*, 2 Beav. 329, the Master of the Rolls said that "the attorney-general ought not to be allowed to appear for any other party than the informant," quoting from a note to *Atty.-Gen. v. Galway*, 1 Moll. 95, where that point was discussed. Compare *Shore v. Atty.-Gen.*, 9 Cl. & F. 355, where it was held that the attorney-general may appear as counsel for defendants to an information filed by relators in his name.

1. *Mitford Eq. Pl.*, c. 1, pt. 4; *Cooper Eq. Pl.* 104; *People v. Stratton*, 25 Cal. 242; *Atty.-Gen. v. Parker*, 126 Mass. 221.

2. *Atty.-Gen. v. Parker*, 126 Mass. 221, where the court, after defining an "information and bill" (see *supra*, I. 2. *Information and Bill*), said: "Unless

the bill of the person thus interested is incorporated with the information, he is not a party to the suit;" *Parker v. May*, 5 Cush. (Mass.) 337; *Atty.-Gen. v. Rumford Chemical Works*, 32 Fed. Rep. 608; *Hesing v. Atty.-Gen.*, 104 Ill. 292; *Atty.-Gen. v. Moliter*, 26 Mich. 444.

The Relator Cannot Appeal from a decree dismissing the suit at the instance of the attorney-general. *Hesing v. Atty.-Gen.*, 104 Ill. 292.

3. *Parker v. May*, 5 Cush. (Mass.) 337; *Hesing v. Atty.-Gen.*, 104 Ill. 292; *Atty.-Gen. v. Moliter*, 26 Mich. 444. See also, as illustrating the principle, *Burbank v. Burbank*, 152 Mass. 254.

In *Atty.-Gen. v. Wyggeston's Hospital*, 16 Beav. 313, a petition filed in the cause by the relators in the name of the attorney-general was dismissed upon the request of the latter.

**Notice of Motion** given "on behalf of the relator" that the defendant should pay a sum of money into court was held to be irregular in form. *Atty.-Gen. v. Wright*, 3 Beav. 447, where the Master of the Rolls said: "Relators should know that they are not parties to informations, and have no right of their own authority to make any application to the court. The attorney-general is the only person whom the court recognizes in such cases."

4. *Atty.-Gen. v. Parker*, 126 Mass. 221; *Parker v. May*, 5 Cush. (Mass.) 337; *Atty.-Gen. v. Barker*, 4 Myl. & C. 262.

5. *Parker v. May*, 5 Cush. (Mass.) 336; *Atty.-Gen. v. Sherborne Grammar School*, 18 Beav. 264.

In *Atty.-Gen. v. Ironmongers' Co.*, 2 Beav. 328, the Master of the Rolls said that "he could only recognize the counsel for the relator as the counsel for the attorney-general, and could hear them only by his permission."

adduced by the counsel whom he has thus permitted the relators to select and instruct; <sup>1</sup> and where the proceeding is by information and bill instituted by the relator, who is the real party in interest, with the authority of the attorney-general, the latter cannot have the suit dismissed to the prejudice of the relator. <sup>2</sup>

1. *Atty.-Gen. v. Sherborne Grammar School*, 18 Beav. 264, conceding, however, that the attorney-general might stop the information or regulate the mode of conducting it.

2. In *People v. North San Francisco Homestead, etc., Assoc.*, 38 Cal. 564, on motion of the defendant, without notice to the plaintiff, the court entered a decree in favor of the defendant, concluding the rights of the relator, upon a paper signed and filed by the attorney-general which purported to direct and authorize a decree for the defendant, so far as the state, was a party. It was held that the decree should have been set aside on motion of the relator. The court said: "This is an action instituted by Edward Rondel, as relator in the name of the state, by sanction and permission of the attorney-general of the state, for the purpose of procuring the cancellation of, or decree of court nullifying, a patent [for land] issued to defendant. The complaint partakes of the characteristics both of an information and bill. As it appears therefrom that the relator is the real party in interest seeking relief, and that the state has no direct interest in the subject-matter of the suit, or the relief sought, the relator is the real party in interest, and the real plaintiff who has a right to conduct and control the suit, and is responsible for its commencement, conduct, and the costs thereof; and after he has instituted the suit in the name of the people of the state, by permission and consent of the attorney-general, and when it appears, as in this

case, that the relator is the real party in interest seeking relief, and that the state has no direct interest in the event of the suit, the attorney-general, *as such*, has no power to control the conduct of the suit, or withdraw his consent to the use of the name of the people, as plaintiff, to the prejudice of the relator." The foregoing case was followed in *People v. Jacob*, (Cal. 1886) 12 Pac. Rep. 222, and *People v. Clark*, 72 Cal. 289, which were actions for the same purpose, and it was there held that the dismissal of the action on motion of the attorney-general, without the consent of the relator, was erroneous.

But in *U. S. v. San Jacinto Tin Co.*, 125 U. S. 305, Justice Field said: "I cannot admit that the attorney-general can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them."

**Relator Appearing Without Consent.** — In *Atty.-Gen. v. Barker*, 4 Myl. & C. 262, the case is reported as follows: "This was an information and bill, the relator and plaintiff being Charles Hand. The cause now coming on to be heard, the relator and plaintiff appeared in person to argue the case. The Lord Chancellor said he could not hear the relator in person, on behalf of the attorney-general, and he could not separate the information from the bill, so as to hear him as the plaintiff in the bill."



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BY B. A. MILBURN.

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## CROSS-REFERENCES.

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**1. DEFINITIONS — 1. In General.** — A writ of injunction is a judicial process whereby a party is required to do or refrain from doing a particular thing, and the most common sort is that which operates as a restraint upon him in the exercise of his real or supposed rights.<sup>1</sup>

1. *Gaines v. Hale*, 26 Ark. 168; *Ex p. Jones*, 2 Ark. 93, wherein it is said that it is a judicial writ issued out of a court of chancery for the purpose of staying waste or oppressive and unjust judgments at law; *Wangelin v. Goe*, 50 Ill. 459; *Boyd v. State*, 19 Neb. 128; *Norris v. Cobb*, 8 Rich. L. (S. Car.) 58; *Pelzer v. Hughes*, 27 S. Car. 408, *per McGowan, J.*

It is a writ issuing by the order and under the seal of a court of equity. *Per Smith, J.*, in *Ex p. Batesville*, etc., R. Co., 39 Ark. 82, *citing* 1 Eden Inj. 1. See also, to the same effect, *Ex p. Kennedy*, 11 Ark. 598, *per Johnson, C. J.*

In Louisiana an injunction has been

defined as a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction. *McDonogh v. Calloway*, 7 Rob. (La.) 442, *per Garland, J.*

**A Judicial Process.** — A writ of injunction is "a judicial process." *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379, *quoting* Story Eq. Jur., § 861. It has also been styled an extraordinary process. *Jackson v. Millspaugh*, 100 Ala. 285.

**Order of Stay.** — A simple order of the court staying proceedings in an action pending before it is not an injunction. *Avery v. Superior Ct.*, 57 Cal. 247, *citing* *Rhodes v. Craig*, 21 Cal. 419.

**Scope of Remedy.** — "This remedy ex-



**As Prerogative Writ.** — The writ of injunction is not in itself a prerogative writ, but it is sometimes put to prerogative purposes, *e. g.*, when it is sued out in behalf of the sovereign or state in aid of the jurisdiction to enforce trusts and prevent public nuisances or to enjoin the abuse of trust powers.<sup>1</sup>

**By the Codes** of some of the states the writ of injunction has been abolished and an injunction is merely an order rather than a writ.<sup>2</sup>

**2. Common and Special Injunctions.** — In *England* common injunctions are those which issue of course, and special injunctions are such as are issued only on due notice and are founded

tends to all acts that are contrary to law and prejudicial to the interests of the community and for which there is no adequate remedy at law." *Kerr v. Trego*, 47 Pa. St. 292, *quoted in* *Atty.-Gen. v. Chicago, etc.*, R. Co., 35 Wis. 425.

**The Protection of Property** is one of the offices of an injunction, among others. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146. See also *Batten v. Silliman*, 3 Wall. Jr. (C. C.) 124, wherein it is said that an injunction is used for preventing mischief.

1. *State v. Lord*, 28 Oregon 498, wherein *Wolverton, J.*, said: "Whether appropriately denominated 'prerogative' in the states of the Union, it differs but little; they emanate from a like high source, pertaining to sovereignty, and are adapted to like uses and purposes. But wherever it is necessary to prevent the abuse of trust powers and the misapplication of trust or public funds, the equitable remedy is likewise appropriate and likewise emanates from the like high source, and is attended with equivalent attributes of power." See also *State v. County Ct.*, 51 Mo. 350, and *People v. Ingersoll*, 58 N. Y. 1, in which latter case *Allen, J.*, said: "It is well settled in England that in right of the prerogative of the Crown the attorney-general, in his name of office, may proceed, either by information or by bill in equity, \* \* \* to prevent the misappropriation or misapplication of funds or property raised or held for public use."

**In Wisconsin**, by reason of a provision in the constitution, it has been held that injunction is a *quasi* prerogative writ, whenever a question arises appropriate to its use. *State v. Cunningham*, 81 Wis. 440; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400; *Atty.-Gen. v. Chicago, etc.*, R. Co., 35 Wis. 425.

**Not a Proclamation.** — A writ of in-

junction does not partake of the nature or character of a proclamation, as, ordinarily, courts have to do officially only with parties to suits and legal proceedings before them, while the executive and legislative departments have official relations with the body of the people. *Boyd v. State*, 19 Neb. 128, *per* *Cobb, J.*

**2. California.** — *Hicks v. Michael*, 15 Cal. 107.

**Kansas.** — The injunction provided by the code "is a command to refrain from a particular act. It may be the final judgment in an action, or it may be allowed as a provisional remedy, and when so allowed it shall be by order." *Andrews v. Love*, 46 Kan. 264; *Alma v. Loehr*, 42 Kan. 368.

**Montana.** — *Fabian v. Collins*, 2 Mont. 510.

**Nebraska.** — *Boyd v. State*, 19 Neb. 128, wherein it is said that the writ has been abolished and that the injunction provided for by statute is "a command to refrain from a particular act."

**New York.** — *Coddington v. Webb*, 4 Sandf. (N. Y.) 639; *Methodist Churches v. Barker*, 18 N. Y. 463; *Hutchinson v. New York Cent. Mills*, 2 Abb. Pr. (N. Y. Supreme Ct.) 394; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Fellows v. Heermans*, 13 Abb. Pr. N. S. (N. Y. Ct. App.) 1.

**South Carolina.** — *Ellis v. Commander*, 1 Strobb. Eq. (S. Car.) 188.

**Distinction Disregarded in Practice.** — In *Ellis v. Commander*, 1 Strobb. Eq. (S. Car.) 188, *Chancellor Caldwell* said: "The distinction between the writ of injunction, strictly so called, and an order in the nature of an injunction, has been disregarded in practice, and such orders, although not enforced by writ of injunction, have long since indiscriminately obtained the name of injunctions." See also, *infra* XIII. *Frame of the Injunction.*

on the circumstances of each case as they arise.<sup>1</sup> In the *United States* it would seem that the distinction between common and special injunctions does not exist; certainly it does not in the United States courts, as all injunctions issued by these courts are special injunctions.<sup>2</sup>

**3. Preliminary Injunctions.** — A preliminary injunction or, as it is sometimes called, injunction *pendente lite*, is a provisional remedy granted before the hearing on the merits for the purpose of preventing the perpetration of wrong, or the doing of any act whereby the rights in controversy may be materially injured or endangered before the final decree, and its purpose is to preserve the subject of controversy until an opportunity is afforded for a full and deliberate investigation.<sup>3</sup>

**4. Restraining Orders.** — A restraining order is distinguishable from an injunction in that a restraining order is intended only as

1. *Per* McAllister, J., in *Lawrence v. Bowman*, 1 McAll. (U. S.) 419. See also *Marvel v. Ortlip*, 3 Del. Ch. 9.

A common injunction is one which issues before answer by an order of course. *Per* Vice-Chancellor Sandford, in *Selden v. Vermilya*, 4 Sandf. Ch. (N. Y.) 573.

In *Buckley v. Corse*, 1 N. J. Eq. 504, Chancellor Vroom said: "In the English books a distinction is made between common and special injunctions. When an injunction issues for a default of the defendant, either in appearing or answering, it is called a common injunction. Special injunctions are such as are granted only upon special application to the court."

In *Bibb v. Shackelford*, 38 Ala. 611, it is said that special injunctions are contradistinguished from injunctions designed to restrain proceedings in courts of common law which in England are granted upon the defendant's default. *Citing* 3 Dan. Ch. Pl. & Pr. 1811, and 1 Hoffm. Ch. 78. See also *Earth Closet Co. v. Fenner*, 5 Fisher Pat. Cas. 15, wherein it is said that a special injunction is a preliminary injunction; *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135; *Tucker v. Carpenter*, Hempst. (U. S.) 440; *Robinson v. Cathcart*, 2 Cranch (C. C.) 590, wherein Cranch, J., said that the injunction issued for the default of the defendant in not appearing or answering is called a common injunction; and *Norris v. Cobb*, 8 Rich. L. (S. Car.) 58, wherein O'Neill, J., said that a special injunction is one that arises out of special circumstances stated in the bill.

2. *Lawrence v. Bowman*, 1 McAll. (U. S.) 419; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280, in which cases it was declared that all injunctions issued by the United States courts are to be regarded as special rather than as common, and in the latter case stress was laid upon the fact that by an Act of Congress notice is required to be given of the issuance of all injunctions [*citing* *Drewry Inj.* 5, and *Story Eq. Pl.* 177]; *Selden v. Vermilya*, 4 Sandf. Ch. (N. Y.) 573, wherein Vice-Chancellor Sandford said: "We have nothing like the common injunction in our practice."

In *New Jersey* it has been declared by Chancellor Vroom that the distinction is "not of much importance," as all injunctions are granted in that state upon special application. *Buckley v. Corse*, 1 N. J. Eq. 504.

3. *Carleton v. Rugg*, 149 Mass. 550; *Atty.-Gen. v. Paterson*, 9 N. J. Eq. 624; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Arthur v. Case*, 1 Paige (N. Y.) 447; *Osborn v. Taylor*, 5 Paige (N. Y.) 515; *Third Ave. R. Co. v. New York*, 54 N. Y. 159; *Helm v. Gilroy*, 20 Oregon 517; *Pelzer v. Hughes*, 27 S. Car. 408, *per* McGowan, J.; *Andrae v. Redfield*, 12 Blatchf. (U. S.) 407.

**Mesne Process.** — In *Robertson v. Robertson*, 58 Ala. 68, Manning, J., said: "A writ of injunction sued out before and in anticipation of a decree upon the merits is as different from a perpetual injunction awarded after or by such a decree, as a writ of attachment is different from a writ of execution, or as judgment is from mesne process."

a restraint upon the defendant until the propriety of granting a preliminary injunction can be determined, and it does no more than restrain proceedings until such determination.<sup>1</sup>

**5. Mandatory Injunctions.** — As a general rule an injunction is a preventive remedy and is used only to prevent future injury, but it is sometimes used to afford redress for wrongs already committed, by commanding some act to be done or undone, and when the injunction is so used it is styled a mandatory injunction. The jurisdiction of a court of equity to issue such mandatory injunctions, although well established, is rarely exercised.<sup>2</sup>

1. *Hicks v. Michael*, 15 Cal. 107; *Northern Pac. R. Co. v. Spokane*, 52 Fed. Rep. 428; *Fenwick Hall Co. v. Old Saybrook*, 66 Fed. Rep. 389.

The words "injunction" and "restraining order" are substantially synonymous, the first term applying to a formal injunction as known to the common law, and the second term to a simple order restraining the acts complained of, which need not necessarily contain all the formalities required in a writ of injunction. *State v. Lichtenberg*, 4 Wash. 407.

Likewise see *Strickland v. Griffin*, 70 Ga. 541, wherein the court recognizes the distinction between a restraining order and an injunction, and says that a restraining order is granted *instantly* if it appears from the sworn allegations in the bill or the affidavit of a competent person that the injury apprehended will be done if an immediate remedy is not afforded "against the party complained of, until the hearing or the further order of the court; and this restraining order shall have the force of an injunction until rescinded or modified." \* \* \* The law recognizes no such thing as a 'temporary' or 'permanent' injunction; it does recognize a temporary restraining order and consequent thereon an injunction."

See further, as to the nature of a restraining order, the following cases: *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216; *Prader v. Grim*, 13 Cal. 585, wherein it is said that it is designed to give the court an opportunity to act on an application for a temporary injunction and to keep the property in litigation within the power of the court; *College Corner, etc., v. Gravel Road Co. v. Moss*, 77 Ind. 139; *Pleasants v. Vevay, etc., Turnpike Co.*, 42 Ind. 391; *Cincinnati, etc., R. Co. v. Huncheon*, 16 Ind. 436; *State v. Greene*, 48 Neb. 327; *State v. Wakeley*,

28 Neb. 431; *Carnes v. Heimrod*, 45 Neb. 364; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 77; *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 5 Sawy. (U. S.) 121; *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. Rep. 481.

In *Kansas* there is a marked difference between injunctions and restraining orders; as to which see *Code Kan.*, §§ 240, 241, and *In re Mitchell, McCahon* (Kan.) 256.

2. *Gaines v. Hale*, 26 Ark. 168; *Fullton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554; *Smith v. People*, 2 Colo. App. 99; *Cook v. North, etc., R. Co.*, 46 Ga. 618; *Lawrence v. Ingersoll*, 88 Tenn. 52, 17 Am. St. Rep. 870; *McCauley v. Kellogg*, 2 Woods (U. S.) 13.

See further, as to the nature of mandatory injunctions, the following cases: *Blakemore v. Glamorganshire Canal Nav. Co.*, 1 Myl. & K. 154; *East-India Co. v. Vincent*, 2 Atk. 83; *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Durell v. Pritchard*, L. R. 1 Ch. 244; *Hooper v. Brodrick*, 11 Sim. 47; *Anonymous*, 1 Ves. Jr. 140; *Thomas v. Hawkins*, 20 Ga. 126; *Lynch v. Union Sav. Inst.*, 159 Mass. 306; *McDonogh v. Calloway*, 7 Rob. (La.) 442; *State v. King*, 47 La. Ann. 696; *New Orleans, etc., R. Co. v. Mississippi, etc., R. Co.*, 36 La. Ann. 561; *Black v. Good Intent Tow-Boat Co.*, 31 La. Ann. 497; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21; *Lord v. Carbon Iron Mfg. Co.*, 38 N. J. Eq. 452; *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Close v. Fleisher*, 8 Misc. Rep. (N. Y. C. Pl.) 299; *Sproat v. Durland*, 2 Okla. 24; *Woodruff v. Wallace*, 3 Okla. 355; *Troe v. Larson*, 84 Iowa 649; *McCauley v. Kellogg*, 2 Woods (U. S.) 13; *Henderson v. Ogden City R. Co.*, 7 Utah 199.

Likewise see 2 Story Eq. Jur., § 1861, Volume X.

**II. JURISDICTION — 1. Scope of Inquiry.** — The word "jurisdiction" is not used here with reference to the facts which will make a case for the proper exercise of the court's power, as the appropriateness of the remedy is treated under concrete titles throughout this work and in the article *Injunctions*, American and English Encyclopædia of Law. No more is attempted in this subdivision than to give a summary of the general rules, as contained in judicial utterances, as to the court in which a suit for injunction should be instituted.<sup>1</sup>

cited in *Wangelin v. Goe*, 50 Ill. 459, and in *Smith v. People*, 2 Colo. App. 99; *Kerr Inj.* 230, cited in *Close v. Fleisher*, 8 Misc. Rep. (N. Y. C. Pl.) 299, and in *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 166; 3 Dan. Ch. Pr. 343, cited in *Thomas v. Hawkins*, 20 Ga. 126; and 3 Dan. Ch. Pr. 1767, cited in *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379.

**Remedial and Judicial Injunctions Distinguished.** — A mandatory injunction commanding an act to be done is sometimes called a "judicial" writ, because it issues after a decree and is in the nature of an execution to enforce the same; while the ordinary injunction which operates as a restraint upon the party is sometimes called the "remedial" writ of injunction. *Gaines v. Hale*, 26 Ark. 168; *Smith v. People*, 2 Colo. App. 99; *Wangelin v. Goe*, 50 Ill. 459, citing 2 Story Eq. Jr., § 861.

In Illinois the appropriate function of an injunction is to afford preventive relief, and not to restore parties to that of which they have already been deprived. *Highway Com'rs v. Deboe*, 43 Ill. App. 25; *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128; *Baxter v. Board of Trade*, 83 Ill. 146, in which case it was said that the sole office of an injunction is to afford preventive relief, and not to correct wrongs and injuries already perpetrated; *Clark v. Donaldson*, 104 Ill. 639; *Menard v. Hood*, 68 Ill. 121; *Mead v. Cleland*, 62 Ill. App. 204, wherein it is said that "rights already lost and wrongs already perpetrated may not be corrected by injunction;" *Wangelin v. Goe*, 50 Ill. 459; *Dunning v. Aurora*, 40 Ill. 481; *Fisher v. Board of Trade*, 80 Ill. 85.

In Nevada the writ of injunction is used to prevent apprehended injury only. *Sherman v. Clark*, 4 Nev. 138.

**Distinction between Injunction and Mandamus.** — In *Atty.-Gen. v. Chicago, etc.*,

*R. Co.*, 35 Wis. 425, the court, contrasting the writs of injunction and mandamus, said: "The latter commands; the former forbids. Where there is malfeasance, injunction restrains wrong. And so near are the objects of the two writs, that there is sometimes doubt which is the proper one; injunction is frequently mandatory, and mandamus sometimes operates restraint."

**Injunction Not a Substitute for Mandamus.** — In *McCauley v. Kellogg*, 2 Woods (U. S.) 13, Woods, J., said: "We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive writ, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases when it is used by the court to carry into effect its own decrees, as in putting the purchaser under a decree of foreclosure of a mortgage into possession of the premises."

**Pendente Lite.** — Upon the question whether or not the court will grant a mandatory injunction *pendente lite*, see *infra*, this article.

1. In *People v. McKane*, 78 Hun (N. Y.) 154, Brown, P. J., marking the distinction between the use of the term "jurisdiction" to refer to the power of the court to hear and determine the application for the injunction, and the use of the word with reference to the occasion for the exercise of the court's power which is "equitable jurisdiction," as that term is used and understood in equity jurisprudence, said: "This distinction, while clearly pointed out in the best works on equity jurisprudence, has not always been observed in judicial opinions; and the expression 'jurisdiction' has been used when the writers meant only to inquire whether the facts before the court presented a case for the proper exercise of the power of a court of equity."

**2. Chancery Jurisdiction.** — The authority to allow injunctions is an incident of chancery jurisdiction and can only be exercised by courts clothed with general chancery powers, or by virtue of legislative enactment;<sup>1</sup> but the fact that a court which has chancery jurisdiction has both common-law and chancery jurisdiction in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restriction.<sup>2</sup>

**3. Statutory Provisions.** — A suit for an injunction must be brought in the court having jurisdiction to grant an injunction in the particular instance;<sup>3</sup> and the only safe rule for the guidance of the practitioner is to consult the constitution and the statutes of the state in which it is proposed to bring the suit.<sup>4</sup>

1. *Per* Beck, C. J., in *Cummings v. Des Moines, etc., R. Co.*, 36 Iowa 173. See also *Emporia v. Soden*, 25 Kan. 588, wherein it is said that an action for injunction is an equitable action; *Weiss v. Jackson County*, 9 Oregon 470, wherein it is said that the granting of an injunction is an equitable proceeding; and *Bingham v. Salene*, 15 Oregon 208.

2. *Per* Bartch, J., in *Bailey v. Stevens*, 11 Utah 175, in which case it was held that the district court, sitting as a court of chancery, has power to grant relief by injunction in a proper case, the court saying: "This is an ancient jurisdiction of a court of chancery, and there is nothing in our statute which abrogates such jurisdiction."

**Blending of Law and Equity.** — In *New York*, "although legal and equitable actions are, to a degree at least, blended as to form, principles remain the same; and the court will not interfere by injunction where our former court of chancery would not, unless expressly authorized to do so by statute." *Per* Hand, J., in *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224.

The Code has not enlarged the right to a final injunction nor authorized such relief to be granted except in an equitable action, although the temporary injunction has been extended to other cases than those in which it was allowed before the Code. *Thompson v. Canal Fund*, 2 Abb. Pr. (N. Y. Supreme Ct.) 248.

3. *Murray v. Overstolz*, 1 McCrary (U. S.) 606.

4. In *California* the district courts are invested under the constitution with such equity jurisdiction as that which is administered in the high court of chancery in England, and it is to such court that applications for injunction

should be made. *People v. Davidson*, 30 Cal. 379.

*A County Judge*, in granting an injunction upon a bill filed in the district court, acts as an injunction master and exercises a power auxiliary to the jurisdiction of the district court. *People v. Placer County*, 27 Cal. 151. See also *Crandall v. Woods*, 6 Cal. 449, wherein it is said that the county judge's act has the same force and efficacy for all purposes, as if it were the direct act of the district court.

**Indiana.** — In *Glass v. Ripley County*, 16 Ind. 113, it was held that a master commissioner is not invested with the power of granting injunctions.

In *Louisiana* an injunction may be issued by the parish judge acting in place of the district judge during the absence of the district judge from the parish. *Green v. Huey*, 23 La. Ann. 705.

In *Nebraska*, under Code Civil Pro., § 252, an injunction may be granted at the time of commencing the action or afterwards before judgment by the Supreme Court or any judge thereof, the District Court or any judge thereof, or, in the absence from the county of any of said judges, by the probate judge thereof. *Browne v. Edwards, etc.*, *Lumber Co.*, 44 Neb. 361. See also *Calvert v. State*, 34 Neb. 616, wherein Maxwell, C. J., commented upon the statutory power of a judge of the Supreme Court to grant a temporary injunction.

Likewise, see *State v. Greene*, 48 Neb. 327, wherein it is said that the power conferred upon county judges by statute to grant temporary orders of injunction clearly includes the authority to allow restraining orders, as the greater embraces the less.

In *New York* a motion for an injunction in a case pending before the Su-

**Statute Conferring Authority upon Judge.** — Where a court is not clothed with chancery jurisdiction and there is no statute authorizing it to grant injunctions, a statute authorizing the judge thereof to allow injunctions does not bestow like power upon the court.<sup>1</sup>

**4. Supreme Courts.** — The power to grant an injunction has been rarely conferred by the constitutions upon the supreme courts of the respective states, and it has been held that without constitutional authority the supreme court cannot entertain suits for injunction or issue the writ, and that such power cannot be conferred by statute.<sup>2</sup>

preme Court cannot be addressed to a county judge. *Middletown v. Rondout*, etc., R. Co., 43 How. Pr. (N. Y. Supreme Ct.) 481, in which case it was held that the 94th rule of the Supreme Court could not enlarge the powers of the county judge under the statute. *Citing* *Parmenter v. Roth*, 9 Abb. Pr. N. S. (N. Y. Ct. App.) 392; *Rogers v. McElhone*, 20 How. Pr. (N. Y. Supreme Ct.) 441; and *Merritt v. Slocum*, 3 How. Pr. (N. Y. Supreme Ct.) 309.

**Powers of Surrogates.** — It has been held that the surrogates of Oneida and certain other counties which were by Laws 1849, c. 306, as amended by Laws 1851, c. 108, authorized to perform the duties possessed by the county judge out of court, were authorized to grant an *ex parte* injunction in an action pending in the Supreme Court, and that the Code of Civil Procedure did not repeal Laws 1857, c. 96. *Aldinger v. Pugh*, 132 N. Y. 403; *Ross v. Wigg*, 36 Hun (N. Y.) 107, 101 N. Y. 640.

**Constitutional Authority to Issue Injunctions.** — Jurisdiction to issue injunctions conferred upon a court by the constitution cannot be affected by any statute. *Atty.-Gen. v. Chicago*, etc., R. Co., 35 Wis. 425.

1. *Cummings v. Des Moines*, etc., R. Co., 36 Iowa 173. "The distinction," said Beck, C. J., "between a judge and a court is too familiar and well understood to demand explanation. The statute in many instances empowers the judge to do acts that cannot be done by the court. Thus, in the very last section cited [Acts 12th Gen. Assem., c. 86, § 4], the circuit judge is authorized to solemnize marriages, take depositions, administer oaths, etc. It will not be pretended that the circuit court is authorized by this law to do these acts."

**Court's Act Upheld as Judge's.** — In *Androscoggin*, etc., R. Co. *v.* *Andros-*

*coggin R. Co.*, 49 Me. 392, it was held that where by statute a judge is authorized to issue an injunction, one issued in court may be upheld as the judge's act.

2. **In Illinois** the Supreme Court has no jurisdiction to grant an original injunction. *Bryant v. People*, 71 Ill. 32, following *Campbell v. Campbell*, 22 Ill. 664.

**Statutory Authority.** — The court, in the latter case, said: "The act \* \* \* does provide that 'the supreme and circuit courts in term time, and any judge thereof in vacation, shall have power to grant writs of *ne exeat* and injunction,' but as it is not an exercise of the appellate jurisdiction of this court, nor so declared to be, but original jurisdiction in a new case, the power cannot be conferred by statute upon this court."

**Ohio.** — *Pittsburg*, etc., R. Co. *v.* *Hurd*, 17 Ohio St. 144, wherein it was held that the power to grant an injunction in a case pending in another court cannot under the constitution be conferred upon the Supreme Court. *Following* *Kent v. Mahaffy*, 2 Ohio St. 498.

**Virginia.** — *Fredenheim v. Rohr*, 87 Va. 764. See also *Mayo v. Haines*, 2 Munf. (Va.) 423; *Randolph v. Randolph*, 6 Rand. (Va.) 194; *Gilliam v. Allen*, 1 Rand. (Va.) 414.

**In Wisconsin** it has been held under a constitutional provision empowering the Supreme Court "to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari and other original and remedial writs, and to hear and determine the same," that the policy of the constitution to make the Supreme Court a supreme judicial tribunal over the whole state precludes the view that it was intended to confer upon the Supreme Court jurisdiction of injunction in private suits between private parties proceeding on private

**5. Jurisdictional Amount.**—In a suit for an injunction, the amount in dispute is the value of the object to be gained by the bill.<sup>1</sup> Applying the maxim *de minimis non curat lex* the court will not take jurisdiction where the amount involved is trifling.<sup>2</sup>

**6. United States Courts.**—The judges of the United States circuit courts have power to grant writs of injunction only in cases where they may be granted by the circuit courts.<sup>3</sup>

The Supreme Court of the United States, by a provision of the Revised Statutes, has power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to usages and principles of law; and writs of injunction may be granted by any justice of the Supreme Court in cases where they may be granted by the Supreme Court.<sup>4</sup>

right or wrong, and consequently the only jurisdiction conferred upon the Supreme Court is to issue *quasi* prerogative writs of injunction at the suit of the state or the attorney-general. *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425. See also *Atty.-Gen. v. Eau Claire*, 37 Wis. 400.

1. *Texas, etc., R. Co. v. Kuteman*, 13 U. S. App. 99, in which case the plaintiff sought an injunction against threatened suits about to be brought against the plaintiff, a railroad company, on the ground that it had charged greater freight rates than the maximum prescribed by law, and it was held that the maintenance of the plaintiff's freight rates was the real subject of dispute, and that the value of the plaintiff's right to maintain such rates should be considered in determining whether a United States Circuit Court had jurisdiction. See also *Rainey v. Herbert*, 55 Fed. Rep. 443, wherein it was held that the value of the object to be obtained by the injunction must govern rather than the amount of the injury which will ensue if the threatened acts are performed. See also *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Symonds v. Greene*, 28 Fed. Rep. 834; and *Whitman v. Hubbell*, 30 Fed. Rep. 81.

In *Texas* it has been held under constitutional provisions giving the district courts power to issue writs of habeas corpus, mandamus, injunctions, etc., that the district courts have the power to issue writs of injunction in cases coming within the settled rules of equity without reference to the amount in controversy. *Anderson County v. Kennedy*, 58 Tex. 616; *Hale*

*v. McComas*, 59 Tex. 484. See also *Red v. Johnson*, 53 Tex. 288.

2. *Brush v. Carbondale*, 78 Ill. 74. See also *Yantis v. Burdett*, 3 Mo. 457.

In *Illinois* it is provided by statute that no writ of injunction shall be granted to stay proceedings under a judgment rendered by a justice of the peace for a sum not exceeding \$20, exclusive of costs. *York v. Kile*, 67 Ill. 233.

3. *Murray v. Overstolz*, 1 McCrary (U. S.) 606.

4. U. S. Rev. Stat., §§ 716, 719.

In *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518, in which case the Supreme Court was asked in the exercise of its original jurisdiction, at the suit of the state of Pennsylvania, to enjoin an obstruction in the Ohio river created by a bridge at Wheeling, it was said: "The State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. \* \* \*

Nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained." See also *Georgia v. Brailsford*, 2 Dall. (U. S.) 402, wherein the Supreme Court granted an injunction at the suit of a state to stay the payment to others of a debt confiscated to the state, until it had been ascertained to whom the money belonged; *New York v. Connecticut*, 4 Dall. (U. S.) 3; and *Murray v. Overstolz*, 1 McCrary (U. S.) 606.

**Diverse Citizenship.** — A United States circuit court has jurisdiction of a suit to enjoin the prosecution of proceedings at law or in equity pending in such court, regardless of the citizenship of the parties, as the court's jurisdiction of the suit for injunction is ancillary to the proceedings sought to be enjoined.<sup>1</sup>

**Removal into United States Court.** — An application to remove a suit for an injunction from a state court into a United States court must be made before the defendant has appeared and resisted an application for a temporary injunction and appealed from an adverse decision of the state court.<sup>2</sup>

**7. Prohibition where Court Exceeds Jurisdiction.** — A writ of prohibition will be issued by the Supreme Court to a judge or court which entertains a suit for an injunction in a case in which there is no jurisdiction to do so, and in which the parties cannot by consent or waiver confer jurisdiction.<sup>3</sup>

**Issuance of Injunction by Judge of Supreme Court.** — An application for an injunction may be addressed to a judge of the Supreme Court of the United States outside of the district and circuit in which the bill is pending, where it is shown by affidavit that the judge of the district for that district, the judge of the circuit for that circuit, and the judge of the Supreme Court allotted to that circuit, are all absent from and without the district and circuit. *U. S. v. Louisville, etc., Canal Co.*, 4 Dill. (U. S.) 60r.

1. *Bradshaw v. Miners' Bank*, 81 Fed. Rep. 902, in which case an injunction was sought against the prosecution of a creditors' bill pending in a United States court.

In *Jones v. Andrews*, 10 Wall. (U. S.) 327, it was held that a United States Circuit Court may entertain a suit for injunction against garnishee proceedings pending before it, irrespective of the residence of the parties, as the suit is in its nature not an original but a defensive or supplementary suit, like a cross-bill or a bill filed to enjoin a judgment of the same court. See also *Dunlap v. Stetson*, 4 Mason (U. S.) 349; *Logan v. Patrick*, 5 Cranch (U. S.) 288; *Simms v. Guthrie*, 9 Cranch (U. S.) 19; and *Clarke v. Mathewson*, 12 Pet. (U. S.) 164.

2. *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337. Citing Removal Cases, 100 U. S. 457; *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 U. S. 711; and *Gregory v. Hartley*, 113 U. S. 742.

**Effect of Removal.** — In *Hatch v. Chicago, etc., R. Co.*, 6 Blatchf. (U. S.)

105, it was held that the removal of the cause under Act Cong. 1789, operates *ipso facto* to abrogate an injunction previously issued, because the Act did not provide that the injunction should be preserved as did Act Cong. 1866 and Act Cong. 1867; citing *McLeod v. Duncan*, 5 McLean (U. S.) 342. See also *Northwestern Distilling Co. v. Corse*, 4 Biss. (U. S.) 514.

**Motion for New Injunction.** — In *McLeod v. Duncan*, 5 McLean (U. S.) 342, it is said that where a cause is removed into a Circuit Court of the United States, under Act Cong. 1789, § 12, from a state court after an injunction has been issued by the state court, a motion may be addressed to the United States Circuit Court for a new injunction.

See, further, the article UNITED STATES COURTS.

3. *Swinburn v. Smith*, 15 W. Va. 483, wherein it was held that a writ of prohibition ought to issue notwithstanding the fact that an appeal or writ of error or supersedeas will lie. Citing *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484, and *Thomas v. Mead*, 36 Mo. 246.

In *Alabama*, however, it has been held that matters of defense, such as imperfections in the bill or the institution of the suit in a district in which the defendant is not liable to be sued, cannot be reached by a writ of prohibition. *Ex p. Greene*, 29 Ala. 52.

In *Louisiana* it has been held that prohibition will not lie when the lower court is "proceeding in a matter over which it possesses a legitimate and indisputable jurisdiction." *State v. Superior Dist. Ct.*, 29 La. Ann. 360.



**III. VENUE.** — Where the Statute Fixes the County in which injunctive relief is obtainable, the action must be brought in such county.<sup>1</sup>

**Power to Grant Injunctions Throughout the State.** — A statute providing that an injunction may be granted by "the District Court or any judge thereof" does not authorize a district judge to grant temporary injunctions throughout the state irrespective of whether the judge of the court in which the action is brought is absent or incapacitated.<sup>2</sup>

**Ancillary Injunction.** — A statute providing that a suit for injunction shall be brought in the county in which the judgment sought to be enjoined was rendered, or in which the act or proceeding sought to be enjoined is being done or apprehended, applies only to a pure bill of injunction, and not to a bill asking other relief to which an injunction is merely ancillary.<sup>3</sup>

**IV. WHETHER UNITED STATES COURTS FOLLOW STATE PRACTICE.** — A United States court in a suit for injunction, as in other suits in equity, administers "the same general principles

1. *Gorham v. Toomey*, 9 Cal. 77; *Rickett v. Johnson*, 8 Cal. 34; *Chipman v. Hibbard*, 8 Cal. 268; *Phelan v. Smith*, 8 Cal. 520; *Anthony v. Dunlap*, 8 Cal. 26; *Uhlfelder v. Levy*, 9 Cal. 607; *Phelan v. Johnson*, 80 Iowa 727; *Garetson v. Appleton Mfg. Co.*, 61 Ill. App. 443; *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270; *Childress v. Perkins*, *Cooke* (Tenn.) 87; *Beckley v. Palmer*, 11 Gratt. (Va.) 625; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 936. Most of the foregoing cases were decided under statutes fixing the court in which a suit must be brought to enjoin proceedings at law.

In Georgia it has been provided by Code, §§ 247 and 248, that when a judge of the circuit is disqualified to act, an application for an injunction must be made to some other judge of the superior courts who is qualified. *Norris v. Pollard*, 75 Ga. 358.

In *Sharman v. Thomaston*, 67 Ga. 246, it was held that where an application for an injunction is presented to the judge of another circuit the grounds on which the judge of such other circuit exercises his authority must appear in the record.

**Title to Land.** — Where the object of the bill is to cancel a deed, it is not such a suit affecting title to land as requires it to be brought in the county where the land lies. *McArthur v. Mathewson*, 67 Ga. 134.

2. *Ellis v. Karl*, 7 Neb. 381.

**New York — Jurisdiction of Supreme**

**Court.** — In *People v. Central R. Co.*, 42 N. Y. 283, an injunction was sought against certain public nuisances; and the court, through E. D. Smith, J., said: "The cause of action set forth in the complaint is clearly one of equitable cognizance; and as the jurisdiction of the Supreme Court is coextensive with the boundaries of the state, it clearly had jurisdiction of such cause of action, if the place where the nuisances complained of were erected and existed was within the territorial limits of the state."

In Virginia, although by statute jurisdiction is given to each of the judges of the Circuit Courts to award injunctions without as well as within his own circuit, yet the order of the judge must be directed to the clerk of the court of that county or corporation in which the judgment shall have been rendered or the proceeding is apprehended, and the subsequent proceedings must be had in that county. *Randolph v. Tucker*, 10 Leigh (Va.) 688.

3. *Muller v. Bayly*, 21 Gratt. (Va.) 521. Citing *Winston v. Midlothian Coal Min. Co.*, 20 Gratt. (Va.) 686; *Hough v. Shreeve*, 4 Munf. (Va.) 490; *Singleton v. Lewis*, 6 Munf. (Va.) 397; and *Pulliam v. Winston*, 5 Leigh (Va.) 324. See also, to the same effect, *Beckley v. Palmer*, 11 Gratt. (Va.) 625, wherein it is said that the statute is inapplicable where the injunction is sought as appropriate to the main relief administered in the cause.

in all cases and in every state, irrespective of local laws and state practice." <sup>1</sup>

**V. DEMAND BEFORE BRINGING SUIT.**—Where acts of commission are charged in the bill as being injurious to the plaintiff, it is not necessary before instituting suit for an injunction to request the defendant to desist from his acts, or to give him notice of the plaintiff's intention to bring a suit for injunction. <sup>2</sup>

1. *Per* McCrary, J., in *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 2 McCrary (U. S.) 260, the question being whether or not the court should require the defendant to give bond with approved security to pay the damages which might be awarded to the plaintiff and dissolve the injunction, such course being "within the ordinary powers of a court of chancery when proceeding according to the general principles of equity." The learned judge remarked: "If the court has jurisdiction to try and determine a case in equity, it must determine it according to these general principles, which are the same in every state." *Citing* *U. S. v. Howland*, 4 Wheat. (U. S.) 115; *Boyle v. Zacharie*, 6 Pet. (U. S.) 658; *Neves v. Scott*, 13 How. (U. S.) 268; *Noonan v. Lee*, 2 Black (U. S.) 499. See likewise *Browning v. Porter*, 2 McCrary (U. S.) 581. See also *Bein v. Heath*, 12 How. (U. S.) 168.

In *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518, in which case an injunction was sought by the state of Pennsylvania against the obstruction of the Ohio river, it was objected that there were "no statutory] provisions to guide the court," and that there was no common law of the Union on which the procedure could be founded. To these objections Justice McLean replied: "Chancery jurisdiction is conferred on the courts of the United States with the limitation 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.' The rules of the High Court of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court. In exercising this juris-

diction, the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

2. *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352, in which case it was held that where the defendant creates a nuisance by conducting his business in such a manner as to do harm to people living in the neighborhood, it is not necessary to give him notice of the injuries caused by his business before bringing a suit against him for an injunction. *Affirmed* in 132 N. Y. 602, 44 N. Y. St. Rep. 934. See also, to the same effect, *Charleston, etc., R. Co. v. Johnson*, 73 Ga. 306. But see *Paramore v. Persons*, 57 Ga. 473, in which case it was held that a bill asking an injunction against a marshal to prevent him from dispossessing the plaintiff must show that the plaintiff has done all that he ought to do in acquainting the marshal with the facts of his case and his rights, and that nevertheless his possession is threatened or imperiled.

**Wrongs Innocently Committed.**—Where the defendant has not created a nuisance, but has innocently suffered it to continue, notice should be given him of the injurious effects thereof before bringing suit. *Per* Landon, J., in *Dunsbach v. Hollister*, 49 Hun (N. Y.) 352. *Citing* *Vanderwiele v. Taylor*, 65 N. Y. 341, in which case "the distinction is taken that the defendant did not accumulate the water on his premises, nor do anything to cause its accumulation there to the injury of the plaintiff, but it accumulated there by natural causes, and therefore no obligation rested upon him to do anything to protect the plaintiff until he had notice that something ought to be done."

**VI. ESTABLISHMENT OF PLAINTIFF'S RIGHT AT LAW.** — In England from a very early day the rule has obtained that a court of equity will not entertain jurisdiction of a suit to enjoin nuisances, waste, trespasses, the violation of franchises, or like injuries, where the plaintiff's right has not been previously established in the appropriate tribunal, and is in doubt, and the defendant disputes the right of the plaintiff or denies the fact of its violation; and that under such circumstances the court will ordinarily do nothing more than preserve the property in its present condition, if that be necessary, until the question of right can be settled at law.<sup>1</sup>

1. *Whitchurch v. Hide*, 2 Atk. 391; *Miller v. Taylor*, 4 Burr 2400, *per* Lord Mansfield; *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57; *Weller v. Smeaton*, 1 Cox 102; *Churchman v. Tunstall*, Hard. 162; *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287; *Atty.-Gen. v. Nichol*, 16 Ves. Jr. 338; *Pillsworth v. Hopton*, 6 Ves. Jr. 51; *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 211; *Crowder v. Tinkler*, 19 Ves. Jr. 617; *Ripon v. Hobart*, 3 Myl. & K. 169; *Field v. Jackson*, Dick. 599; *Smith v. Collyer*, 8 Ves. Jr. 89; *Semple v. London*, etc., R. Co., 1 Eng. R. & C. Cas. 120; *Blackmore v. Glamorganshire Canal Nav.*, 1 Myl. & K. 154; *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 436, 7 H. L. Cas. 600; *Elmhurst v. Spencer*, 2 Macn. & G. 45. See also *Story Eq.*, §§ 925 *et seq.*; 3 Dana Ch. 1859, 1860; *Adams Eq.* 211; *Eden Inj.* 274.

See further the following American cases:

**Alabama.** — *State v. Mobile*, 5 Port. (Ala.) 279; *St. James's Church v. Arrington*, 36 Ala. 546; *Rouse v. Martin*, 75 Ala. 510, wherein it was said that where the thing sought to be prohibited is not unavoidably noxious in itself, the court will generally refuse to interfere until the matter has been tried at law; *Rosser v. Randolph*, 7 Port. (Ala.) 238.

**Connecticut.** — *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165; *Roath v. Driscoll*, 20 Conn. 533.

**Delaware.** — *Thompson v. Lynam*, 1 Del. Ch. 64, holding that where an injunction against waste is applied for it is not sufficient to allege merely that the plaintiff is entitled to a fee simple, but he should have or establish a title to the place in which the waste is being committed.

**Florida.** — In *Thebaut v. Canova*, 11 Fla. 143, it was declared that the court

will be slow to interfere in cases of doubtful right.

**Illinois.** — In *Dunning v. Aurora*, 40 Ill. 481, Walker, C. J., said: "A court of equity will, under some circumstances, grant an injunction to restrain the erection of a nuisance, but with great caution. This is always so where there is a remedy at law, until the right has been established by a verdict. And a court will always act with reluctance in abating a nuisance, and seldom, if ever, until it has been regularly found to be such by a jury."

**Maine.** — *Tracy v. Le Blanc*, 89 Me. 304; *Varney v. Pope*, 60 Me. 192; *Morse v. Machias Water Power*, etc., Co., 42 Me. 119; *Jordan v. Woodward*, 38 Me. 423; *Porter v. Witham*, 17 Me. 292.

**Maryland.** — *Clayton v. Shoemaker*, 67 Md. 216; *Stewart v. Chew*, 3 Bland (Md.) 440.

**Massachusetts.** — *Ingraham v. Dunning*, 5 Met. (Mass.) 118; *Dana v. Valentine*, 5 Met. (Mass.) 8.

**Mississippi.** — Injunction will not lie to stay trespass or waste when the defendant is in possession under an adverse title, and a bill which shows that the defendant is in possession under an adverse title is without equity. *Nevitt v. Gillespie*, 1 How. (Miss.) 108; *Poin-dexter v. Henderson*, Walk. (Miss.) 176; *Green v. Lake*, 54 Miss. 540.

**Missouri.** — *Echelkamp v. Schrader*, 45 Mo. 505.

**New Hampshire.** — *Coe v. Winnepisiogee Lake Cotton*, etc., Mfg. Co., 37 N. H. 254. See also *Burnham v. Kempton*, 44 N. H. 78, in which case the court said: "Equity will not ordinarily assume jurisdiction merely for the purpose of suppressing litigation and preventing suits, until the right has been established by one suit, whenever that right is doubtful, and

In Modern Times, however, this rule has been greatly relaxed, and, although the decisions have not been so uniform as to justify the

there is an attempt to repeat the wrong and to compel the plaintiff to bring a multiplicity of suits to redress these repeated wrongs."

**New Jersey.** — In *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299, the court declared: "No rule of equity is better settled than the doctrine that a complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled."

See likewise the following cases: *Higbee v. Camden, etc., R., etc., Co.*, 20 N. J. Eq. 435; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 421; *Atty.-Gen. v. Paterson*, 9 N. J. Eq. 624; *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566; *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 24; *Harper v. McElroy*, 42 N. J. Eq. 280; *Stevens v. Paterson, etc., R. Co.*, 20 N. J. Eq. 126; *Hagerty v. Lee*, 45 N. J. Eq. 255; *New York, etc., Telephone Co. v. East Orange Tp.*, 42 N. J. Eq. 490.

**New York.** — *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21; *Stevens v. Beekman*, 1 Johns. Ch. (N. Y.) 318; *Snowden v. Noah*, *Hopk.* (N. Y.) 347; *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 19; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 563; *Olmsted v. Loomis*, 6 Barb. (N. Y.) 152; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 379; *West v. New York*, 10 Paige (N. Y.) 539; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Gordon v. Hostetter*, 37 N. Y. 99; *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91; *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191, *per* Grover, J.; *Wallack v. Society, etc.*, 67 N. Y. 23; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, *per* Earle, J. In a majority of the late New York cases the court has merely adverted to the ancient rule.

In *Rochester v. Curtiss*, *Clarke Ch.* (N. Y.) 336, Vice-Chancellor Whittlesey said: "In cases of doubtful right or

remote and contingent injury this court will wait for the right to be settled at law or the injury to become imminent before it will interfere with its extraordinary process of injunction."

**North Carolina.** — In *Irwin v. Davidson*, 3 Ired. Eq. (N. Car.) 317, *Ruffin, C. J.*, said: "It is plain that the jurisdiction to restrain trespasses, like that to restrain nuisances, is not an original jurisdiction of the court of equity, which enables this court, under the semblance of preventing an irreparable injury to a legal estate, to take a jurisdiction of deciding exclusively upon the legal title itself. Therefore, in such case, the plaintiff ought to establish his title at law, or show a good reason for not doing so; and, if he will not, this court cannot undertake, against a defendant's answer, to try the questions of title and trespass and nuisance;" and that "the court of equity should only grant the injunction where the plaintiff is endeavoring to establish his title at law, and until he should have had a reasonable time allowed for that purpose." *Quoted* with approval in *Bishop v. Baisley*, 28 Oregon 119.

**Oregon.** — In *Walts v. Foster*, 12 Oregon 247, *Lord, J.*, said: "The object here is to make the injunction perpetual in the suit, the manifest object of which is to adjudicate title to the *locus in quo*. In cases of this character, when the rights of the parties are not clear, but involved in doubt and uncertainty, it presents a subject peculiarly appropriate for the investigation of a court and jury." See also *Bishop v. Baisley*, 28 Oregon 119.

**Pennsylvania.** — *Com. v. Rush*, 14 Pa. St. 186; *Rhea v. Forsyth*, 37 Pa. St. 506.

**Tennessee.** — *Kirkman v. Handy*, 11 Humph. (Tenn.) 406, 54 Am. Dec. 45. This case was doubtless intended to be cited in *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; the court in the latter case referring to "11 Hump. 403."

**Utah.** — In *Old Tel. Min. Co. v. Central Smelting Co.*, 1 Utah 331, 7 Morris. Min. Rep. 556, the court laid down the rule as follows: "In order to entitle the plaintiff to the relief asked, where that relief is injunctive only, the title of the plaintiff to the property said to be trespassed upon must be clearly

statement of a hard-and-fast rule upon the subject, the tendency has been to grant injunctions with more frequency and with less hesitation than formerly, and many cases are to be found in which the plaintiff has not been required first to establish his right at law.<sup>1</sup>

shown and be undisputed, or steps taken to establish the title by action at law, or valid and satisfactory reasons be shown for not doing so." See also, to the same effect, *Kahn v. Old Tel. Min. Co.*, 2 Utah 13.

**Vermont.** — *Prentiss v. Larnard*, 11 Vt. 135; *White v. Booth*, 7 Vt. 131, which cases were cited in *Burnham v. Kempton*, 44 N. H. 78.

**Virginia.** — *Sanderlin v. Baxter*, 76 Va. 299, wherein it was said by Burks, J., that ordinarily where the existence of a nuisance is controverted, the plaintiff will be required first to establish his right at law.

**United States.** — *Irwin v. Dixon*, 9 How. (U. S.) 10; *Fitzpatrick v. Childs*, 2 Brews. (Pa.) 365; *Potter v. Whitney*, 1 Lowell, (U. S.) 87; *Zinsser v. Cooledge*, 17 Fed. Rep. 538.

**Verdict in Favor of One of Several Plaintiffs.** — A verdict at law establishing the fact of a nuisance, recovered by one plaintiff since the filing of the original bill, may be set up in a supplemental bill and will be taken as conclusive that the defendant's business is a nuisance, although the benefit of the verdict will thereby inure to the benefit of another plaintiff who was not a party to the action at law. *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362.

**Establishment of Right by Decree.** — In *Anonymous*, 1 Ves. 476, the bill was filed to restrain the defendants from using ferryboats to the prejudice of the plaintiff's ferry, his right to its exclusive use having been established by a decree of the court. The record of this decree was held by Lord Hardwicke to be sufficient to authorize the granting of an injunction before answer. Cited in *Coe v. Winnepisiogee Lake Cotton, etc.*, Mfg. Co., 37 N. H. 254.

**Pendency of Writ of Review.** — In *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71, it was held that an averment that the title of the plaintiff had been established by a verdict of a jury, and that a judgment had been entered thereon, was met by an averment in the answer of the defendant which set out a writ of review which was still pending and undecided.

1. *Hanson v. Gardiner*, 7 Ves. Jr. 305; *Hoskins v. Featherstone*, 2 Bro. C. C. 552; *Thompson v. Lynam*, 1 Del. Ch. 64; *Waddingham v. Robledo* 6 N. Mex. 347; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, *per* Earl, J.; *Woodruff v. Wallace*, 3 Okla. 355; *Com. v. Rush*, 14 Pa. St. 186, *per* Hepburn, J.; *Mayor v. Com'rs*, 7 Pa. St. 348; *Smith v. Cummings*, 2 Pars. Eq. Cas. (Pa.) 102; *Bishop v. Baisley*, 28 Oregon 119, *per* Wolverton, J.; *Allen v. Dunlap*, 24 Oregon 232; *Manchester Cotton Mills v. Manchester*, 25 Gratt. (Va.) 825; *Sanderlin v. Baxter*, 76 Va. 299; *Switzer v. McCulloch*, 76 Va. 777; *Hanna v. Clarke*, 31 Gratt. (Va.) 36; *Pruner v. Pendleton*, 75 Va. 516; *Wilson v. Rockwell*, 29 Fed. Rep. 674; *U. S. v. Parrott*, 1 McAll. (U. S.) 271.

In *Carlisle v. Cooper*, 21 N. J. Eq. 576, Depue, J., declared that the rule has been somewhat relaxed and that the mere denial of the plaintiff's right by the defendant in his answer will not oust the court of its jurisdiction by injunction. Citing *Shields v. Arndt*, 4 N. J. Eq. 235, and *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335.

**The Supreme Court of the United States.** In *Erhardt v. Boaro*, 113 U. S. 537, having stated that the former doctrine was that where there was a dispute as to the title no injunction would be granted restraining a trespass, said: "This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

**Distinction Between Waste and Trespass.** — In *Bishop v. Baisley*, 28 Oregon 119, Wolverton, J., said: "It is said that injunctions are now granted much.

**Title Undisputed.** — It is well settled at this day that if the title of the plaintiff is not disputed, and his right to an injunction is clear, he need not first establish his right in an action at law;<sup>1</sup> but where there is a dispute as to the plaintiff's title and his right to relief, it would seem that the best rule is to require an action at law to settle the legal title.<sup>2</sup>

**Preliminary Injunction.** — If the facts charged in the injunction bill show clearly that irreparable injury may be wrought, the court will take cognizance of the case and, if the circumstances require it, direct a trial by jury, in the meantime restraining the defendant by injunction, and when the right is established make the injunction perpetual;<sup>3</sup> and in such case the plaintiff need not by

more liberally than formerly, and that the tendency is to break through the old distinction arising between waste and trespass. \* \* \*

The authorities, however, when closely observed, would seem to indicate that the distinction which has been broken through is mostly the distinction which formerly existed in granting the injunction in one instance while refusing it in the other. The same conditions which lay the foundation for or that will support an injunction in case of waste will not suffice as against trespass. The material and vital distinction regards the possession of the relative parties litigant. In case of waste the privity existing between the parties will always enable the plaintiff, while out of possession, to maintain the suit; while without the privity of estate or title, as in case of trespass, possession, or what is tantamount thereto, the adjudicated or admitted right of possession, or an action pending therefor, is necessary to justify the interference of a court of equity." *Citing Chapman v. Toy Long*, 4 Sawy. (U. S.) 33, 5 Fed. Cas. No. 2610, in which case Deady, J., said: "Wherever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, the remedy by injunction will be applied the same as if it were a technical waste."

1. *Walter v. Selfe*, 4 De G. & Sm. 315; *Crump v. Lambert*, L. R. 3 Eq. 409, which cases were cited in *Duncan v. Hayes*, 22 N. J. Eq. 25. See also *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Shields v. Arndt*, 4 N. J. Eq. 234; *Ross v. Butler*, 19 N. J. Eq. 294; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Burnham v. Kempton*, 44 N. H. 78; *Corning v. Troy Iron, etc., Factory*, 6 How.

Pr. (N. Y. Supreme Ct.) 89; *Com. v. Rush*, 14 Pa. St. 186; *Erhardt v. Boaro*, 113 U. S. 537.

2. *Per Knowles, J.*, in *Waterloo Min. Co. v. Doe*, 82 Fed. Rep. 45, citing *St. Louis Min., etc., Co. v. Montana Min. Co.*, 58 Fed. Rep. 129. See also *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35; *Savannah, etc., R. Co. v. Coast Line R. Co.*, 49 Ga. 202; *Seymour v. Mutual Reserve Fund L. Assoc.*, 14 Misc. Rep. (N. Y. Supreme Ct.) 151; *Thebaut v. Canova*, 11 Fla. 143; *Hacker v. Barton*, 84 Ill. 313, citing *Wing v. Sherrer*, 77 Ill. 202. See further the cases cited in the first note on this branch of the subject, *supra*, p. 887.

3. In *Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co.*, 1 Sim. N. S. 410, Lord Cranworth said: "Where the alternative is interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant."

In *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287, a bill which did not allege that the plaintiff had taken proceedings at law to establish his right was retained for a year in order that the plaintiff might take such proceedings at law as should be thought fit.

The doctrine finds support in *Kerr Inj.* 196, 197, which was cited in *Fulton v. Greacen*, 36 N. J. Eq. 216.

See likewise the following American cases:

*Kansas*. — *Long v. Kasebeer*, 28 Kan. 226; *Webster v. Cooke*, 23 Kan. 637.

*Maine*. — *Tracy v. Le Blanc*, 89 Me. 304, citing *Lockwood Co. v. Lawrence*, 77 Me. 297.

his bill show an incontestable legal title, but need only satisfy the court that his claim is a substantial one, and that there is ground for doubting the validity of the defendant's title.<sup>1</sup>

**Sending the Defendant to Law.** — It occasionally happens that where the plaintiff is in possession under a *prima facie* good title and his rights are being interfered with under a claim of right by the defendant, the court will grant a temporary injunction and decree that it shall be made permanent unless the *defendant* shall immediately institute a suit at law to establish his title and prosecute such suit with effect.<sup>2</sup>

The Code, by allowing legal and equitable causes of action to be joined in one suit, has done away with the necessity of establishing the plaintiff's right at law before suing for an injunction.<sup>3</sup>

*Maryland.* — Clayton v. Shoemaker, 67 Md. 216, cited in Norton v. Elwert, 29 Oregon 583.

*Missouri.* — Echelkamp v. Schraeder, 45 Mo. 505.

*New Hampshire.* — Coe v. Winnepisogee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

*New Jersey.* — Fulton v. Greacen, 36 N. J. Eq. 216.

*New York.* — Manhattan Gaslight Co. v. Barker, 36 How. Pr. (N. Y. Super. Ct.) 233, per McCunn, J.

*Oregon.* — Bishop v. Baisley, 28 Oregon 119; Walts v. Foster, 12 Oregon 247; Norton v. Elwert, 29 Oregon 583.

*Texas.* — In Burnley v. Cook, 13 Tex. 589, 65 Am. Dec. 79, Wheeler, J., said: "In all cases where the right is doubtful the court will direct a trial, and in the meantime, if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established, a perpetual injunction will be decreed."

*Wisconsin.* — Bracken v. Preston, 1 Pin. (Wis.) 584, 44 Am. Dec. 412.

*United States.* — Wilson v. Rockwell, 29 Fed. Rep. 674; Erhardt v. Boaro, 113 U. S. 537.

1. Fulton v. Greacen, 36 N. J. Eq. 216, wherein it was said that the court in such cases does not take jurisdiction for the purpose of settling the rights of the parties, but simply to preserve the property until the legal title is established, citing Kerr Inj. 196, 197, and Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co., 1 Sim. N. S. 410.

2. Echelkamp v. Schraeder, 45 Mo. 505, in which case the court said: "It

is usual in cases like this, where the title itself comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence." See also Allen v. Dunlap, 24 Oregon 229, in which case an injunction was sought to restrain insolvent defendants from working a mine. The court said: "The defendants claim the right by location to do the acts alleged to be trespass and waste, and which affect the substance of the mining claim, and they insist that the plaintiffs shall establish their right of possession to the mining claim by judgment for its recovery before an injunction will issue, when the facts show that the plaintiffs are already in possession of it, and that the injury to it is irremediable at law. It is the defendants who are in a position to bring an action at law in a justice's court for the recovery of the mine, and to determine whether the right of possession is in the plaintiffs or themselves. It is the proper remedy for the defendants if they wish to determine the possessory title. The plaintiffs cannot resort to it, as they are in possession."

3. In Corning v. Troy Iron, etc., Factory, 40 N. Y. 191, Grover, J., said: "All the relief to which a party is enti-

## VII. PARTIES — 1. In General — a. PERSONS IN INTEREST. —

In accordance with a general rule of equity pleading, every person who is interested in the event of the suit, or in the subject-matter thereof, should be made a party, either plaintiff or defendant, in order that a complete and final decree may be made and a multiplicity of suits avoided.<sup>1</sup>

The Object of This Rule being to enable the court to administer justice, the court will not suffer the rule to become the instrument of a denial of justice to parties before the court who are entitled to relief.<sup>2</sup>

tled, arising from the same transaction, may, under the code, be obtained in one suit." See also *Broiestedt v. South Side R. Co.*, 55 N. Y. 220, in which case *Church, C. J.*, said: "This was formerly necessary if the legal title was at all doubtful, but since the code this court has held that the legal right may be established and the legal remedy by injunction obtained in the same action," citing *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191.

1. *Alabama*. — *Parkman v. Aicardi*, 34 Ala. 393.

*California*. — *Gates v. Lane*, 44 Cal. 392.

*Iowa*. — *Fleming v. Mershon*, 36 Iowa 413. Citing *Story Eq. Pl.*, §§ 72, 76, 76a, and 96; and *Culvert on Parties*, §§ 5, 6, 10, and 11.

*Kentucky*. — *Macey v. Brooks*, 4 Bibb. (Ky.) 238.

*Maryland*. — *Binney's Case*, 2 Bland (Md.) 99; *Bowen v. Gent*, 54 Md. 555.

*Massachusetts*. — *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285; *Florence Sewing Mach. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 110 Mass. 1.

*Mississippi*. — *Coulson v. Harris*, 43 Miss. 728; *Lemmon v. Dunn*, 61 Miss. 210.

*New Jersey*. — *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31.

*New York*. — *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375; *Wood v. Draper*, 24 Barb. (N. Y.) 187; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Strowbridge Lithographic Co. v. Crane*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 15; *Boughton v. Allen*, 11 Paige (N. Y.) 321, wherein Chancellor Walworth said that the object of requiring all persons having a joint and common interest with the plaintiff to be made parties is that the decision shall be final.

*Virginia*. — *Crawford v. M'Daniel*, 1

*Rob. (Va.)* 473, wherein it is said that the general rule "is too familiar to require authority to support it;" *Jameson v. Deshields*, 3 Gratt. (Va.) 4, in which latter case the court cited *Story Eq. Pl.*, § 72, and *Calvert on Parties*, p. 11.

*United States*. — *U. S. v. Parrott*, 1 McAll. (U. S.) 271; *Cole Silver Min. Co. v. Virginia, etc. Water Co.*, 1 Sawy. (U. S.) 685. See also *Wood v. Dummer*, 3 Mason (U. S.) 317.

**Parties May Be Either Plaintiffs or Defendants.** — As in other suits in equity, it is sufficient in a suit for injunction if all the parties interested in the subject of the suit are before the court either as plaintiffs or defendants; but it would seem that if one who would naturally occupy the position of a plaintiff is made a defendant, an excuse must be shown for not making him a plaintiff. *Parkman v. Aicardi*, 34 Ala. 393, citing 1 *Dan. Ch. Pr.* 197.

**Parties Having Legal and Equitable Interests.** — It is wholly unimportant whether the parties interested in the subject-matter of the suit, and who, because of such interest, must be joined, have a legal or equitable interest, this being one of the leading distinctions between proceedings at law and in equity. *Crawford v. M'Daniel*, 1 *Rob. (Va.)* 473. See also *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377; and *Jameson v. Deshields*, 3 Gratt. (Va.) 4.

See also *Boughton v. Allen*, 11 Paige (N. Y.) 321, to the effect that where the plaintiff alleges a sufficient excuse for omitting to join as a plaintiff one who has a joint or common interest with himself in the subject-matter of the suit, he should nevertheless make such person a defendant.

2. *Per Brown, J.*, in *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375, citing *Wood v. Dummer*, 3 Mason (U. S.) 317.



**Surety on Injunction Bond.** — The mere signing of the injunction bond by the sureties does not make them parties to the suit for injunction.<sup>1</sup>

**Nonresidents.** — The court will not suffer the rule that all persons who are interested in the subject-matter of the bill are necessary and proper parties, to be so applied as to defeat the purposes of justice if it can dispose of the merits of the case without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable, and the court will always, if possible, dispense with the joinder of persons who are beyond the process of the court.<sup>2</sup>

See also *U. S. v. Parrott*, 1 McAll. (U. S.) 271, wherein the court declared that the rule should not be so applied as to defeat the purposes of justice, and that the omission of interested parties should be excused where the court may dispose of the merits of the case without prejudice to their rights, or if the circumstances of the case render the application of the rule impracticable.

**Joinder of Improper Parties.** — While care must be taken on the one hand to bring all proper parties before the court, the same care should be taken on the other, that none are brought there whose rights are not to be in some way bound by the decree that may be made. *Per* Chancellor Vroom, in *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31.

1. *Grove v. Bush*, 86 Iowa 95.

2. In *U. S. v. Parrott*, 1 McAll. (U. S.) 271, it was said, speaking of the rule that all persons who are interested are necessary and proper parties: "There are exceptions to this rule which are governed by one and the same principle, which is — as the object of the general rule is — to accomplish the purposes of justice between all the parties in interest; and it is a rule founded in some sort upon public convenience and policy, rather than upon positive municipal or general jurisprudence. Courts of equity will not suffer it to be so applied as to defeat the very purposes of justice. \* \* \* The first exception to the rule \* \* \* is founded upon the utter impracticability of making the necessary or proper parties, by reason of their being beyond the process of the court." *Citing* Story Eq. Pl., §§ 77, 79. To the same effect is the language of Field, J., in *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685.

See also *Abbot v. American Hard*

*Rubber Co.*, 4 Blatchf. (U. S.) 489, wherein it was declared that the Circuit Courts of the United States will usually dispense with merely formal parties where they are beyond the reach of process; *Parkman v. Aicardi*, 34 Ala. 393, wherein it was held that the failure to join as a plaintiff one who has an interest in the subject of the suit is excused by his absence from the state; and *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375, wherein it was declared by Brown, J., that where parties are beyond the jurisdiction of the court, the chancellor will make such decree as he can without them. See further *Wood v. Dummer*, 3 Mason (U. S.) 317.

**Prayer for Process When Defendant Comes Within Jurisdiction.** — It is a rule in equity that all persons legally or beneficially interested in the subject-matter of the suit shall be made parties, and if any such persons are absent, it is usual to give their names and pray process against them when they come within the jurisdiction. *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377.

**Unknown Parties.** — An injunction against unknown defendants is valid and binding when the order is served upon them, although at the time the injunction was ordered or decreed they were not parties to the suit. *U. S. v. Agler*, 62 Fed. Rep. 824, in which case Baker, J., said: "Indeed, I think an injunction that is issued against one man, enjoining or restraining him and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that."

Likewise see *Anthony v. State*, 49 Kan. 246, wherein Valentine, J., said

*b.* **INDISPENSABLE PARTIES.** — If the interests of those present and those absent are so interwoven with each other that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the court cannot proceed, and, as a consequence, will refuse to entertain the suit.<sup>1</sup>

*c.* **WHEN AND HOW OBJECTIONS SHOULD BE TAKEN.** — Where the omitted parties are merely formal the court will be indisposed to listen to the objection at the hearing, and, if it can properly do so, will dispose of the cause on its merits without requiring such formal parties to be joined.<sup>2</sup>

**Objections Waived.** — Where proper and necessary parties are omitted the objection is waived by the coming in of such parties and their answering the bill.<sup>3</sup>

that a preliminary injunction may sometimes be issued against a merely nominal party to restrain him from doing something that may affect the plaintiff's rights before service of summons can be had.

1. *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685, *per* Field, J., whose language is quoted literally in the text. See also the following cases *cited* by him: *Shields v. Barrow*, 17 How. (U. S.) 130; and *Barney v. Baltimore City*, 6 Wall. (U. S.) 280.

2. *Kean v. Johnson*, 9 N. J. Eq. 401, in which case there was no demurrer for want of parties, and the objection was not taken until the hearing of a general demurrer to the equity of the bill; *citing* Story Eq. Pl. 542.

See also *Wallace v. Holmes*, 9 Blatchf. (U. S.) 65, holding that the objection to want of parties, unless it is set up or suggested in the defendant's answer, is one which cannot avail him unless the case is one in which the court cannot proceed to a decree between the parties before the court without prejudice to the right of those who are proper to be made parties, but who are not brought before the court. To the same effect see *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285; *Watertown v. Cowen*, 4 Paige (N. Y.) 510, 27 Am Dec. 80; *Brunswick v. Finney*, 54 Ga. 317; *Bosley v. Susquehanna Canal*, 3 Bland. (Md.) 63; *Binney's Case*, 2 Bland. Md. 106; *Chambers v. Robbins*, 28 Conn. 552; *Hartford v. Chipman*, 21 Conn. 489; *Ferguson v. Fisk*, 28 Conn. 501, in which last case the

court *cited* *New-London Bank v. Lee*, 11 Conn. 120.

In *Morgan v. Rose*, 22 N. J. Eq. 583, *Beasley, C. J.*, said: "I think the true principle is, that when the injunction will have the effect of injuring, in any material respect, the rights of absent persons, the court will not, unless in case of special necessity, interfere with such rights, but that when the absence of persons as parties constitutes, so far as the granting or refusing of the injunction is concerned, a formal rather than a substantial defect, there is no ground arising from such fact for a refusal of the temporary aid of the court, if such aid appears, under the circumstances, to be equitable."

3. *Brunswick v. Finney*, 54 Ga. 317. See also *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63, in which case the plaintiff asked for a writ of injunction against the governor and directors of a corporation without bringing in the corporation itself and asking for an injunction against it, and it was held on the *ex parte* application for an injunction that this was an objection which might be waived by the corporation by coming in and answering in its true name, and making defense upon the merits. *Citing* *Binney's Case*, 2 Bland (Md.) 106.

**Objection Delayed Until Appeal.** — In *Illinois* it has been held that where the bill does not show on its face that proper parties defendant have been omitted, and no relief is sought against any one who has not been made a party defendant, the objection that proper parties are not made to the bill cannot be made for the first time on appeal. *Turpin v. Dennis*, 139 Ill. 274.

The Court, *Ex Mero Motu*, if there be an omission of an indispensable party so that a complete decree cannot be made without him, will itself take notice of the fact and direct the cause to stand over in order that such new party may be added, or will dismiss the bill when the plaintiff is chargeable with laches.<sup>1</sup>

*d. AMENDMENTS.* — It is a well-settled practice for the court at any time during the progress of the suit, in its discretion, to call in other parties or to cause the proceedings to be amended by striking out or adding the names of parties, as may be necessary to accomplish the ends of justice and secure the interests of all.<sup>2</sup>

In Iowa, under Code, § 2650, the objection that necessary parties defendant have been omitted, which objection was not made either by demurrer, answer, or motion in arrest of judgment, cannot be made for the first time on appeal. *Hanks v. North*, 58 Iowa 396.

See also the articles EXCEPTIONS AND OBJECTIONS, vol. 8, p. 153; PARTIES.

1. *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285, *per* Colt, J. See also *Lemmon v. Dunn*, 61 Miss. 210, wherein it was held that even after hearing the court may refuse to proceed with the cause because of the failure of the plaintiff to bring in an indispensable party. See further *Cole Silver Min. Co. v. Virginia, etc.*, *Water Co.*, 1 Sawy. (U. S.) 685; *Morse v. Machias Water Power, etc., Co.*, 42 Me. 119, in which latter case the court cited *Story Eq. Pl.*, § 75.

2. *California.* — *Gates v. Lane*, 44 Cal. 392.

*Georgia.* — *Colley v. Duncan*, 47 Ga. 668; *Mayer v. Coley*, 80 Ga. 207.

*Idaho.* — *Oro Fino, etc.*, Min. Co. v. Cullen, 1 Idaho 113.

*Illinois.* — *Howell v. Peoria*, 90 Ill. 104, holding that the bill should not be dismissed because necessary parties defendant are omitted, but it should be retained in order that the proper parties may be made. *Citing Knapp v. Marshall*, 26 Ill. 63; *Thomas v. Adams*, 30 Ill. 37. See also *Kerfoot v. People*, 51 Ill. App. 409.

*Iowa.* — *Hanks v. North*, 58 Iowa 396, holding that where there is a misjoinder of parties plaintiff one should withdraw from the case and dismiss the action as to himself, and that such dismissal will not work a dissolution of the injunction.

*Kansas.* — *Voss v. Union School Dist.* No. 11, 18 Kan. 467, holding that where the plaintiff brings in mere nominal

parties and omits to join the real party in interest, the court may permit such necessary party to be brought in.

*Kentucky.* — A reasonable time should be allowed the plaintiff to bring in a necessary party defendant. *Hendrick v. Robinson*, 7 Dana (Ky.) 165; *Turner v. Cox*, 5 Litt. (Ky.) 175. See also *Hoofman v. Marshall*, 1 J. J. Marsh. (Ky.) 64, holding that where the plaintiff does not make the proper parties defendant, the chancellor may, in his discretion, either dismiss without prejudice or give the plaintiff leave to bring in the proper parties.

*Maryland.* — *Binney's Case*, 2 Bland (Md.) 99.

*Massachusetts.* — *Case v. Minot*, 158 Mass. 577; *Boston Water Power Co. v. Boston, etc., R. Corp.*, 16 Pick. (Mass.) 512. See also *Ingraham v. Dunnell*, 5 Met. (Mass.) 118; and *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285.

*New Jersey.* — *Irick v. Black*, 17 N. J. Eq. 189; *Buckley v. Corse*, 1 N. J. Eq. 504, wherein it is said that the court is very liberal as to amendments; *Morgan v. Rose*, 22 N. J. Eq. 583, in which case an injunction was sought against the acts of the officers of a corporation and all the corporators were made defendants, but not the corporation, and an amendment was allowed; *Fleischman v. Young*, 9 N. J. Eq. 620, wherein there was a misjoinder of parties plaintiff and leave was given by striking out the parties improperly joined or setting up facts justifying the joinder.

*New York.* — *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Clark v. Judson*, 2 Barb. (N. Y.) 90, wherein it was said by Hand, J., that courts are very liberal in permitting amendments as to parties in equity; *Allegany, etc., R. Co. v. Weidenfeld*, 5 Misc. Rep. (N. Y. Supreme Ct.) 43; *Mickles v. Roch-*

**Bill Without Equity.** — Where, upon the allegations in the bill, the plaintiff must necessarily fail even if an omitted party be brought in, an amendment will not be allowed.<sup>1</sup>

**New Cause of Action.** — An amendment of the bill will not be allowed which will in effect, by the introduction of new parties, change the aspect of the bill and amount to the institution of a new suit.<sup>2</sup>

**2. The Plaintiff** — *a.* IN GENERAL — **Plaintiff Is Not a Relator.** — The plaintiff in a suit for injunction assumes, it would seem, only the position of a complainant in a bill in equity, and not that of a relator, as on an information for a writ of mandamus or quo warranto.<sup>3</sup>

*ester City Bank*, 11 Paige (N. Y.) 118; *People v. Clark*, 70 N. Y. 518, holding that the proper parties defendant may be brought in where they have been omitted. See also *Derham v. Lee*, 87 N. Y. 599; and *Turner v. Conant*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 160.

*Virginia.* — *Holland v. Trotter*, 22 Gratt. (Va.) 136, wherein Christian, J., said that the amendment may be made by common order before answer or demurrer and afterwards by leave of court; *Pulliam v. Winston*, 5 Leigh (Va.) 324, holding that the plaintiff will be permitted to add proper parties defendant; *Jameson v. Deshields*, 3 Gratt. (Va.) 4, holding that where a plaintiff has shown a right to relief but such relief cannot be extended to him because of the omission of necessary parties the bill should not be dismissed, but should stand over with leave to amend; *Billups v. Sears*, 5 Gratt. (Va.) 31.

*United States.* — *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685.

**Before Final Hearing.** — The right to amend by making a new party defendant must be exercised before a final hearing on the merits, or, at least, such an amendment will not be allowed, if the cause has proceeded to a final hearing, without the payment of costs by the plaintiff. *Ingraham v. Dunell*, 5 Met. (Mass.) 118.

After the cause has matured the amendment is within the discretion of the court, and the bill may be dismissed at the final hearing, or the court may permit it to stand over with leave to amend and make proper parties. *Binney's Case*, 2 Bland. (Md.) 99.

1. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118.

2. *New Mexico Land Co. v. Elkins*,

22 Blatchf. (U. S.) 203; *Goodyear v. Bourn*, 3 Blatchf. (U. S.) 266; *Jameson v. Deshields*, 3 Gratt. (Va.) 4.

**Substitution of Attorney-General for Private Citizen as Plaintiff.** — In *New York* it has been maintained that where the action has been improperly brought in the name of a private citizen instead of the attorney-general or people, it is not proper to allow an amendment by striking out the name of the plaintiff and adding the name of the attorney-general, since the provision of the code authorizing amendments by adding or striking out the name of parties does not confer upon the court power to strike out the names of all interested parties plaintiff on the ground that they have no cause to amend, and substitute an entirely new set of parties plaintiff who are entitled to maintain the suit. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186, *per* Denio, C. J. See likewise *Kerfoot v. People*, 51 Ill. App. 409, wherein it was held that the amendment of the bill by granting the attorney-general leave to appear as a plaintiff, without reference by order or otherwise to an injunction which had been previously issued, gave no new force or efficacy to the injunction, no injunction having been asked for by the attorney-general, and it not appearing that any of the defendants had notice or knowledge of the amendments.

3. *Collins v. Ripley*, 8 Iowa 129, wherein Woodward, J., said: "When the defendant says that the petitioner is not entitled to become relator, we presume he means petitioner. \* \* \* His [the petitioner's] position as a citizen, and his interest as such in the public welfare, entitle him to present a petition to restrain a public officer from an act which would be a public

**Motives of the Plaintiff.** — The court will not inquire into the motives which actuate the plaintiff in bringing the suit. Where he shows a right to an injunction it is immaterial that he is seeking it for other purposes than the assertion and enforcement of the rights upon which he relies.<sup>1</sup>

**Must Be an Interested Party.** — The plaintiff, of course, must have such an interest in the subject-matter of the suit as gives him title to relief, and must be more than a mere intermeddler.<sup>2</sup>

**b. IN SUITS TO ENJOIN PUBLIC MISCHIEF** — (1) *Private Individuals as Plaintiffs* — **Statement of the General Rule.** — It is settled by numerous authorities, English and American, that a suit for an injunction to restrain apprehended wrongs against the public cannot be maintained by a citizen on the ground that his interests and rights as a member of the state will be interfered with or disturbed, where the injuries which he apprehends are of the same kind as those which will be sustained by the people at large; and this rule has been rigidly adhered to in a great variety of cases, *e. g.*, suits to restrain public nuisances, purprestures, obstructions of highways, official delinquencies, and usurpations of corporate powers.<sup>3</sup> It has been held that it requires some individual interest

wrong. There is some analogy between this and the case of a relator applying for a mandamus in a public matter, and it has been held that one holding such relations might present an information for that purpose."

1. *Brockman v. Creston*, 79 Iowa 587. See also *Atty.-Gen. v. Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304; *Goodson v. Richardson*, L. R. 9 Ch. 225; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417.

2. *Parkman v. Aicardi*, 34 Ala. 399; *Bennett v. American Art Union*, 5 Sandf. (N. Y.) 614; *Gould v. Thompson*, 39 How. Pr. (N. Y. Supreme Ct.) 5; *Rabberman v. Hause*, 89 Ill. 209; *Atchison v. State*, 34 Kan. 379.

Persons who are neither residents, voters, nor taxpayers of a school district are neither necessary nor proper parties plaintiff to the suit to enjoin the use of the common schoolhouse for religious purposes or worship. *Hurd v. Walters*, 48 Ind. 148.

**Interference with United States Mail.** — The United States has such property in the mails as to enable it to sue for injunction against interference by lawless persons with the transportation of the mail. *In re Debs*, 158 U. S. 564.

**Colorable Plaintiff.** — The rule that any taxpayer may maintain an action to enjoin the performance of an unlawful act which will operate to injure

or damage him by increasing the burden of his taxation is limited to cases where the action is instituted by the taxpayer in good faith, and for the protection of his own interests, and an injunction will not be granted if it appears that he is merely a colorable plaintiff, suing only in behalf of other parties in interest. *Highway Com'rs v. Debole*, 43 Ill. App. 25.

3. *Winterbottom v. Derby*, L. R. 2 Exch. 316; *Crowder v. Tinkler*, 19 Ves. Jr. 617; *Iveson v. Moore*, 1 Ld. Raym. 486; *Robins v. Robins*, 1 Salk. 15; *Earle's Case*, Carth. 173; *Williams's Case*, 5 Coke 73; *Chichester v. Lethbridge*, Willes 71; *Rose v. Miles*, 4 M. & S. 101; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336; *Greasley v. Codling*, 2 Bing. 263, 9 E. C. L. 407; *Rex v. Bristol Dock Co.*, 12 East 429. See also *Co. Litt.* 56.

Among the numerous cases decided by the courts of this country in which the doctrine stated in the text has been announced and adhered to, are the following:

*Arkansas.* — *Ward v. Little Rock*, 41 Ark. 526, wherein the object of the bill was to abate a public nuisance.

*California.* — *McCloskey v. Kreling*, 76 Cal. 511, 23 Am. & Eng. Corp. Cas. 151.

*Connecticut.* — *Frink v. Lawrence*, 20 Conn. 117; *Bigelow v. Hartford Bridge*

distinct from that which belongs to every inhabitant of a municipal corporation, to give one of such inhabitants a standing in

Co., 14 Conn. 565, which case has been cited often by American courts; *O'Brien v. Norwich*, etc., R. Co., 17 Conn. 372; *Clark v. Saybrook*, 21 Conn. 326; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165.

*Dakota*. — *Wood v. Bangs*, 1 Dakota 172.

*Florida*. — *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409, 17 Am. & Eng. R. Cas. 184; *Alden v. Pinney*, 12 Fla. 390.

*Georgia*. — *Coast Line R. Co. v. Cohen*, 50 Ga. 451.

*Illinois*. — *Kerfoot v. People*, 51 Ill. App. 409; *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379; *McDonald v. English*, 85 Ill. 232; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Rand v. Wilber*, 19 Ill. App. 395.

*Indiana*. — *Sidener v. Haw Creek Turnpike Co.*, 91 Ind. 186; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *McCowan v. Whitesides*, 31 Ind. 235, in which case an injunction was sought against the obstruction of a highway; *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201.

*Kansas*. — *Center Tp. v. Hunt*, 16 Kan. 430; *Crowell v. Ward*, 16 Kan. 60; *Wyandotte, etc., Bridge Co. v. Wyandotte County*, 10 Kan. 326; *Miller v. Palermo*, 12 Kan. 14; *Turner v. Jefferson County*, 10 Kan. 16; *Bobbett v. State*, 10 Kan. 9; *Craft v. Jackson County*, 5 Kan. 518, in which case an injunction was sought restraining the issuance of county warrants.

*Louisiana*. — *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7, which case was cited in *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201.

*Maine*. — *Southerland v. Jackson*, 30 Me. 466, which, however, was an action on the case for obstructing a street. Cited in *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. (N. Y. Super. Ct.) 233.

*Maryland*. — *Baltimore v. Gill*, 31 Md. 375, per *Bartol. C. J.*; *Kelly v. Baltimore*, 53 Md. 134.

*Massachusetts*. — *Smith v. Boston*, 7 Cush. (Mass.) 254; *Hale v. Cushman*, 6 Met. (Mass.) 425; *Hartshorn v. South Reading*, 3 Allen (Mass.) 501.

*Mississippi*. — *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378, wherein it was said: "A private action, either at law or in equity, will not lie unless the

plaintiff has sustained some special damage."

*Nebraska*. — *Hill v. Pierson*, 45 Neb. 503; *Barton v. Union Cattle Co.*, 28 Neb. 350; *Farrell v. Cook*, 16 Neb. 483; *Shed v. Hawthorne*, 3 Neb. 179.

*New Hampshire*. — *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249, cited in *Esson v. Wattier*, 25 Oregon 7.

*New Jersey*. — *Easton, etc., R. Co. v. Greenwich Tp.*, 25 N. J. Eq. 566; *Higbee v. Camden, etc., R. Co.*, 19 N. J. Eq. 276, in which case an injunction was sought against a public nuisance; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314; *Allen v. Chosen Freeholders*, 13 N. J. Eq. 68.

*New York*. — *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 439; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. (N. Y. Super. Ct.) 233, wherein it was declared that "no doctrine is more firmly settled than that \* \* \* those who do not suffer by a violation of law otherwise than as a member of the community, cannot maintain any remedial action;" *Davis v. New York*, 14 N. Y. 506; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Doolittle v. Broome County*, 18 N. Y. 155; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Lamming v. Galusha*, 135 N. Y. 239; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Myers v. Malcolm*, 6 Hill (N. Y.) 292; *Butler v. Kent*, 19 Johns. (N. Y.) 223; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301.

*Oklahoma*. — *Stiles v. Guthrie*, 3 Okla. 26.

*Oregon*. — *Esson v. Wattier*, 25 Oregon 7; *Luhrs v. Sturtevant*, 10 Oregon 170.

*Pennsylvania*. — *Horstman v. Young*, 13 Phila. (Pa.) 19, which case was cited in *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201; *Buck Mountain Coal Co. v. Lehigh Coal, etc., Co.*, 50 Pa. St. 91, in which latter case the court cited many English authorities.

*Rhode Island*. — *Mowry v. Providence*, 16 R. I. 422; *Engs v. Peckham*, 11 R. I. 210.

*Vermont*. — *Baxter v. Winooski*

court where it is an alleged delinquency in the administration of public affairs which is called in question, and there are cases in which it has been maintained that the fact of owning taxable property is not such a peculiarity as to take the case out of the rule, as all property, with very limited exceptions, is taxable, and every one either has or is capable of acquiring property.<sup>1</sup>

Turnpike Co., 22 Vt. 114, which case was cited in *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378.

*Virginia*.—*Beveridge v. Lacey*, 3 Rand. (Va.) 63.

*West Virginia*.—*Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

*Wisconsin*.—*Atty.-Gen. v. Chicago*, etc., R. Co., 35 Wis. 425, wherein it was maintained that relief against public wrongs is obtainable only on information by the attorney-general.

*United States*.—*Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91; *Pennsylvania v. Wheeling*, etc., Bridge Co., 13 How. (U. S.) 518; *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Illinois*, etc., R., etc., Co. v. St. Louis, 2 Dill. (U. S.) 70; *Mississippi*, etc., R. Co. v. Ward, 2 Black (U. S.) 485; *Osborne v. Brooklyn City R. Co.*, 5 Blatchf. (U. S.) 366; *Irwin v. Dixon*, 9 How. (U. S.) 27; *Currier v. West Side El. Patent R. Co.*, 6 Blatchf. (U. S.) 487.

1. *Atty.-Gen. v. West Hartlepool Imp. Com'rs*, L. R. 10 Eq. 152. And see the article TAXES.

*Illinois*.—*Hesing v. Scott*, 107 Ill. 600, in which case it was held that a taxpayer and inhabitant of a city is not entitled to an injunction against the vacation of a street unless it appears that he will sustain injury and loss distinct from that which will be sustained by the general public; *Seager v. Kankakee County*, 102 Ill. 669, in which case it was held that inhabitants of a township cannot maintain a suit to prevent the issuance by a board of supervisors of a license to keep a dramshop. See also *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379.

*Kansas*.—*State v. Marion County*, 21 Kan. 419, holding that a suit to enjoin county commissioners from letting a contract to erect county buildings, and from appropriating for the payment of such buildings funds raised to defray county charges and expenses, should be maintained in the name of the state on the relation of the county attorney. See also, to the same effect, *Freeland*

*v. Stillman*, 49 Kan. 197; *Wyandotte*, etc., *Bridge Co. v. Wyandotte County*, 10 Kan. 326; *Craft v. Jackson County*, 5 Kan. 518; *Bobbett v. State*, 10 Kan. 9; *Bartlett v. State*, 13 Kan. 99; *State v. Faulkner*, 20 Kan. 541; *Turner v. Jefferson County*, 10 Kan. 16; *Barber County v. Smith*, 48 Kan. 331; *School Dist. No. 1 v. Neil*, 36 Kan. 617; *Mike-sell v. Durkee*, 34 Kan. 509; *School Dist. No. 1 v. Shaddock*, 25 Kan. 467.

*New York*.—In *Roosevelt v. Draper*, 23 N. Y. 323, it was said: "It requires some individual interest, distinct from that which belongs to every inhabitant of the town or county, to give the party complaining a standing in court where it is an alleged delinquency in the administration of public affairs which is called in question." Quoted with approval in *Tift v. Buffalo*, 65 Barb. (N. Y.) 460. See also *Davis v. New York*, 2 Duer (N. Y.) 663, wherein Duer, J., said: "In all the cases in the English books, in which the act of a municipal corporation is sought to be restrained or annulled, as a violation of its charter, a breach of trust, or an excess of power, the attorney-general is found to be a party, either prosecuting alone or in conjunction with or upon the relation of individual corporators." See likewise the following cases, which are to the same effect: *Kilbourne v. St. John*, 59 N. Y. 21; *Osterhoudt v. Rigney*, 98 N. Y. 222; *Phelps v. Watertown*, 61 Barb. (N. Y.) 121; *Roosevelt v. Draper*, 23 N. Y. 318; *People v. Canal Board*, 55 N. Y. 390; *People v. New York*, 32 Barb. (N. Y.) 102; *Guest v. Brooklyn*, 69 N. Y. 506; *Doolittle v. Broome County*, 18 N. Y. 155; *Ayres v. Lawrence*, 63 Barb. (N. Y.) 458; *Demarest v. Wickham*, 63 N. Y. 320; *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 28; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *New York L. Ins. Co. v. New York*, 4 Duer (N. Y.) 192; *Heywood v. Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. Broome County*, 25 N. Y. 312.

**The Reason for the Rule.** — The rule is not a technical and arbitrary one, but has a solid foundation of principle and is sustained by very sound reasons of public policy, the object of the rule being to protect the defendant against a multiplicity of suits and to secure him in one suit a final determination of all the controverted questions involved.<sup>1</sup>

**When Private Individual May Be Plaintiff.** — Although the rule is firmly established that a suit to enjoin public mischiefs of whatever character must in general be instituted by or on behalf of the sovereign or the state, it is equally well settled that a private individual is a proper party plaintiff where the injuries which he will sustain are special and particular, differing in kind and not merely in degree from those which the public at large will suffer.<sup>2</sup>

*Oregon.* — *State v. Lord*, 28 Oregon 498; *State v. Pennoyer*, 26 Oregon 205; *State v. Hibernian Sav., etc., Assoc.*, 8 Oregon 396.

*Pennsylvania.* — *Kerr v. Trego*, 47 Pa. St. 292.

*Wisconsin.* — *Judd v. Fox Lake*, 28 Wis. 583.

*United States.* — *Dows v. Chicago*, 11 Wall. (U. S.) 108.

1. *Davis v. New York*, 2 Duer (N. Y.) 663.

2. *Crowder v. Tinkler*, 19 Ves. Jr. 617, in which case Lord Chancellor Eldon said: "If the subject was represented as a mere public nuisance, I could not interfere in this case, as the attorney-general is not a party. \* \* \* The complaint is therefore to be considered as of not a public nuisance simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence; and on such a case, clearly established, I do not hesitate to say an injunction would be granted." See also *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272. See further 2 Story Eq. Jur., § 924; and *Waterman's Eden on Inj.*, §§ 267 and 268.

The right of a private individual to maintain a suit in his own name under the circumstances stated in the text, without the attorney-general, finds support in the following American cases:

*Alabama.* — *Columbus v. Rodgers*, 10 Ala. 37.

*Connecticut.* — *Frink v. Lawrence*, 20 Conn. 117; *Scofield v. Eighth School Dist.*, 27 Conn. 499.

*Georgia.* — *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271; *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601.

*Illinois.* — *Green v. Green*, 34 Ill. 320; *Green v. Oakes*, 17 Ill. 249.

*Indiana.* — *Dwenger v. Chicago, etc., R. Co.*, 98 Ind. 153. See also *Cummins v. Seymour*, 79 Ind. 491; *McGowan v. Whitesides*, 31 Ind. 235; *Ross v. Thompson*, 78 Ind. 90.

*Iowa.* — *Musser v. Hershey*, 42 Iowa 356. See also *Hougham v. Harvey*, 33 Iowa 203; *Ewell v. Greenwood*, 26 Iowa 377.

*Kansas.* — *Craft v. Jackson County*, 5 Kan. 518.

*Louisiana.* — *Blanc v. Murray*, 36 La. Ann. 162.

*Massachusetts.* — *Kenney v. Consumers' Gas Co.*, 142 Mass. 417.

*Mississippi.* — *Whitfield v. Rogers*, 26 Miss. 84.

*Nebraska.* — *Hill v. Pierson*, 45 Neb. 503. See also *Barton v. Union Cattle Co.*, 28 Neb. 350; *Farrell v. Cook*, 16 Neb. 483; *Shed v. Hawthorne*, 3 Neb. 179; *Normand v. Otoe County*, 8 Neb. 18.

*New Jersey.* — *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314.

*New York.* — In *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. (N. Y. Super. Ct.) 233, McCunn, J., said: "If a public nuisance work a private injury to a person, that person may have a remedy by private action for damages, and in a proper case may have an injunction." Likewise see *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 439 [in which case the court distinguished *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371]; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Wilcken v. West Brooklyn R. Co.* (Supreme Ct.) 1 N. Y. Supp. 791; *Lansing v. Smith*, 4 Wend. (N. Y.) 9, *per* Chancellor Wal-



**Extent of Relief Granted Private Individual.** — And even where a private individual makes out a case in which he is the proper party plaintiff to a suit for an injunction, injunction will be granted, if at all, only to the extent of protecting his special and individual interests.<sup>1</sup>

**Nature of Plaintiff's Peculiar Interest.** — Although there is no question that a private individual who will suffer special injuries is a proper party plaintiff to enjoin public mischiefs of whatever character, it is a very difficult question what constitutes such peculiar and special interest as will suffice to enable him to maintain the action, and the courts have been far from harmonious in their decisions, especially where the fact relied upon by the plaintiff is that he is a taxpayer and his burden of taxes will be increased.<sup>2</sup>

worth; *Milhau v. Sharp*, 27 N. Y. 625; *Doolittle v. Broome County*, 18 N. Y. 160; *Gillespie v. Forrest*, 18 Hun (N. Y.) 110; *New York v. Baumberger*, 7 Robt. (N. Y.) 219; *Hudson River R. Co. v. Loeb*, 7 Robt. (N. Y.) 418; *Delaware, etc., Canal Co. v. Lawrence*, 2 Hun (N. Y.) 163; *Fish v. Lodge*, 4 Den. (N. Y.) 311; *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 317; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 563; *Penniman v. New York Balance Co.*, 13 How. Pr. (N. Y. Supreme Ct.) 40.

*Oregon.* — *State v. Lord*, 28 Oregon 498.

*Vermont.* — *Sargent v. George*, 56 Vt. 627.

*Virginia.* — *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

*West Virginia.* — *Keystone Bridge Co. v. Summers*, 13 W. Va. 476. *Citing* *Green v. Oakes*, 17 Ill. 249; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, 6 Paige (N. Y.) 563; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 317; *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

*United States.* — *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91.

1. *School District No. 1 v. Shaddock*, 25 Kan. 467.

2. In view of the limited scope of this article, the writer has made no attempt to do more than state the general principles which govern the courts in determining who is a proper party plaintiff to a suit for an injunction against public mischiefs, and has left the subject for treatment under more cognate titles in this work, such as STREETS AND HIGHWAYS; MUNICIPAL CORPORATIONS; NUISANCES; TAXES.

Reference is also made to the title *Injunctions*, American and English Encyclopædia of Law. For the purpose, however, of illustrating the application of the rules stated in the text to various cases, the following citations are made:

*Alabama.* — *Demopolis v. Webb*, 87 Ala. 659; *New Orleans, etc., R. Co. v. Dunn*, 51 Ala. 134.

*California.* — *Crowley v. Davis*, 63 Cal. 460; *Bigley v. Nunan*, 53 Cal. 403; *Payne v. McKinley*, 54 Cal. 532; *Marini v. Graham*, 67 Cal. 130.

*Connecticut.* — *Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571; *New Haven v. Sargent*, 38 Conn. 50; *Derby v. Alling*, 40 Conn. 410; *New London v. Brainard*, 22 Conn. 553.

*Georgia.* — *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1.

*Illinois.* — *Chicago v. Union Bldg. Assoc.*, 102 Ill. 379, holding that it is not sufficient that a private individual will suffer injuries differing only in degree from those which will be sustained by the general public; *McDonald v. English*, 85 Ill. 236; *Du Page County v. Jenks*, 65 Ill. 275; *Springfield v. Edwards*, 84 Ill. 627; *Fletcher v. Tuttle*, 151 Ill. 41.

*Indiana.* — *Adams v. Ohio Falls Car Co.*, 131 Ind. 375; *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156; *Fosson v. Landry*, 123 Ind. 136; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542; *Sohn v. Cambern*, 106 Ind. 302; *Terre Haute, etc., R. Co. v. Bissell*, 108 Ind. 113; *Dwenger v. Chicago, etc., R. Co.*, 98 Ind. 153; *Harney v. Indianapolis, etc., R. Co.*, 32 Ind. 244; *McCowan v. Whitesides*, 31 Ind. 235; *Oliver v. Keightley*, 24 Ind. 514; *Lafayette v. Cox*, 5 Ind. 38; *Delphi v. Evans*, 36 Ind. 90.

(2) *The Attorney-General.* — The authority of the attorney-general or other law officer empowered to represent the government to file an information in equity to restrain or prevent public mischiefs is well established in England and in this country, and it may be done by him either *ex officio* or upon the relation of persons who have an interest in the subject-matter, and whose private rights may be protected by a decree which is sought mainly on the ground that the rights of the public will be jeopardized.<sup>1</sup>

*Iowa.* — Brockman *v.* Creston, 79 Iowa 587; Fleming *v.* Mershon, 36 Iowa 413; Anderson *v.* Orient F. Ins. Co., 88 Iowa 579; Brandriff *v.* Harrison County, 50 Iowa 164; Olmstead *v.* Henry County, 24 Iowa 33; Litchfield *v.* Polk County, 18 Iowa 70; Rice *v.* Smith, 9 Iowa 570; Collins *v.* Ripley, 8 Iowa 129; Hospers *v.* Wyatt, 63 Iowa 264; Goetzman *v.* Whitaker, 81 Iowa 527; Snyder *v.* Foster, 77 Iowa 640; Collins *v.* Davis, 57 Iowa 256; Cornell College *v.* Iowa County, 32 Iowa 520; State *v.* Bailey, 7 Iowa 396; State *v.* Smith, 7 Iowa 244.

*Kansas.* — Craft *v.* Jackson County, 5 Kan. 518; Barber County *v.* Smith, 48 Kan. 331; School District No. 1 *v.* Neil, 36 Kan. 617; Mikesell *v.* Durkee, 34 Kan. 509; School District No. 1 *v.* Shaddock, 25 Kan. 467; Graham *v.* Horton, 6 Kan. 343.

*Maine.* — Carlton *v.* Newman, 77 Me. 408.

*Maryland.* — Kelly *v.* Baltimore, 53 Md. 139; Baltimore *v.* Gill, 31 Md. 394.

*Massachusetts.* — Hartshorn *v.* South Reading, 3 Allen (Mass.) 501; Brainard *v.* Connecticut River R. Co., 7 Cush. (Mass.) 506; Harvard College *v.* Stearns, 15 Gray (Mass.) 1; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63.

*Minnesota.* — Hodgman *v.* Chicago, etc., R. Co., 20 Minn. 48; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82.

*Missouri.* — State *v.* County Court, 51 Mo. 350; McPike *v.* Pew, 48 Mo. 525; Steines *v.* Franklin County, 48 Mo. 175; Leslie *v.* St. Louis, 47 Mo. 474; Barrow *v.* Davis, 46 Mo. 394; Sayre *v.* Tompkins, 23 Mo. 443; Dean *v.* Todd, 22 Mo. 90; St. Louis *v.* Goode, 21 Mo. 216; Page *v.* St. Louis, 20 Mo. 136.

*Nebraska.* — Shed *v.* Hawthorne, 3 Neb. 179.

*New Jersey.* — Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171; Woodbridge Tp. *v.* Inslee, 37

N. J. Eq. 397; Greenwich Tp. *v.* Easton, etc., R. Co., 24 N. J. Eq. 217.

*New York.* — Wright *v.* Shanahan, 149 N. Y. 495; Roosevelt *v.* Draper, 23 N. Y. 318; Doolittle *v.* Broome County, 18 N. Y. 155; Milhau *v.* Sharp, 15 Barb. (N. Y.) 193; DeBaun *v.* New York, 16 Barb. (N. Y.) 392; Corwin *v.* Campbell, 45 How. Pr. (N. Y. Supreme Ct.) 9; Mutual Ben. L. Ins. Co. *v.* New York, 3 Keyes (N. Y.) 182; Hasbrouck *v.* Kingston Board of Health, 3 Keyes (N. Y.) 480; Messeck *v.* Columbia County, 50 Barb. (N. Y.) 190; Adriance *v.* New York, 1 Barb. (N. Y.) 19; Robinson *v.* Chamberlain, 34 N. Y. 389; McCarthy *v.* Syracuse, 46 N. Y. 194; Milhau *v.* Sharp, 15 Barb. (N. Y.) 193; Smith *v.* Rochester, 92 N. Y. 473; Stuyvesant *v.* Pearsall, 15 Barb. (N. Y.) 244; Adsit *v.* Brady, 4 Hill (N. Y.) 630; St. Peter *v.* Denison, 58 N. Y. 416; Hover *v.* Barkhoof, 44 N. Y. 113; Cady *v.* Conger, 19 N. Y. 256; Penniman *v.* New York Balance Co., 13 How. Pr. (N. Y. Supreme Ct.) 40; Watertown *v.* Cowen, 4 Paige (N. Y.) 510; Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 390.

*Ohio.* — Armstrong *v.* Athens County, 10 Ohio 235.

*Oregon.* — White *v.* Multnomah County, 13 Oregon 317, 57 Am. Rep. 20; Walts *v.* Foster, 12 Oregon 247; Luhrs *v.* Sturtevant, 10 Oregon 171; Price *v.* Knott, 8 Oregon 438.

*Pennsylvania.* — Kerr *v.* Trego, 47 Pa. St. 292; Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9.

*West Virginia.* — Williams *v.* County Ct., 26 W. Va. 488.

*Wisconsin.* — Willard *v.* Comstock, 58 Wis. 565.

*United States.* — Crampton *v.* Zabriske, 101 U. S. 609; The Liberty Bell, 23 Fed. Rep. 843, 8 Am. & Eng. Corp. Cas. 329; Cutting *v.* Gilbert, 5 Blatchf. (U. S.) 259; Board of Liquidation *v.* McComb, 92 U. S. 531.

1. Atty.-Gen. *v.* Birmingham, etc.,

**Matters Concerning Private Interests Only.**—Where the wrong complained of is one in which the state has no direct interest any

R. Co., 8 Eng. L. & Eq. 243; Atty.-Gen. v. West Hartlepool Imp. Com'rs, L. R. 10 Eq. 152; Atty.-Gen. v. Great Northern R. Co., 1 Drew. & S. 154; Atty.-Gen. v. Forbes, 2 Myl. & C. 123; Winterbottom v. Derby, L. R. 2 Exch. 316; Atty.-Gen. v. Cleaver, 18 Ves. Jr. 216; Atty.-Gen. v. Richards, 2 Anstr. 603; Atty.-Gen. v. Johnson, 2 Wils. Ch. 87; Kerrison v. Sparrow, Cooper 305; Ware v. Regent's Canal Co., 3 De G. & J. 212; Baines v. Baker, Amb. 158; Anonymous, 3 Atk. 750. See also 1 Dan. Ch. Pr. 11, 3 Dan. Ch. Pr. 1858, and 2 Story Eq. Jur., §§ 921 and 936, which authorities were cited in District Atty. v. Lynn, etc., R. Co., 16 Gray (Mass.) 242; Eden Inj. 259, § 9, cited in People v. Vanderbilt, 26 N. Y. 287; and Laus-sat's Fonblanque 5, note, Mitford Pl. by Jeremy 99, 1 Newl. Pr. 55, Blake Ch. Pr. 40, and Cooper Eq. 10r, which authorities were cited in Atty.-Gen. v. Delaware, etc., R. Co., 27 N. J. Eq. 1.

The practitioner is likewise referred to the following cases decided in this country, in which the doctrine stated in the text finds support:

*Alabama.*—State v. Mobile, 5 Port. (Ala.) 279.

*California.*—People v. Davidson, 30 Cal. 379, per Shafter, J. Citing Atty.-Gen. v. Cleaver, 18 Ves. Jr. 216, and Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

*Illinois.*—Kerfoot v. People, 51 Ill. App. 409; Seager v. Kankakee County, 102 Ill. 669; Chicago v. Union Bldg. Assoc., 102 Ill. 379.

*Kansas.*—Freeland v. Stillman, 49 Kan. 197; State v. Marion County, 21 Kan. 419. See also State v. Faulkner, 20 Kan. 541; Bartlett v. State, 13 Kan. 99; Bobbett v. State, 10 Kan. 9; Craft v. Jackson County, 5 Kan. 518. See further State v. McLaughlin, 15 Kan. 228, per Brewer, J.

*Massachusetts.*—Smith v. Boston, 7 Cush. (Mass.) 254; Hartshorn v. South Reading, 3 Allen (Mass.) 501; Atty.-Gen. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; District Atty. v. Lynn, etc., R. Co., 16 Gray (Mass.) 242; Kenney v. Consumers' Gas Co., 142 Mass. 419.

*Michigan.*—Taggart v. Board of Auditors, 73 Mich. 53.

*Missouri.*—State v. County Ct., 51 Mo. 350.

*New Jersey.*—Hutchinson v. State, 39 N. J. Eq. 569, 8 Am. & Eng. Corp. Cas. 345; Atty.-Gen. v. Delaware, etc., R. Co., 27 N. J. Eq. 1; Higbee v. Camden, etc., R. Co., 19 N. J. Eq. 276; Atty.-Gen. v. Delaware, etc., R. Co., 27 N. J. Eq. 631; Easton, etc., R. Co. v. Greenwich Tp., 25 N. J. Eq. 566.

*New York.*—Doolittle v. Broome County, 18 N. Y. 155; People v. Vanderbilt, 26 N. Y. 287; Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 382; People v. Lowber, 7 Abb. Pr. (N. Y. Supreme Ct.) 158; People v. New York, 32 Barb. (N. Y.) 102; People v. Equity Gas Light Co., 141 N. Y. 232; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; People v. Albany, etc., R. Co., 5 Lans. (N. Y.) 25, per Mullin, J.; People v. Canal Board, 55 N. Y. 390; Davis v. New York, 2 Duer (N. Y.) 663; Smith v. Lockwood, 13 Barb. (N. Y.) 209.

*Oregon.*—State v. Lord, 28 Oregon 498. See also State v. Hibernian Sav., etc., Assoc., 8 Oregon 396.

*Pennsylvania.*—Kerr v. Trego, 47 Pa. St. 292; Com. v. Rush, 14 Pa. St. 186.

*Rhode Island.*—Mowry v. Providence, 16 R. I. 422.

*Wisconsin.*—Atty.-Gen. v. Chicago, etc., R. Co., 35 Wis. 425; Atty.-Gen. v. Eau Claire, 37 Wis. 400; State v. Cunningham, 81 Wis. 440.

*United States.*—*In re Debs*, 158 U. S. 564; Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91; Coosaw Min. Co. v. South Carolina, 144 U. S. 550; Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. (U. S.) 518.

**Contra.**—Bigelow v. Hartford Bridge Co., 14 Conn. 565, cannot be said to be a case *contra*, as the suit in that case was not brought by the attorney-general; but it is deemed advisable to direct attention to the following language of the court: "The courts of equity in England will indeed entertain informations, not by individuals, but at the suit of the attorney-general, or the proper crown officer, for the purpose of abating public nuisances, and what are termed purprestures. That mode of proceeding has been, however, hitherto unknown here; and whether it would be tolerated in any case it is unnecessary to consider."

In Atty.-Gen. v. Chicago, etc., R. Co.

more than it has in an ordinary controversy between individuals, the state is not a proper party plaintiff, and the suit should be instituted by the particular individual who will be injured.<sup>1</sup>

(3) *Statutory Provisions.* — In some states the rule hereinbefore stated forbidding a private citizen from being the plaintiff in a suit to enjoin a public mischief does not apply with reference to suits for injunctions to restrain certain sorts of public mischiefs, because of statutes providing that any citizen may maintain a suit for injunction regardless of whether or not he will suffer particular injury.<sup>2</sup>

35 Wis. 535, the court said, with reference to the language quoted in the next preceding paragraph: "If, in saying that the remedy by information in behalf of the state was hitherto unknown there, the court meant in Connecticut, it was probably correct; if in the United States, it was certainly mistaken."

**The Relator.** — In *New Jersey* it has been held that where the suit immediately concerns the right of the state, *c. g.*, where an injunction is sought against a purpresture, it may be brought in the name of the attorney-general without a relator, although in practice it is usual to name a relator. *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1. *Citing* Lausat's Fonblanque 5, note; Mitford Pl. by Jeremy 99; 1 Newl. Pr. 55; Blake Ch. Pr. 40; and Cooper Eq. 101.

In *Wisconsin* it has been held that the refusal of the attorney-general to bring or consent to the bringing of a suit on behalf of the state for a quasi-prerogative writ of injunction does not prevent the court from rightfully taking jurisdiction of the same upon the relation of a private citizen in the name of the state. *State v. Cunningham*, 83 Wis. 90, wherein the court said: "This ruling relieves any attorney-general from the charge of preventing a suit for an alleged invasion of the sovereignty of the state or the franchises and liberties of its people. The present attorney-general certainly has the right to exercise the judgment and discretion vested in him by law in the prosecution of suits in this court as well as other courts."

1. *Atty.-Gen. v. Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304, in which case one of the lords justices said: "I agree that motives are very often immaterial with reference to the manner of disposing of a suit. \* \* \*

Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which or under which the matter is brought forward. Now, in the present case, though the attorney-general's name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good."

*Illinois.* — *Cairo, etc., R. Co. v. People*, 92 Ill. 170.

*Kansas.* — *State v. McLaughlin*, 15 Kan. 228; *Atchison v. State*, 34 Kan. 379.

*Massachusetts.* — *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *Atty.-Gen. v. Salem*, 103 Mass. 138; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95.

*Michigan.* — *Atty.-Gen. v. Burrell*, 31 Mich. 25.

*Missouri.* — *Ewing v. Board of Education*, 72 Mo. 436; *Newmeyer v. Missouri, etc., R. Co.*, 52 Mo. 81, 14 Am. Rep. 394.

*New Jersey.* — *King v. Morris, etc., R. Co.*, 18 N. J. Eq. 397.

*New York.* — *People v. Albany, etc., R. Co.*, 5 Lans. (N. Y.) 25; *People v. Law*, 34 Barb. (N. Y.) 494; *People v. Clark*, 53 Barb. (N. Y.) 172; *People v. Booth*, 32 N. Y. 397.

*Wisconsin.* — *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425.

**Joinder of Attorney-General in Suit by Private Individual.** — Where a suit for an injunction against a public nuisance is brought by one who alleges that he will suffer special injury thereby, it is not necessary, although it may be right, to make the attorney-general a party in order that the question may be set at rest in one suit. *Sampson v. Smith*, 8 Sim. 272.

2. In *Iowa* it has been provided by statute that any citizen residing in a

c. WHO MAY JOIN AS PLAINTIFFS. — The court will not permit several plaintiffs to demand, by one bill, several matters distinct and unconnected.<sup>1</sup> But there is no inflexible rule as to the joinder

county where a liquor nuisance exists may, upon the refusal of the county attorney to bring suit, institute and prosecute in the name of the state an action to enjoin the nuisance, or he may institute such an action in his own name. It has been held that in either event the action so instituted is of a public nature and for the public benefit, and that the right thus conferred by statute upon the citizen is a mere naked right to maintain the action and stand for and represent the public. *Cameron v. Kapinos*, 89 Iowa 561. See also *Geyer v. Douglass*, 85 Iowa 93; *Dickinson v. Eichorn*, 78 Iowa 710; *Conley v. Zerber*, 74 Iowa 699; *Applegate v. Winebrenner*, 66 Iowa 67, and *Littleton v. Fritz*, 65 Iowa 488.

*Employment of Private Counsel.* — Under this statute, where a citizen engages in the prosecution of such an injunction proceeding, he may employ private counsel, and need not rely upon the services of the county attorney. *Maloney v. Traverse*, 87 Iowa 306.

In *Massachusetts* it has been provided by statute that an injunction against the use of premises for prostitution, lewdness, sale of intoxicating liquors, etc., in violation of law, may be allowed on the petition of not less than ten legal voters of any town or city; and it has been held that where a suit has been brought by voters they represent the public as does the attorney-general in other similar cases, and that it is immaterial that no one of them has suffered any damage or apprehends injury beyond that common to the citizen. *Carleton v. Rugg*, 149 Mass. 550.

In *New Jersey*, by Act March 22, 1883 (Public Laws 1883, p. 119), authority was conferred upon certain legal boards of health to file a bill in equity as relators in the name of the state for an injunction to prohibit nuisances hazardous to public health; and it has been held that a bill filed by one of such boards of health is not within the rule that ordinarily the bill or information must be on the part of the attorney-general. *Hutchinson v. State*, 39 N. J. Eq. 569, 8 Am. & Eng. Corp. Cas. 345.

1. *Alabama.* — *Larkin v. Mason*, 71 Ala. 227, in which case the court applied

the general rule that all of the parties plaintiff must be entitled to relief.

*Dakota.* — *Wood v. Bangs*, 1 Dakota 172.

*Indiana.* — *Heagy v. Black*, 90 Ind. 534; *Lewis v. Eshleman*, 57 Iowa 633.

*Kansas.* — *Atchison St. R. Co. v. Nave*, 38 Kan. 744; *Hudson v. Atchison County*, 12 Kan. 140, holding that the misjoinder of parties plaintiff is fatal and requires the dismissal of the plaintiff's action.

*New Jersey.* — *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31; *Johnson v. Vail*, 14 N. J. Eq. 423; *Davidson v. Isham*, 9 N. J. Eq. 186; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Titus v. Bennet*, 8 N. J. Eq. 267.

*New York.* — *Wood v. Perry*, 1 Barb. (N. Y.) 114, in which it was said: "To allow persons having distinct claims against the same individual to maintain a joint suit against him, merely because the act of one may, if valid, incidentally prove beneficial to the others who had nothing to do with it, might be productive of great oppression and injustice. We have seen no case which goes to that extent." See also to the same effect the following cases: *Emery v. Erskine*, 66 Barb. (N. Y.) 9; *Gould v. Thompson*, 39 How. Pr. (N. Y. Supreme Ct.) 5; *New York, etc., R. Co. v. Schuyler*, 7 Abb. Pr. (N. Y. Ct. App.) 41; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 257; *Alston v. Jones*, 3 Barb. Ch. (N. Y.) 400; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59.

*Wisconsin.* — *Newcomb v. Horton*, 18 Wis. 566.

*United States.* — *Woolstein v. Welch*, 42 Fed. Rep. 566.

*England.* — *Davies v. Quarterman*, 4 Y. & Coll. 257, which case was cited in *Johnson v. Vail*, 14 N. J. Eq. 423; *Jones v. Garcia Del Rio*, T. & R. 297; *Hudson v. Maddison*, 12 Sim. 416, which cases were cited in *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, and in *Woolstein v. Welch*, 42 Fed. Rep. 566. And see, in general, the article MULTIFARIOUSNESS.

*Injunction and Damages.* — Where several adjacent landowners join in a bill to restrain a nuisance, they should not pray that the defendant be decreed

of parties plaintiff, and the rule forbidding the misjoinder of plaintiffs or multifariousness, so far as any rule can be said to exist, is one of convenience only, and must depend in its application upon the circumstances of each particular case.<sup>1</sup>

**It Is Only When the Interests of the Plaintiffs Are Conflicting** that their joinder as parties plaintiff is objectionable, and it is well settled that where one general right is claimed, and there is one common interest among all the plaintiffs in the subject of the suit, their joinder is proper.<sup>2</sup>

to pay them, respectively, the damages which they have sustained, because they have no common interest in such damages. *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Barham v. Hostetter*, 67 Cal. 272; *Foreman v. Boyle*, 88 Cal. 290.

1. *Scofield v. Lansing*, 17 Mich. 437, *per* Christianity, J. [citing *Campbell v. Mackey*, 1 Myl. & C. 603; *Adams Eq.* 309, 310; and *Story Eq. Pl.*, § 530]. See also *Kennedy v. Troy*, 14 Hun (N. Y.) 308, wherein it was declared by Learned, P. J., that there is no inflexible rule as to the joinder of parties plaintiff, and that persons having separate interests are sometimes allowed to unite to restrain a common injury. See likewise *Tradesman's Bank v. Merriitt*, 1 Paige (N. Y.) 302, wherein Chancellor Walworth declared that misjoinder of plaintiffs is a matter of form only and does not go to the merits, saying: "I am not certain that in a clear case of misjoinder of complainants the defendant would be entitled to have the injunction dissolved as a matter of course before demurrer or answer."

2. **Illinois.** — *Mount Carbon Coal, etc., Co. v. Blanchard*, 54 Ill. 240; *Du Page County v. Jenks*, 65 Ill. 275; *Harward v. St. Clair, etc., Levee, etc., Co.*, 51 Ill. 130.

**Indiana.** — *Tate v. Ohio, etc., R. Co.*, 10 Ind. 174; *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201; *Sullivan v. Phillips*, 110 Ind. 321; *Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424; *Robbins v. Sand Creek Turnpike Co.*, 34 Ind. 461.

**Iowa.** — *Brandirff v. Harrison County*, 50 Iowa 164; *Powell v. Spaulding*, 3 Greene (Iowa) 443.

**Kansas.** — *Atchison St. R. Co. v. Nave*, 38 Kan. 744; *Palmer v. Waddell*, 22 Kan. 352; *Jeffers v. Forbes*, 28 Kan. 179.

**Statutory Provisions.** — Under Code Kan., § 253, any number of persons

whose property is affected by an illegal tax or assessment may unite as plaintiffs in an action to enjoin the collection or tax of such assessment although their interests may be several and not joint. *Gilmore v. Norton*, 10 Kan. 491; *Wyandotte, etc., Bridge Co. v. Wyandotte County*, 10 Kan. 326; *Gilmore v. Fox*, 10 Kan. 509.

**Louisiana.** — *Dudley v. Tilton*, 14 La. Ann. 283.

**Massachusetts.** — In *Ballou v. Hopkinton*, 4 Gray (Mass.) 324, it was held that several persons having mills in one and the same stream might join as plaintiffs in an action to enjoin the defendant from drawing off water from the plaintiff's reservoir established for the purpose of supplying the several mills of the plaintiffs. The court remarked: "Although the plaintiffs are several owners of separate and distinct mills, \* \* \* yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased and a joint interest in the remedy, which equity alone can afford, in maintaining a regular flow of the water of the reservoir at suitable and proper times, so as best to subserve the equal rights of them all. The remedy in equity therefore would, by one decree in one suit, prevent a multiplicity of actions." See also *Cadigan v. Brown*, 120 Mass. 493; *Parker v. Nightingale*, 6 Allen (Mass.) 341.

**Minnesota.** — *Grant v. Schmidt*, 22 Minn. 1.

**New Jersey.** — *Davidson v. Isham*, 9 N. J. Eq. 186.

**New York.** — In *Gillespie v. Forrest*, 18 Hun (N. Y.) 110, it was said by Bockes, J.: "Several plaintiffs may not join in one suit against a defendant for matters and claims entirely distinct and disconnected; but it is otherwise where plaintiffs have a common interest centring in the point in issue, and when one general right by all is

The Joint or Common Interest of the plaintiffs necessary to enable them to sue jointly must be in the subject-matter of the action, and not merely in the legal questions involved in their separate causes of action.<sup>1</sup>

**d. REPRESENTATION OF NUMEROUS PARTIES BY ONE OR MORE PLAINTIFFS.**—Where the suit is one in which a great many individuals are interested, and it is impracticable to make them all parties, the court will permit one or more of the persons so interested to institute the action in behalf of all the parties concerned; this rule having been adopted from necessity in order to prevent a failure of justice, which could not otherwise be

claimed by way of relief in the action."

See also *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Mitchell v. Thorne*, 134 N. Y. 536; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Emery v. Erskine*, 66 Barb. (N. Y.) 9; *Reid v. Gifford*, *Hopk.* (N. Y.) 416; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Foot v. Bronson*, 4 Lans. (N. Y.) 47; *Cady v. Conger*, 19 N. Y. 256; *Brady v. Weeks*, 3 Barb. (N. Y.) 157; *Milhau v. Sharp*, 27 N. Y. 611; *Beebe v. Coleman*, 8 Paige (N. Y.) 392; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *McKenzie v. L'Amoreaux*, 11 Barb. (N. Y.) 516.

**Oklahoma.**—Under Stat. Oklahoma 1893, § 4193, any number of persons whose property is affected by some illegal tax can join in an action to restrain its collection. *Stiles v. Guthrie*, 3 Okla. 26.

**Vermont.**—*Howe v. School Dist. No. 3*, 43 Vt. 282.

**Wisconsin.**—*Pettibone v. Hamilton*, 40 Wis. 402.

**United States.**—*Hart v. Buckner*, 54 Fed. Rep. 925; *Woodworth v. Wilson*, 4 How. (U. S.) 712; *Stimpson v. Rogers*, 4 Blatchf. (U. S.) 333; *Goodyear v. Allyn*, 6 Blatchf. (U. S.) 33; *Goodyear v. New Jersey Cent. R. Co.*, 1 Fisher Pat. Cas. 626; *Griffing v. Gibb*, 2 Black (U. S.) 519.

**England.**—*Sutton v. Montfort*, 4 Sim. 559; *Spencer v. London, etc., R. Co.*, 1 Eng. R. & C. Cas. 159, cited in *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59; *Kensington v. White*, 3 Price 164, cited in *Scofield v. Lansing*, 17 Mich. 437.

1. *Hudson v. Atchison County*, 12 Kan. 140, citing *Barnes v. Beloit*, 19 Wis. 93. See also *Davidson v. Isham*,

9 N. J. Eq. 186, in which case an injunction was sought by several plaintiffs against the operation of a manufactory in their vicinity. All of the plaintiffs complained of the noxious fumes and smoke proceeding from the manufactory, and it was held that this grievance was a common one; but one of the plaintiffs, and he only, complained of injuries proceeding from the use of the steam engine, which caused a jarring of his houses and a rattling of the doors and windows, and it was held that this grievance was not a common one to the plaintiffs. The court said: "They have no right to make a joint complaint of any injury except one common to all. Can the facts of particular injuries confined to one or two of the complainants be taken into the account in adjudging whether the subject complained of is or is not a nuisance? \* \* \* Where several complainants unite in a bill of this kind, the injury or grievance complained of must be common to all. The several complainants cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance, which separately would not establish the complaint."

**Distinction Between Joinder of Plaintiffs and Defendants.**—The objection to the misjoinder of plaintiffs must rest upon very different grounds from an objection to the misjoinder of defendants having separate and distinct interests and whose cases are unconnected with each other, because in the latter case each defendant may well insist that he should not be involved in the contests or litigations of other parties involving transactions with which he has no connection or concern. *Per Christianity, J.*, in *Scofield v. Lansing*, 17 Mich. 437.

obtained.<sup>1</sup> To authorize the plaintiff to sue on behalf of others not named they must have a common or general interest with him in the subject-matter of litigation;<sup>2</sup> and according to the weight of authority the bill should expressly state that it is filed as well on behalf of such other persons as of those who are really made plaintiffs.<sup>3</sup>

1. *Arkansas*. — *Greedup v. Franklin County*, 30 Ark. 101.

*Colorado*. — In *Packard v. Jefferson County*, 2 Colo. 338, an injunction was sought against the collection of illegal taxes, and the court said: "The general rule would require that all the taxpayers in the county should be made parties to the suit, but as this is impracticable, the law will admit one or more to sue on behalf of themselves and others." *Citing Phillips v. Hudson*, L. R. 2 Ch. 243; *Barr v. Deniston*, 19 N. H. 170.

*Georgia*. — *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1.

*Illinois*. — *Davidson v. Reed*, 111 Ill. 167. See also *Whitney v. Mayo*, 15 Ill. 252.

*Indiana*. — *Covington v. Nelson*, 35 Ind. 532, holding that a suit to enjoin an unauthorized public improvement on the ground that the same will be of no benefit to the plaintiff and will be unjust to him may be brought by the plaintiff in his own name and in behalf of all others who are affected by the acts of others who are defendants, it being alleged that the other plaintiffs are so numerous that it would be impracticable to make them parties.

*Iowa*. — *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74, *citing Brandirff v. Harrison County*, 50 Iowa 164, and *disapproving Fleming v. Mershon*, 36 Iowa 413.

*Maine*. — *Carlton v. Newman*, 77 Me. 408.

*Maryland*. — *Levy v. Taylor*, 24 Md. 282. See also *Kelly v. Baltimore*, 53 Md. 134.

*Missouri*. — *Newmeyer v. Missouri, etc., R. Co.*, 52 Mo. 81, 14 Am. Rep. 394.

*Nebraska*. — *Normand v. Otoe County*, 8 Neb. 18.

*New Hampshire*. — *Barr v. Deniston*, 19 N. H. 170, *cited in Packard v. Jefferson County*, 2 Colo. 338.

*New York*. — *Wood v. Draper*, 24 Barb. (N. Y.) 187; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375, *citing Wood v. Dummer*, 3 Mason (U. S.) 317.

*United States*. — *Beatty v. Kurtz*, 2 Pet. (U. S.) 566.

2. *Harkness v. District of Columbia*, 1 MacArthur (D. C.) 121, in which case the court said: "The reason for a suit being brought in the name of one or more in behalf of all is that where a large number of persons have a common interest in the subject-matter of litigation, a court of equity will administer relief, so as to prevent multiplied and useless litigation." *Following Dodd v. Hartford*, 25 Conn. 232; *Sheldon v. Centre School Dist.*, 25 Conn. 228; *Barnes v. Beloit*, 19 Wis. 93; *Newcomb v. Horton*, 18 Wis. 566; and *Cutting v. Gilbert*, 5 Blatchf. (U. S.) 259.

Where a separate suit is maintainable by different persons, and the non-joinder of one could not be set up as a reason why another should not be allowed to maintain the action for himself, the case is not one in which a plaintiff will be permitted to sue in behalf of himself and all others. *Fleming v. Mershon*, 36 Iowa 413.

3. *Wood v. Draper*, 24 Barb. (N. Y.) 187; *Baldwin v. Lawrence*, 2 Sim. & S. 18, in which case the bill was dismissed; *Douglass v. Horsfall*, 2 Sim. & S. 184, in which case a demurrer was sustained; *Ling v. Young*, 2 Sim. & S. 385; *Macbride v. Lindsay*, 9 Hare 574; *Whitney v. Mayo*, 15 Ill. 251; and *disapproving Dodge v. Woolsey*, 18 How. (U. S.) 331, as being "the only case \* \* \* sustaining a doctrine apparently adverse" to decisions in this country and in England, although it is said that the precise point does not seem to have arisen in the last-mentioned case]. See also *Kelly v. Baltimore*, 53 Md. 134, wherein it was held that a bill filed by two persons in their own right and as taxpayers of a city without making their fellow citizens parties, and without an application that it was filed in behalf of themselves and others who might come in and contribute to the expenses of the suit, was, strictly speaking, a private bill. See further *Covington v. Nelson*, 35 Ind. 532, and *Levy v. Taylor*, 24 Md. 282. In the latter case it was held that a bill filed by the plaintiff in express



**3. The Defendant** — *a.* IN GENERAL. — As in other suits, it sometimes happens that a party is a proper, although not a necessary, defendant;<sup>1</sup> but it should be constantly borne in mind that as a general rule an injunction cannot regularly be issued preliminarily or be decreed on the final hearing against persons who are not parties defendant, and, furthermore, that a decree or an order for an injunction will not be made which will affect prejudicially the rights of absent parties.<sup>2</sup>

**There Are Exceptions** to the general rule that an injunction will not be granted against one who is not a party to the suit, but they will be found to consist either of cases where the party enjoined is the mere solicitor, agent, or tenant of a party to the suit and has no rights involved in the controversy, or where the right of the omitted party has already been determined.<sup>3</sup>

**Who Must Be Joined.** — In consequence of the rule that an injunction will not be ordered or decreed against strangers, the plaintiff must bring in as parties defendant those against whom relief

terms "on behalf of himself and all other creditors \* \* \* who shall come in and contribute to the expenses of the suit" provided expressly for admission of other creditors as parties plaintiff.

1. *Elsberry v. Seay*, 83 Ala. 614.

2. In *Iveson v. Harris*, 7 Ves. Jr. 251, Lord Eldon said: "I find the court has adhered very closely to the principle that you cannot have an injunction except against a party to the suit. Upon a review of all the cases, I think the practice of granting an injunction against a creditor who is not a party is wrong. The court has no right to grant an injunction against a person whom they have not brought or attempted to bring before the court by subpoena; and in the ordinary case of an injunction after a decree in the absence of a creditor, no one appearing for him as counsel, which might make a difference, I should hesitate very much to proceed against him for breach of the injunction." The foregoing language was quoted with approval by Chancellor Kent in *Fellows v. Fellows*, 4 Johns. Ch. (N. Y.) 25, and he added: "I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause for the purpose of the cause. I shall accordingly dissolve the injunction as against those persons who were not made parties to the suit."

See also *Schalk v. Schmidt*, 14 N. J. Eq. 268, wherein the court cited, in addi-

tion to the two foregoing cases, *Inchiquin v. French*, Amb. 34, and *Dawson v. Princeps*, 2 Anstr. 521. The last-mentioned case was also cited in *Rorke v. Russell*, 2 Lans. (N. Y.) 244.

See further 1 Bart. Ch. Pr. 428, cited in *Robertson v. Tapscott*, 81 Va. 533; Willard Eq. Jur. 342, cited in *Batterman v. Finn*, 32 How. Pr. (N. Y. Supreme Ct.) 501; 1 Mad. Ch. Pr. 175 (3d London ed.), cited in *Watson v. Fuller*, 9 How. Pr. (N. Y. Supreme Ct.) 425; and 1 Barb. Ch. Pr. 632, cited in *Rorke v. Russell*, 2 Lans. (N. Y.) 244.

The doctrine finds support in the following American cases: *Davidson v. Wilson*, 3 Del. Ch. 307; *Morgan v. Rose*, 22 N. J. Eq. 583, *per* Beasley, J.; *Schalk v. Schmidt*, 14 N. J. Eq. 268, *per* Chancellor Green; *Fellows v. Fellows*, 4 Johns. Ch. (N. Y.) 25; *Rorke v. Russell*, 2 Lans. (N. Y.) 244; *Watson v. Fuller*, 9 How. Pr. (N. Y. Supreme Ct.) 425; *Chase v. Chase*, 1 Paige (N. Y.) 198 [citing *Nugent v. Smith*, Mos. 354]; *Sage v. Quay*, Clarke Ch. (N. Y.) 347; *Robertson v. Tapscott*, 81 Va. 533; *Chapman v. Harrison*, 4 Rand. (Va.) 336; *Abbot v. American Hard Rubber Co.*, 4 Blatchf. (U. S.) 489.

3. *Per* Chancellor Green, in *Schalk v. Schmidt*, 14 N. J. Eq. 268.

In *Tradesman's Bank v. Merritt*, 1 Paige (N. Y.) 302, Chancellor Walworth said: "Where persons not parties to the bill are injuriously affected by an injunction, if they apply in a proper manner the court will grant them relief."

is sought and whose joinder is necessary to the settlement of the plaintiff's rights.<sup>1</sup> Where, however, parties defendant are omitted who belong to a class which is represented by those who are made parties defendant, the means provided for bringing in other parties are such that relief by a preliminary injunction should not be denied because of the nonjoinder.<sup>2</sup>

**Multifariousness.** — Where the plaintiff has several causes of action against several persons, he should not join them as defendants in one suit for an injunction, but should bring a separate suit against each;<sup>3</sup> and the courts, in suits for injunctions, apply the general rule of equity pleading that no person should be made a party

1. *Eldridge v. Turner*, 11 Ala. 1049; *Fayolle v. Texas*, etc., R. Co., (D. C.) 3 Am. & Eng. R. Cas. 533; *Jones v. Sligh*, 75 Ga. 7; *Hope v. Gainesville*, 72 Ga. 246; *Miller v. McDonald*, 72 Ga. 20; *Binney's Case*, 2 Bland (Md.) 99; *Irick v. Black*, 17 N. J. Eq. 189; *Strowbridge Lithographic Co. v. Crane*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 15; *People v. Clark*, 70 N. Y. 518; *Atlantic*, etc., Tel. Co. v. *Baltimore*, etc., R. Co., 46 N. Y. Super. Ct. 377; *Cole Silver Min. Co. v. Virginia*, etc., *Water Co.*, 1 *Sawyer* (U. S.) 685; *New Mexico Land Co. v. Elkins*, 22 *Blatchf.* (U. S.) 203.

**Injunction Against Judgments and Decrees.** — The rule stated in the text has been applied in numerous cases in which it was sought to enjoin the enforcement of judgments and decrees, it being held in such cases that all the owners of the decree or judgment are necessary parties defendant. *Davidson v. Wilson*, 3 Del. Ch. 307; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Turner v. Cox*, 5 Litt. (Ky.) 175; *Hendrick v. Robinson*, 7 Dana (Ky.) 165; *Berry v. Berry*, 3 T. B. Mon. (Ky.) 263; *Shields v. Pipes*, 31 La. Ann. 765; *Morris v. Bienvenu*, 30 La. Ann. 878; *Marshall v. Beverley*, 5 Wheat. (U. S.) 313. For a further and more detailed elucidation of this question, and a more exhaustive citation of authorities, see the article JUDGMENTS.

**Injunction Against Servant Working for Others.** — Where the object of an injunction is to enjoin the plaintiff's servant from working for others in violation of his contract of employment with the plaintiff, the others for whom he intends to work have an interest in the controversy and the subject thereof within the meaning of Code, § 452, and they have a right to be heard. *Strowbridge Lithographic Co.*

*v. Crane*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 15, wherein it was said: "It has been the common practice, both in England and this country, to proceed against the party who may be injuriously affected by the injunction, as well as against the employee who is charged with violating the restrictive covenant." *Citing De Pol v. Sohlke*, 7 Robt. (N. Y.) 280; *Fredricks v. Mayer*, 13 How. Pr. (N. Y. Super. Ct.) 566, 1 Bosw. (N. Y.) 227; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *McCaull v. Braham*, 16 Fed. Rep. 37; *Lumley v. Wagner*, 1 De G. M. & G. 604.

2. *Blatchford v. Ross*, 54 Barb. (N. Y.) 42. See also *U. S. v. Parrott*, 1 McAll. (U. S.) 271, wherein it was declared that the court will not suffer the rule that necessary parties shall be brought in to be so applied as to defeat the purposes of justice.

3. *Dilly v. Doig*, 2 Ves. Jr. 486; *Whaley v. Dawson*, 2 Sch. & Lef. 367. The foregoing cases were cited in *Keyes v. Little York Gold Washing*, etc., Co., 53 Cal. 724. See also *American Refrigerating*, etc., Co. v. *Linn*, 93 Ala. 610; *Keyes v. Little York Gold Washing*, etc., Co., 53 Cal. 724; *Meigs v. Lister*, 23 N. J. Eq. 199.

**Demurrer.** — The usual method of making the objection of multifariousness as to parties is by demurrer, and not at the hearing. *Hamilton v. Whitridge*, 11 Md. 128.

**Which Defendant May Object.** — Where there is a misjoinder of parties defendant the one without whom the plaintiff is entitled to relief and who should have been omitted can take advantage of the misjoinder, and not the other defendants. *Cartwright v. Bamberger*, 90 Ala. 405, *citing Horton v. Sledge*, 29 Ala. 478.

defendant who is not interested in the subject-matter of the suit, and for or against whom no decree can be made.<sup>1</sup>

*b.* THE STATE. — As in other suits, the state cannot be made a party defendant without her consent, and this rule cannot be avoided by making the state's agent a party.<sup>2</sup>

*c.* PERSONS INTERESTED IN SUBJECT-MATTER. — It is not sufficient, as a general rule, to bring in merely nominal parties, but those whose legal or equitable rights are to be directly affected are indispensable parties.<sup>3</sup>

1. *Anderson v. Orient F. Ins. Co.*, 88 Iowa 579; *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Beatty v. Smith*, 2 Smed. & M. (Miss.) 567; *Attala County v. Niles*, 58 Miss. 48; *Woolstein v. Welch*, 42 Fed. Rep. 566; *Hart v. Buckner*, 2 U. S. App. 488; *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485; *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685. In *Binney's Case*, 2 Bland (Md.) 99, it was held that where a person who has no interest in the matter has been improperly associated with others as a defendant, the bill may be dismissed as to him with costs without prejudice to the case as regards all others.

2. *Printup v. Cherokee R. Co.*, 45 Ga. 365. See also *Mayo v. Renfroe*, 66 Ga. 408.

The President of the United States will not be enjoined by the United States Supreme Court at the suit of a state from carrying into effect an Act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed; and it is immaterial whether the defendant be described as President or as a citizen of a named state. *Mississippi v. Johnson*, 4 Wall. (U. S.) 475.

The Governor — *Executive Acts.* — In *State v. Lord*, 28 Oregon 498, it was held that the court will not interfere with governmental and executive acts of the governor to restrain him from performing matters political or governmental which require the exercise of judgment or discretion. *Citing* *Marbury v. Madison*, 1 Cranch. (U. S.) 170; *Mississippi v. Johnson*, 4 Wall. (U. S.) 498; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89.

*Ministerial Acts.* — In *State v. Lord*, 28 Oregon 498, it was said by *Wolverton, J.*, *obiter*: "It may well be admitted that if the duty pertained to acts

which are merely ministerial in their character, which call for no exercise of judgment or discretion, and do not relate to political or governmental matters, the governor of the state may, at the suit of interested parties, in a proceeding appropriate for the purpose, be compelled at the hands of the judiciary to perform them." *Citing* *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Board of Liquidation v. McComb*, 92 U. S. 541; *Enterprise Sav. Assoc. v. Zumstein*, 37 U. S. App. 71.

When Officers Are Nominal Parties. — Where there is an attempt to compel the public officers of a state to do positive and affirmative acts as such, and to carry out what the plaintiff conceives to be the law of the state, not in accordance with their own sense of duty and their own interpretation of the law, it is in effect a suit against the state, and the officers are merely nominal parties, and if they only are brought in no decree can be made. *McCauley v. Kellogg*, 2 Woods (U. S.) 13 [*distinguishing* *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738, and *Davis v. Gray*, 16 Wall. (U. S.) 203].

3. *Elliott v. Sibley*, 101 Ala. 344; *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280; *Oliphint v. Mansfield*, 36 Ark. 191; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201; *Union Terminal R. Co. v. Railroad Com'rs*, 52 Kan. 680; *McCarthy v. Marsh*, 41 Kan. 17; *State v. Anderson*, 5 Kan. 90; *Hill v. Reifsnider*, 39 Md. 429; *Beasley v. Shively*, 20 Oregon 508; *McCauley v. Kellogg*, 2 Woods (U. S.) 13.

Discretion of Court. — The rule that all persons in interest should be made parties to the suit is subject to the sound discretion of the court. *Per Saffold, J.*, in *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

Necessity to Join Partner. — It is unnecessary in a petition for an injunction

**Injunction Against Payment of Money.** — Where the object of the suit is to enjoin the payment of money, it is necessary to join as parties defendant the persons who would be the recipients of such money if it should be paid.<sup>1</sup>

brought by one who has the legal title to a trade-mark, and is apparently the sole proprietor of the business in which it is used, to join as a party a silent partner in the business whose existence is unknown to the public. *Bradley v. Norton*, 33 Conn. 157. See also *Mississippi, etc., R. Co. v. Ward*, 2 Black (U. S.) 485, where it was held that a part owner of a vessel might bring an action to restrain the obstruction of a river without joining as parties plaintiff the co-owners of his vessel; the court saying: "He seeks redress of a continuing trespass and wrong against himself and acts in behalf of all others who are or may be injured; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit any other person as complainant who has sustained injury." *Citing Gibbons on Dilapidations, etc.*, 402.

See also the articles **PARTNERSHIP** and **PARTIES**.

#### **Tenants in Common and Joint Tenants.**

— One tenant or joint tenant may alone bring a suit to enjoin a threatened injury to property held in cotenancy or joint tenancy. *Gilpin v. Sierra Nevada Consol. Min. Co.*, 2 Idaho 662. See also *Lytle Creek Water Co. v. Perdue*, 65 Cal. 447, wherein the court said: "It is only where the court cannot determine the controversy between the parties before it without prejudicing the rights of any of the co-owners, or of any other person, that other parties must be brought in. When the contest can be settled without affecting the rights of others, there is no ground or reason for bringing in any other parties." *Vanwinkle v. Curtis*, 3 N. J. Eq. 422; *Ackroyd v. Briggs*, 14 W. R. 25; *Waring v. Crow*, 11 Cal. 366.

**Importer of Article Protected by Trade-mark — Necessity to Join Manufacturer in a Suit for Infringement.** — Where the plaintiff has the exclusive right by contract to import a manufactured article, and covers the same with a label bearing a trade-mark devised by himself, he may bring a suit to enjoin the infringement of his trade-mark without joining as a party plaintiff the person from whom he imports the article.

*Walton v. Crowley*, 3 Blatchf. (U. S.) 440. See also article **TRADE-MARKS**.

**Owners of Patents.** — Where there is more than one owner of a patent, all of them must be made parties plaintiff to a bill to enjoin the infringement thereof. *Jordan v. Dobson*, 2 Abb. (U. S.) 398. See also the article **PATENTS FOR INVENTIONS**.

1. *Smith v. Crissey*, 66 How. Pr. (N. Y. Supreme Ct.) 112, in which case the court remarked: "He who is deprived of his property, or of what he claims to be his, is entitled to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court which is asked to determine his rights. \* \* \* It is true that in an action between some individuals a court, in deciding matters which affect them, may establish principles and decide questions which affect others also; but neither this court nor any court can legally decide that an action which has for its direct object the forfeiture of the property or rights of an individual is maintainable without bringing before it as a party the individual at whom and at whose right and property such action is directly aimed." See also *Hop-pock v. Chambers*, 96 Mich. 509.

**Issuance and Payment of Municipal Bonds.** — In an action to enjoin the issuance of municipal bonds, the persons to whom the bonds are to be issued must be made parties defendant, unless perhaps, from the special circumstances of the cause, the great number of persons to whom the bonds are to be issued, and the character of the parties involved, it may answer to bring in only a sufficient number to fully represent and protect the interests of all. *Hutchinson v. Burr*, 12 Cal. 103; *Patterson v. Yuba County*, 12 Cal. 105. See also *Hope v. Gainesville*, 72 Ga. 246, holding that the holders of municipal bonds are necessary parties defendant to a suit to enjoin their payment. But see *Dixon Tp. v. Sumner County*, 25 Kan. 519, holding that where it is sought to enjoin county commissioners and the county clerk from subscribing for a portion of the capital stock of a railroad company

*d. PURCHASERS AND INCUMBRANCERS.* — Purchasers, mortgagees, creditors, and others having an interest in the subject-matter, which interest was acquired before the institution of the suit for injunction, are necessary parties;<sup>1</sup> and as a general rule all the parties who have property interests which will be affected by the injunction should be brought in.<sup>2</sup>

and executing bonds of the township in payment thereof, and it is alleged in the petition that no subscription has been made, the railroad company is not a necessary party.

**Fund Arising from Sale of Public Lands.** — Where an injunction is sought against the state treasurer to prevent him from paying over to certain railroad companies a fund arising from the sale of certain public lands, the railroad companies are the real persons interested in the resistance of the prayer of the petition, and no final judgment can be rendered until they are brought in. *State v. Anderson*, 5 Kan. 90.

**Bill to Enjoin Collection of Taxes.** — In *Illinois* it has been held that the persons who are to be the recipients of an illegal tax are not necessary parties to suit to enjoin its collection, as they have no vested interest in the tax. *Leitch v. Wentworth*, 71 Ill. 146.

*Kansas.* — In *Voss v. Union School Dist.* No. 11, 18 Kan. 467, it was sought to restrain the collection of certain taxes levied by and for a school district, and it was held that the school district was the real party in interest, and should have been made a party defendant. See also *Hays v. Hill*, 17 Kan. 360, holding that in a suit to enjoin collection of a tax levied for the purpose of paying interest on a school district bond and creating a sinking fund for final redemption of such bond, the school district was the real party in interest and was a necessary party defendant, and that the county treasurer was a mere nominal party. *Citing Gilmore v. Fox*, 10 Kan. 509.

Likewise in *Anthony v. State*, 49 Kan. 246, it was held that where the bill seeks to enjoin the collection of taxes for the payment of interest on bonds which are alleged to be void, the bondholders are the real parties in interest, and are the only ones whose rights will be substantially affected by declaring the bonds to be invalid and by enjoining the officers from levying or collecting taxes to pay the bonds or interest thereon; and consequently an

injunction should not be allowed without making them parties.

1. *Schalk v. Schmidt*, 14 N. J. Eq. 268, *per* Chancellor Green. See also *Hutchinson v. Johnson*, 7 N. J. Eq. 40, holding that where a suit for an injunction involves the question whether machinery in a building is covered by a mortgage, the mortgagor should be made a party defendant.

2. *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165; *Beasley v. Shively*, 20 Oregon 508.

In *O'Sullivan v. New York El. R. Co.*, (Super. Ct.) 25 N. Y. St. Rep. 903, an injunction was sought against the use of a structure in such a manner as to inflict injuries on the plaintiff's real estate, and it was held that in order to enable the court effectually to give relief, it was necessary that all parties having a substantial interest in the structure and its use should be made parties. *Citing Chenango Bridge Co. v. Lewis*, 63 Barb. (N. Y.) 115; *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. Ct. 340; *Irvine v. Wood*, 51 N. Y. 224.

**Adverse Claimant of Land.** — Where the right to an injunction involves the title to land, and the plaintiff claims title against an adverse claimant, it is necessary to make such adverse claimant a party defendant. *Litchfield v. Polk County*, 18 Iowa 70, wherein it is said: "It is against all principle, and, as we suppose, without support in the authority of adjudged cases, to allow the plaintiff to file a bill alleging that he owns a tract of land, claiming in argument that an adverse claimant does not own it, omit to make such adverse claimant a party, and ask a decree which can only be granted by deciding against the rights of such omitted party." *Citing Fowler v. Doyle*, 16 Iowa 534.

**Adverse Claimant of Office.** — In *Priest v. Stevens*, 26 Kan. 528, the controversy was over the title to an office, and it was held that the adverse claimant of the office, whose legal rights were sought to be affected, was a necessary party defendant.

**Purchasers Pendente Lite.** — Where title in the subject matter is acquired *pendente lite*, the party claiming such title need not be joined, but is bound by the decree.<sup>1</sup>

**e. PARTIES TO CONTRACT.** — Where the object of the suit is the rescission of a contract and injunction, all the parties to the contract should be brought in.<sup>2</sup>

**f. MUNICIPAL CORPORATIONS.** — Where the injunction will affect the property rights or interests of a municipal corporation, such municipal corporation must be made a party defendant, and not merely the particular officer or officers sought to be enjoined.<sup>3</sup>

**g. EXECUTORS AND ADMINISTRATORS.** — Where the estate of a deceased person is involved, his executor or administrator should be made a party defendant; although it is only when the assets in his hands are to be affected by the decree that he is an indispensable party.<sup>4</sup>

1. *Schworer v. Boylston Market Assoc.*, 99 Mass. 285; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102. But see *Schalk v. Schmidt*, 14 N. J. Eq. 268, wherein Chancellor Green said that any party whose rights are acquired *pendente lite* may be bound by the decree, but that it does not follow that he will be enjoined before decree without an opportunity of being heard.

2. *Hardy v. Newton First Nat. Bank*, 46 Kan. 88.

**Vendor and Purchaser.** — The vendor of land must be made a party to a bill to enjoin the collection of the purchase money for defect of title notwithstanding the fact that the sale was made by an agent, and that he took the bond for the purchase money in his own name. *Sweets v. Biggs*, 5 Litt. (Ky.) 18. See also *Kinney v. Ensminger*, 87 Ala. 340, holding that where the bill seeks the reformation of a deed and notes given for the purchase money, so as to make the papers show that a vendor's lien was retained, and also an injunction staying meanwhile a threatened sale of the land, all of the purchasers of the land are proper parties defendant, and it is immaterial whether one of the defendants is a purchaser of the land or a mere surety on the note. *Citing Tedder v. Steele*, 70 Ala. 347, and *Ramage v. Towles*, 85 Ala. 588.

**Payee of Note After Negotiation.** — To a bill by the maker of a note against the holder to enjoin a judgment on such note on the ground of fraud in the procurement of the note, the payee is a necessary party. *Elston v. Blanchard*, 3 Ill. 420.

3. *Bradley v. Gilbert*, 155 Ill. 154;

*Beach v. Shoenmaker*, 18 Kan. 147; *People v. Clark*, 70 N. Y. 518.

In *Attala County v. Niles*, 58 Miss. 48, an injunction was sought against a road overseer, and the board of supervisors of the county was permitted to answer the bill on a petition alleging that the said board had ordered the overseer's acts, that public interests demanded the performance of such acts, and that the board of supervisors as the representative of the county was the real party in interest.

See further on this question the articles *COUNTIES*, vol. 5, p. 294; *STREETS AND HIGHWAYS*; *MUNICIPAL CORPORATIONS*; *TAXES*.

In **Maine** it has been held that where the selectmen, collector, and treasurer of a town are made parties defendant to a suit for injunction, service upon them is binding upon the town, and the injunction will not be dissolved upon their ceasing to hold office. *Clark v. Wardwell*, 55 Me. 61, in which case it is said that the case is in fact the same as if the bill had been brought against the inhabitants of the town, as it more properly should have been.

4. *Miller v. McDonald*, 72 Ga. 20. See also *Burchard v. Boyce*, 21 Ga. 6, holding that where a bill is filed to procure dissolution of a partnership, and injunction against further interference with the partnership affairs, the representatives of a deceased partner are necessary parties defendant.

**Administrator's Surety.** — In *Banks v. Speers*, 103 Ala. 436, a bill was filed to enjoin the sale of the lands belonging to a decedent's estate, for the payment

**h. SERVANTS, AGENTS, AND ATTORNEYS.** — The omission of one who is but a servant, agent, or attorney of the defendant, and who is not otherwise interested in the subject matter of the controversy, is not prejudicial to the defendant; and as a general rule persons occupying such relations are not brought in.<sup>1</sup>

**Discovery.** — Where a corporation is made a party defendant the officers or members thereof may be made defendants for the purpose of compelling discovery by them.<sup>2</sup>

of his debts, on the ground that the administrator had received sufficient personal property to pay all the debts of the estate, and it was held that the sureties on his bond were not necessary parties.

See further upon this question, the article **EXECUTORS AND ADMINISTRATORS**, vol. 8, p. 650.

1. *Opelika v. Daniel*, 59 Ala. 211; *Brown v. Haven*, 12 Me. 164; *Binney's Case*, 2 Bland (Md.) 99; *Annapolis v. Harwood*, 32 Md. 471, holding that an agent of the defendant is not a necessary party defendant, and that if he be made a party he becomes a nominal party merely; *Hatch v. Chicago*, etc., R. Co., 6 Blatchf. (U. S.) 105; *Toledo*, etc., R. Co. v. *Pennsylvania Co.*, 54 Fed. Rep. 746, 53 Am. & Eng. R. Cas. 293; *Woolstein v. Welch*, 42 Fed. Rep. 566. But see *Western Star Lodge No. 2 v. Schminke*, 4 McCrary (U. S.) 366, in which case it was held that in a suit against a postmaster to which the postmaster's agent was not made a party, no injunction could be granted against the latter.

**Attorneys.** — In *Hastings v. Belden*, 55 Vt. 273, it was said: "We understand the rule to be that attorneys can only be made parties to a suit in equity in cases where they have so involved themselves in fraud, that a court of equity, although it can give no other relief against them, will order them to pay the costs; and that if an attorney is made a party, the bill must pray that he pay the costs, otherwise a demurrer will lie."

**Officers of Corporation.** — In *Consolidated Safety Valve Co. v. Ashton Valve Co.*, 26 Fed. Rep. 319, it was held that officers of a corporation were proper parties defendant to a suit against the corporation for infringement of a patent. See also *Goodyear v. Phelps*, 3 Blatchf. (U. S.) 91, holding that where a corporation is engaged in infringing a patent right, stockholders who are either directors or officers of

the company, have the management and superintendence of the business, or are the agents of the corporation and concerned in directing its business, are properly made parties defendant. See further *Hatch v. Chicago*, etc., R. Co., 6 Blatchf. (U. S.) 105, to the effect that where an injunction is sought against a corporation the treasurer and directors thereof, who are its servants and agents, are usually made parties defendant, but are merely nominal parties who are not necessary or even proper parties.

**Misconduct of Officers.** — In *Levy v. Mutual L. Ins. Co.*, 54 Hun (N. Y.) 315, an injunction was sought for to restrain misconduct on the part of the officers of a corporation, and it was held that the action should have been against them rather than the corporation.

**Stockholders.** — Service upon a corporation is not to be considered, for the purpose of a prayer for injunction against the shareholders thereof, as service on such shareholders. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525.

**Agent of Foreign Corporation.** — In *Sickels v. Borden*, 4 Blatchf. (U. S.) 14, it was held that the master and engineer of a foreign corporation which owned a vessel were proper parties defendant to a suit to enjoin the use of certain apparatus on such vessel.

**When Corporation Should Be Joined with Officers.** — Where the acts complained of are being done by officers of a corporation *colore officii*, and one of the questions in controversy is the corporation's authority to do such acts, the corporation has a right to be heard in its own proper person, and is a necessary party defendant. *Morgan v. Rose*, 22 N. J. Eq. 183, citing *Lawyer v. Cipperly*, 7 Paige (N. Y.) 282, in which case Chancellor Walworth arrived at the same conclusion.

2. *Per Moncure, J.*, in *Baltimore*, etc., R. Co. v. *Wheeling*, 13 Gratt. (Va.) 40.

**i. OFFICERS ARMED WITH PROCESS.** — To bills to restrain the execution of process, or the performance of official acts, the officer is sometimes made a party, as the design of the injunction is to restrain him from acting, although he is merely a nominal party and no relief is prayed and no decree asked against him.<sup>1</sup>

**Excess of Authority by Ministerial Officer.** — Where an officer having a writ in his hands exceeds his authority, and it is not charged that the person who is interested in the execution of the process has advised or directed such excess of authority, it is

1. *Per* Chancellor McGill, in *Brooks v. Lewis*, 13 N. J. Eq. 214. See also the following cases: *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74; *Cartwright v. Bamberger*, 90 Ala. 405; *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270; *Buffandeau v. Edmondson*, 17 Cal. 436, holding that in a suit to enjoin the sale of property under an execution the sheriff is not a necessary party defendant; *Fairchild v. Knight*, 18 Fla. 770.

Some of the cases declare that the sheriff is not a proper party defendant in such a case. *Shrader v. Walker*, 8 Ala. 244; *Collier v. Falk*, 61 Ala. 105; *Smith v. Rogers*, 1 Stew. & P. (Ala.) 317; *Edney v. King*, 4 Ired. Eq. (N. Car.) 465; *Olin v. Hungerford*, 10 Ohio 268.

**Condemnation Proceedings.** — Where a bill is filed to enjoin a railroad company from condemning a right of way, the railroad company is the party really interested in the subject of the controversy, and the sheriff and the commissioners summoned by him to appraise the damages are purely nominal parties. *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770, wherein it was held that the joining of such nominal parties could not affect the question of jurisdiction and the right of removal into a United States court.

**Commissioner of Sale.** — Where the object of the suit is to prevent a sale by a commissioner he is a proper party defendant. *Robertson v. Tapscott*, 81 Va. 533, in which case it was said: "It is difficult to perceive how the very object of the bill — the prevention of the sale of the property — could have been certainly attained without making, in such a case as this, the commissioner of sale a party." *Citing Lyne v. Jackson*, 1 Rand. (Va.) 119, wherein the object was to prevent the issuing of a patent by the register of a land office, and it

was held that such register was a proper party in order to effectuate the relief sought; and 1 Bart. Ch. Pr. 195, wherein it is said: "The common rule with regard to injunctions is, that they will not be granted to restrain a person who is not a party to the suit; but whether granted in a pending cause or not, the person whose action is sought to be restrained must become a party to the bill or petition upon which the application is based."

**Clerk of the Court.** — Since an injunction to stay proceedings in a court of law is granted on the sole ground that it is against conscience that the party inhibited should proceed in the cause, and its object is to prevent unfair use being made of the court of law, the bill should not, in disregard of this principle, pray that the process may be directed not only to the party who is proceeding in the court of law, but also to the clerk of the court. *Tyler v. Hamersley*, 44 Conn. 419, in which case the court said: "Should such an injunction be granted it would be the duty of the court \* \* \* to disregard it and to protect its clerk \* \* \* in proceeding in contempt of it. That would lead to a conflict of jurisdiction which would produce great confusion and disorder and tend in a serious degree to subvert the administration of justice."

**Recorder of Deeds.** — In *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74, an injunction was sought against a fraudulent conveyance, and it was held proper to make the recorder of deeds a party defendant, although he was not charged with any wrongful or unlawful purpose.

**Probate Judge.** — It is improper to make the probate judge a defendant to a bill in chancery which seeks to enjoin the settlement of an estate pending in his court. *McNeill v. McNeill*, 36 Ala. 109.



not essential that he should be joined as a party defendant with the officer.<sup>1</sup>

**Participants in Fraud.** — Where fraud is the gravamen of the plaintiff's right to relief, all persons who are charged to have participated in the alleged fraud should be made parties defendant.<sup>2</sup>

**j. AIDERS AND ABETTORS.** — As a general rule it is proper to join as parties defendant all persons who are assisting each other to violate the plaintiff's rights, such as tortfeasors each of whom is contributing to the wrong complained of.<sup>3</sup>

**k. PERSONS WHOSE ACTS HAVE BEEN CONSUMMATED.** — The object of an injunction, as a general rule, being to prevent anticipated mischief, it is not necessary to join as a party defendant one who has been committing acts injurious to the plaintiff, but who is not contemplating the commission of such acts in the future.<sup>4</sup>

1. *North v. Peters*, 138 U. S. 271.

2. *Alabama*. — *Planters', etc.*, Bank v. Lauchheimer, 102 Ala. 454.

*Georgia*. — *McArthur v. Matthewson*, 67 Ga. 134, in which case the bill asked the cancellation of a deed made by an administrator on the ground that it had been obtained by fraud, and it was held that the administrator was a necessary and proper party defendant.

*Iowa*. — *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74, in which case an injunction was sought against a fraudulent conveyance, and it was held that the parties who were about to receive the conveyance, and who were conspiring with the grantor to defraud the plaintiff, were proper parties defendant.

*Maine*. — *Brown v. Haven*, 12 Me. 164, in which case it was held that where several persons are charged with having combined and confederated to defraud the plaintiff, relief may be decreed against each defendant distributively, as the case may require.

*Maryland*. — *Hill v. Reifsnider*, 39 Md. 429, citing *Lovejoy v. Ireland*, 17 Md. 525.

*New Jersey*. — *Robinson v. Davis*, 11 N. J. Eq. 302, 69 Am. Dec. 591.

3. *Courthope v. Mapplesden*, 10 Ves. Jr., 290, cited in *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 596. See also the following cases: *Millbank v. Penniman*, 73 Ga. 136; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737; *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y. C. Pl.) 459, in which case it was held that several vendors of an article which infringed plaintiff's trade-mark might be united in an action on the same principle as tortfeasors may be joined;

*Foot v. Bronson*, 4 Lans. (N. Y.) 47; *Cole Silver Min. Co. v. Virginia, etc.*, Water Co., 1 Sawy. (U. S.) 470; *Poppenhusen v. Falke*, 4 Blatchf. (U. S.) 493.

See further the following cases in which the joinder of the defendants was not considered improper. *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Buckleugh v. Coman*, 5 Macph. 214 (which three cases were cited in *Lockwood Co. v. Lawrence*, 77 Me. 297); *Miller v. Highland Ditch Co.*, 87 Cal. 430; *Hillman v. Newington*, 57 Cal. 56; *People v. Gold Run Ditch, etc., Co.*, 66 Cal. 138; *Miller v. Baltimore County Marble Co.*, 52 Md. 642; *Woodyear v. Schaefer*, 57 Md. 1; *Blaisdell v. Stephens*, 14 Nev. 17; *Chipman v. Palmer*, 77 N. Y. 57; *Mining Debris Case*, 8 Sawy. (U. S.) 628. *Keyes v. Little York Gold Washing, etc., Co.*, 53 Cal. 724, in which case it was held that defendants were improperly joined, was *disapproved* in *Hillman v. Newington*, 57 Cal. 56.

**Failure to Join Tortfeasors.** — Where the acts complained of are tortious, the cause of action is several as well as joint, and the absence of one tortfeasor will not prevent the court from interfering and granting relief. *Cole Silver Min. Co. v. Virginia, etc.*, Water Co., 1 Sawy. (U. S.) 470. See also the article TRESPASS.

4. *Brammer v. Jones*, 2 Bond (U. S.) 100, in which case an injunction was sought against the use of a patented machine, and it was held to be improper to join as a defendant one who had been using the machine, but had

4. **Intervention.** — A motion by a stranger to the suit, suggesting that he is interested in the subject matter, to be admitted as a defendant, is not regular; but if the court be satisfied that he has a right to be made a party, it will be ordered that the injunction shall stand dissolved unless the plaintiff shall amend his bill by making such person a party.<sup>1</sup>

**VIII. THE BILL — 1. Injunction Bill Defined.** — A sworn bill asking specifically for an injunction in the prayer for relief, and complying with all the other formalities requisite to obtain one, is properly denominated an injunction bill.<sup>2</sup>

2. **Necessity for Bill.** — As a general rule an injunction will not be granted except when the plaintiff has a meritorious case; and that a case is meritorious must be shown by an injunction bill, that is, a bill or complaint asking for an injunction in the prayer for relief and for process.<sup>3</sup> The matters relied upon for an injunc-

sion sold out his interest therein prior to the filing of the bill, and had no intention to further use the machine.

1. *Harrison v. Morton*, 4 Hen. & M. (Va.) 483. See also the articles INTERVENTION; PARTIES.

**Intervention.** — In *Mississippi* the real parties in interest may be permitted to come in and defend the suit. *Per Chalmers, C. J.*, in *Attala County v. Niles*, 58 Miss. 48.

In *Connecticut* it has been provided by statute (Gen. Stat., § 1288) that any person who may be directly or indirectly interested or affected by the granting of a permanent injunction may appear to be heard with regard to the granting and dissolution of the same. Section 887 provides that where a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party. *In re Ferris*, 56 Conn. 396, in which case these provisions were applied to a suit for injunction.

2. *Per Hand, J.*, in *Clark v. Judson*, 2 Barb. (N. Y.) 90, wherein the bill was considered an injunction bill, although no injunction had been actually issued, the question being whether or not leave of court was necessary before amending it; *citing* *Mitford Pl.* by *Jeremy 47.* and *Story Eq. Jur.*, § 362.

3. *Alabama.* — *Bolling v. Tate*, 65 Ala. 417.

*Illinois.* — *Bryant v. People*, 71 Ill. 32, wherein the court said: "There is no bill filed in this case upon which an injunction could be issued. \* \* \* It would be unheard of in practice to grant an injunction \* \* \* without

an appropriate bill framed for the purpose." See also *Poyer v. Des Plaines*, 20 Ill. App. 30, and *Dickey v. Reed*, 78 Ill. 261.

*Indiana.* — *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178, *citing* *McGoldrick v. Slevin*, 43 Ind. 522.

*Maryland.* — *Binney's Case*, 2 Bland (Md.) 100; *Salmon v. Claggett*, 3 Bland (Md.) 125.

*Montana.* — There must always be an action commenced before an injunction issued under the provisions of the code will have any force, and, for the purpose of showing the pendency of an action, the complaint will always be a necessary part of the evidence in support of the motion. *Per Knowles, J.*, in *Fabian v. Collins*, 2 Mont. 510.

*New York.* — In *Hovey v. M'Crea*, 4 How. Pr. (N. Y.) 31, *Hand, J.*, speaking of the old chancery practice, said: "As a general rule, an injunction could only be issued on filing an injunction bill, that is, a bill asking for an injunction in the prayer for relief and for process." See also *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72; *Vermilyea v. Vermilyea*, 14 How. Pr. (N. Y. Supreme Ct.) 470.

In *Jackson v. Bunnell*, 113 N. Y. 216, it was said: "A court of equity may grant it [an injunction] in an action where the pleadings show its necessity, and the remedy is asked as an element of the final relief sought; but after judgment which does not award it, and which judgment is a final disposition of the action, there can be no permanent injunction granted upon affidavits and an order."

In *Rondout First Nat. Bank v.*  
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tion must be alleged in the bill, as matters not alleged therein cannot be shown by affidavits or otherwise, or, if shown, will not authorize an injunction.<sup>1</sup>

**Petition in Cause Pending.** — As a general rule, injunction on an

Navarro, (Supreme Ct.) 43 N. Y. St. Rep. 813, an injunction was sought in supplementary proceedings, the application being based on a petition of the receiver, and it was held that as the only authority for granting an injunction is found in Code Civ. Proc., § 603, under which it must appear from the complaint that the plaintiff, from the nature of the action, is entitled to an injunction, and in section 604, which provides that an injunction order may be applied for in an action upon extrinsic facts, it was proper to deny the application.

*Oregon.* — State v. Lord; 28 Oregon 498.

*Pennsylvania.* — Wilson v. Childs, 10 Phila. (Pa.) 275, 8 Nat. Bank Reg. 527, 30 Leg. Int. (Pa.) 321.

*Utah.* — Bailey v. Stevens, 11 Utah 175.

*Wisconsin.* — Atty.-Gen. v. Chicago, etc., R. Co., 35 Wis. 425.

**Affidavit Equivalent to Complaint.** — An affidavit upon which the motion for an injunction is founded, which affidavit contains all the ingredients of a complaint, viz., the title of the cause, the name of the court, the county where the plaintiff proposes to try the action, the names of the parties, a statement of the facts upon which the plaintiff relies to constitute his cause of action, and the demands for the relief to which the plaintiff supposes himself entitled, answers all the purposes of a complaint, and the form in which it is presented furnishes no sufficient ground of objection. *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72.

1. *Wharton v. Hannon*, 101 Ala. 554; *Moulton v. Reid*, 54 Ala. 320; *Heinlen v. Heilbron*, 71 Cal. 557; *National Bank v. Printup*, 63 Ga. 570; *Highway Com'rs v. Deboe*, 43 Ill. App. 25; *Poyer v. Des Plaines*, 20 Ill. App. 30; *Kansas City, etc., R. Co. v. Rich Tp.*, 45 Kan. 275; *Stockett v. Johnson*, 22 La. Ann. 89; *Lacoste v. Benton*, 3 La. Ann. 220; *Chambliss v. Atchison*, 2 La. Ann. 488; *Busey v. Hooper*, 35 Md. 15; *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273, in which case it was held, on a motion for a preliminary injunction, that affidavits could not be read by the

plaintiff to enlarge the scope of the bill. See also the following cases: *American Water-Works Co. v. Venner*, (Supreme Ct.) 18 N. Y. Supp. 379, holding that a preliminary injunction cannot be sustained by matters which have occurred after the filing of the bill which are not set up in a supplementary bill; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362; *Osborne County v. Blake*, 19 Kan. 299; *Bailey v. Stevens*, 11 Utah 175.

**Joinder of Legal and Equitable Causes of Action.** — Although, when a complaint contains more than one cause of action, each count must contain all the facts necessary to constitute a cause of action; yet, where a complaint sets forth two causes of action, and asks damages for acts already committed, and also an injunction against the further commission of such acts, the plaintiff may set forth in one count all the facts entitling him to relief at law, and in the other count in which he asks the equitable interposition of the court it is only necessary or proper to allege other facts which, in addition to those previously stated as ground for a judgment at law, will justify the injunction sought, without repeating allegations of ownership, etc., contained in the other count. *Jerrett v. Mahan*, 20 Nev. 89, citing *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 548; *Pomeroy Rights Rem.*, §§ 78, 437, 452, 454, 574; and *Bliss Code Pl.*, § 114.

**Separate Specifications of Complaint.** — In *Indiana* the practice of assigning several specifications of cause for an injunction against the collection of a tax has been approved by the court, and each of such specifications, when demurred to, is considered as a separate paragraph of complaint, and is considered in connection with the allegations preceding and following it in the complaint. The specifications on demurrer cannot aid each other, but they must be considered separately. *Hill v. Probst*, 120 Ind. 528. Citing *Boden v. Dill*, 58 Ind. 273; *Mustard v. Hoppess*, 69 Ind. 324; and *Hilton v. Mason*, 92 Ind. 157.

**Bond.** — The complaint need not disclose whether a bond is filed or not. *Smith v. Chandler*, 13 Ind. 513.

original bill is not the proper mode of obtaining a stay of proceedings under a bill in chancery, whether the application be made by parties, privies, or strangers, but the proper method is to apply by petition in the original cause for such an order as the cause made by the petition will warrant.<sup>1</sup>

**3. When the Bill Should Be Filed.** — In the absence of any statute or rule of court requiring the bill to be filed before the issuance of an injunction, an order allowing an injunction made upon the presentation of the bill to the chancellor before the filing of the bill, is not void but is at most, a mere irregularity.<sup>2</sup>

1. *Smith v. American L. Ins., etc., Co.*, Clarke Ch. (N. Y.) 307, *citing* 1 Hoffm. Ch. Pr. (N. Y.) 89.

In *Lane v. Clark*, Clarke Ch. (N. Y.) 309, it was said that proceedings in chancery will not be restrained by injunction issuing out of chancery upon a new bill, whether filed by a party, privy, or stranger to the original suit. See also *Peck v. Crane*, 25 Vt. 146; *Travis v. Myers*, 67 N. Y. 542.

**Ancillary Injunction.** — When the injunction is sought as auxiliary to an action already commenced, and the end to be obtained by it can be as completely accomplished by motion, upon the clearest principles of equity practice, a new suit instituted simply for such injunction cannot be sustained. To allow it would be to encourage useless litigation and unnecessary expense. *Hamer v. Kane*, 7 Nev. 41.

2. In *Ex p. Sayre*, 95 Ala. 288, the court, after reviewing the cases, English and American, said: "While we have found no authority declaring directly that it is a proper practice to grant the issue of an injunction before the filing of the bill, the authorities are abundant which hold that such an order before filing the bill is not void, but at most is a mere irregularity." *Citing Carr v. Morice*, L. R. 16 Eq. 125, in which case, on account of the office of the court being closed, the filing of the bill was delayed, and it was held that the court might grant an injunction before bill filed, but the chancellor filed a copy of the bill produced to him and directed that it be marked filed as of the day the injunction was granted, remarking that he felt bound to act as if the bill were filed before him on the day the application was made; and *Thorneloe v. Skoines*, L. R. 16 Eq. 126, in which case an injunction to restrain a sale which was expected to be completed within an hour was granted

upon the plaintiff giving an undertaking to file the bill and affidavit in the course of the day, on the ground that the plaintiff did not have time to prepare a copy of the bill for filing. See also the following cases: *Henry v. Watson*, 109 Ala. 335; *Fairchild v. Knight*, 18 Fla. 770; *Davis v. Reed*, 14 Md. 152; *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 791, in which case no question was made as to the correctness of an order for an injunction which was made before the bill was filed.

**On or Before Return Day.** — In *Howe v. Willard*, 40 Vt. 654, Chancellor Barrett said that in England there is an exception to the necessity of having a bill filed before subpoena is issued when a bill prays for injunction to be awarded against the defendant, in which case it is sufficient that the bill be filed on or before the day on which the subpoena is made returnable; *citing* 1 *Smith Ch. Pr.* 110. See also *Matter of Hemiup*, 2 *Paige* (N. Y.) 316, wherein Chancellor Walworth said that by the English practice the plaintiff is in some cases permitted to take out and serve a subpoena and injunction before his bill has been filed.

**Restraining Order Before Institution of Suit.** — In *Heyman v. Landers*, 12 Cal. 107, it was held, notwithstanding a statute expressly providing that an injunction may be granted at the time of issuing the summons, that a restraining order made before the filing of the complaint was not void, but a mere irregularity; *Field, J.*, saying: "The order could only take effect upon the filing of the complaint, and the bond or undertaking required, and it was unnecessary to delay the application to the judge until after the complaint had been filed. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice

The Usual Course is to indorse upon the bill, upon its presentation to the chancellor, an order for an injunction to issue upon the bill being filed.<sup>1</sup>

**4. General Rules of Pleading.** — The bill must contain such averments as are required by the rules of the court,<sup>2</sup> and should conform to prescribed practice and state all the grounds relied on for relief,<sup>3</sup> which grounds for relief should be contained in the stating part of the bill.<sup>4</sup>

Under the Code the plaintiff need only allege the facts constituting his cause of action, in their natural order, and pray for the relief desired.<sup>5</sup>

to present the complaint in advance of the filing to the judge and obtain the order or the allowance of the writ."

**In Delaware**, by statute, injunctions to stay waste and suits at law may be awarded and issued before the bill is filed. Such an injunction determines nothing, but only saves the plaintiff from injury until the matter is finally heard and decided. *Tatem v. Gilpin*, 1 Del. Ch. 13.

**In Massachusetts**, by rule, it is provided that no injunction shall be ordered until the bill is filed, unless for good cause shown. *Winslow v. Naysen*, 113 Mass. 411.

**In New York** it was early provided by statute (2 Rev. Stat. 179, § 71) that an injunction should not be issued until the bill is filed. *Matter of Hemiup*, 2 Paige (N. Y.) 316.

**In Vermont** it has been provided by statute that no injunction shall be issued until the bill shall have been filed. *Howe v. Willard*, 40 Vt. 654, in which case it was held that a statute providing that the issuance of a subpoena attached to the bill shall be deemed a filing of the bill was not intended to exclude any other mode of filing the bill, but rather to provide a mode by which, for the purpose of issuing an injunction, it may be regarded as filed without requiring it to be filed actually according to the law and practice independent of the statute.

**Wisconsin.** — In *Atty.-Gen. v. Chicago, etc.*, R. Co., 35 Wis. 517, it was said that an injunction "can issue only after bill or information filed."

1. *Stimson v. Bacon*, 9 N. J. Eq. 144, per Chancellor Williamson, who said that the bill must be filed without delay, regardless of the frame of the chancellor's order. In that case, the bill not having been filed, the chancellor

declared that it was his duty not to dissolve the injunction merely, but to declare the proceedings irregular and order the bill dismissed.

**Objection Waived.** — By filing an answer to the bill, and moving the court to dissolve the injunction for want of equity and because of the denials in the answer, the defendant waives any irregularity in granting the injunction before the bill was filed. *Ex p. Sayre*, 95 Ala. 288; *Henry v. Watson*, 109 Ala. 335.

**Sanction of Bill Before Filing.** — In *Georgia* a bill for an injunction must be sanctioned before it is filed under Code, § 4184, requiring bills which pray some extraordinary remedy to be sanctioned; but it has been held that any order by the chancellor implies his sanction, and that an order that the defendant show cause, etc., has that import. *Alspaugh v. Adams*, 80 Ga. 345.

Where there is no prayer for a preliminary injunction, the bill may be filed without the sanction of the judge. *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40.

2. *Rose v. Rose*, 11 Paige (N. Y.) 166.

3. *Per* McAdam, J., in *Williams v. Huber*, 5 Misc. Rep. (N. Y. Sup. Ct.) 488.

4. *McCulla v. Beadleston*, 17 R. I. 20, citing *Wright v. Dame*, 22 Pick. (Mass.) 55.

5. *Rickett v. Johnson*, 8 Cal. 34.

**In Kentucky** it has been held that provisions of the Code, specifying the grounds upon which an injunction may be granted, were not intended to take away other well-recognized grounds of equity jurisdiction which may be found necessary for the full and proper administration of justice. *Gates v. Barrett*, 79 Ky. 295.

**Right to Restraining Order or Preliminary Injunction.** — Where a restraining order or a preliminary injunction is sought, the bill should set forth the existence of an emergency or of special reasons why an order should be made before the case can be regularly heard.<sup>1</sup>

**Impertinence.** — The bill should not introduce matters which are irrelevant and are not necessary to show the plaintiff's right to an injunction.<sup>2</sup>

**Anticipation of Defenses.** — It is not necessary in any case that the plaintiff should in his bill anticipate that which is properly a matter of defense.<sup>3</sup>

**The Signature.** — A bill for an injunction should be signed either by the plaintiff or his solicitor.<sup>4</sup>

1. *Carleton v. Rugg*, 149 Mass. 550; *Larsen v. Winder*, 14 Wash. 109.

**Minor Deficiencies.** — In *Kerr v. Trego*, 47 Pa. St. 292, it was declared that for the purpose of a motion for a preliminary injunction it is sufficient that the main facts of the case are set forth in the bill and affidavit, and that the court will overlook objections to the minor details of the bill which may be cured by amendment.

**Amendable Defects.** — Defects in the bill which are amendable will be overlooked on a motion for preliminary injunction. *Com. v. Pittsburgh, etc., R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372; *Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 211.

2. *Andrae v. Redfield*, 12 Blatchf. (U. S.) 407.

**Acts Being Committed by Strangers.** — Allegations as to the commission of other acts by persons other than the defendant, and in which other acts the defendant has not participated, are immaterial, and no evidence can properly be admitted to establish them, and such irrelevant allegations may be stricken out on motion. *Davis v. Chicago, etc., R. Co.*, 46 Iowa 389.

**Allowance of Other Injunctions in Similar Cases.** — An allegation that injunctions have been recently allowed in United States courts in similar cases is a proper one for the consideration of the court, and is not impertinent. *Wells v. Oregon R., etc., Co.*, 18 Fed. Rep. 517, 16 Am. & Eng. R. Cas. 71, wherein it was said that in patent cases it is common to bring to the knowledge of the court in this way similar adjudications to which the plaintiff was a party. *Citing* *Curt. Eq. Prec.* 30, and *Curt. L. Pat.* 544.

**Motion to Strike Out—Exercise of Caution.** — An allegation will not be

expunged from a bill as impertinent unless its impertinence clearly appears, for if it is erroneously struck out the error is irremediable. *Wells v. Oregon R., etc., Co.*, 18 Fed. Rep. 517, 16 Am. & Eng. R. Cas. 71, in which case it was held that the plaintiff might allege the business in which he was engaged and which he was seeking by an injunction to protect, and might also set forth its origin, growth, value, importance, and relation to the public.

3. *Casey v. Holmes*, 10 Ala. 776. See also *Walker v. Armstrong*, 2 Kan. 198, wherein it was held that where the plaintiff seeks an injunction to restrain interference with a ferry franchise, he need not negative the commission by himself of breaches of duty, which breaches would affect his right to the franchise, as they are matters of defense to be pleaded and proved by the defendant.

Where the plaintiff seeks to enjoin a judgment, he has a right to rest his case upon the averment of such fraud as vitiates his contract upon which the judgment was recovered, and of the fact that the security so fraudulently procured had come to the possession of the plaintiff at law by assignment; and if the circumstances under which the holder acquired the paper are such as entitle him to recover, they must be shown in the answer. *Vathir v. Zane*, 6 Gratt. (Va.) 246.

4. *Roach v. Hulings*, 5 Cranch (C. C.) 637, in which case an unsigned bill was ordered to be taken from the files; but upon its being properly signed after it had been stricken from the files, the court received it as a basis of an injunction *de novo*.

**Signature of Corporation.** — A bill for an injunction filed by a corporation is

**Description of Contract.** — Where relief is sought against the apprehended breach of a contract, it is necessary that the contract should be stated either according to its tenor or legal effect, and this, it would seem, is sufficient.<sup>1</sup>

**5. Certainty.** — In suits for injunction the general rule of equity pleading, that the cause of action should be set forth with such particularity as to enable the chancellor from an inspection of the bill alone to grant the relief sought, is applied. If the bill is not so specific, there can be no decree by default on failure of the defendant to controvert the matters set up; nor can there be a decree after pleading over by the defendant unless the answer is of such a nature as to cure the defect in the bill, and, when taken in connection with the bill, show the relief sought and the right of the plaintiff thereto; consequently, in a suit for injunction, the pleader must allege the facts entitling him to an injunction with precision and certainty, so as to distinctly inform the defendant of the nature of the case which he is called upon to meet, and if the bill contains only vague and indefinite allegations a demurrer will be sustained.<sup>2</sup> Especially in cases where there is danger that

sufficiently vouched by the signature of its solicitor and need not be under its corporate seal. *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

1. *Casey v. Holmes*, 10 Ala. 776.

In *Laughlin v. Lamasco City*, 6 Ind. 223, it was held that in a suit to enjoin the commission of acts in violation of a contract, the complaint need not allege in what manner the contract was made, whether it was in writing, the consideration therefor, etc.

2. *Alabama*. — *Spence v. Duren*, 3 Ala. 251, wherein it was said that precision and certainty are required in chancery pleading, and that vague and uncertain charges are insufficient; *Albertville v. Rains*, 107 Ala. 691; *Moulton v. Reid*, 54 Ala. 320; *Duckworth v. Duckworth*, 35 Ala. 70; *Vaughan v. Marable*, 64 Ala. 60; *Kingsbury v. Flowers*, 65 Ala. 479; *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413; *Hart v. Life Assoc.*, 54 Ala. 495, holding that where allegations of the bill are too vague and indefinite to show that the plaintiff is entitled to relief, the injunction should be dissolved and the bill dismissed; *Long v. Brown*, 4 Ala. 622; *Walker v. Allen*, 72 Ala. 456.

In *Attalla Min., etc., Co. v. Winchester*, 102 Ala. 184, it was held that a vague and indefinite allegation that "other suits are threatened," in addition to two suits already pending, is

insufficient in a bill seeking an injunction against a multiplicity of suits.

*Arkansas*. — *Blake v. Jordan*, 45 Ark. 265.

*California*. — *Moore v. Clear Lake Water Works*, 68 Cal. 146; *Marriner v. Smith*, 27 Cal. 649; *Grimes v. Linscott*, (Cal. 1895) 40 Pac. Rep. 421.

*Florida*. — *Cheney v. Jones*, 14 Fla. 587; *Sullivan v. Moreno*, 19 Fla. 200; *Bloxham v. Consumers' Electric Light, etc., Co.*, 36 Fla. 519, in which case the court objected that the allegations of the bill as to the manner in which the plaintiff acquired title were very vague and indefinite.

*Georgia*. — *Bryan v. King*, 51 Ga. 291; *Hill v. Harris*, 42 Ga. 412; *Battle v. Stephens*, 32 Ga. 25; *Camp v. Matheson*, 30 Ga. 170; *Beckham v. Newton*, 21 Ga. 187; *McLendon v. Hooks*, 15 Ga. 533.

*Illinois*. — *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *O'Kane v. Treat*, 25 Ill. 557; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Simpson v. Wright*, 21 Ill. App. 67. See also *Taylor v. Thompson*, 42 Ill. 17; *Briscoe v. Allison*, 43 Ill. 291.

*Iowa*. — *Berger v. Armstrong*, 41 Iowa 447.

*Kansas*. — *Conley v. Fleming*, 14 Kan. 381; *State v. Durkee*, 12 Kan. 308, holding that the allegations should not be ambiguous or contradictory.

*Kentucky*. — *Tye v. Catching*, 78 Ky. 463, in which case it was considered

the injunction, if improvidently issued, may produce serious detriment to the rights and interests of the defendant before he can be relieved of its operation, the court will observe great caution and will deny an application for a preliminary injunction unless the allegations of the bill are definite and clear in support of the right asserted.<sup>1</sup>

insufficient to charge that the defendant repaired his dam and "unlawfully raised it higher than it was at the time of defendant's purchase, or any time prior thereto," without charging what the height of the dam was before it was repaired, and how much the defendant added to the height of the dam in repairing it.

*Maryland.* — *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Laupheimer v. Rosenbaum*, 25 Md. 219.

In *Lamm v. Burrell*, 69 Md. 272, it was held that an allegation that the plaintiff "has illegally, wrongfully, and unjustly procured a writ" directing the sheriff to eject the plaintiff from certain premises, is too vague and indefinite, as it does not show the nature of the writ or designate the tribunal that issued it. See also *Blaine v. Brady*, 64 Md. 373, holding that where an injunction is sought against the erection of an embankment, a vague and indefinite charge that a "considerable portion" of the plaintiff's land has been overflowed by reason of the embankment, is insufficient, and that the plaintiff should state how often the stream has overflowed, how much of the land is or has been overflowed at such time, and whether the land or any part of it has been washed away.

*Massachusetts.* — *Hallett v. Cumston*, 110 Mass. 29.

*Michigan.* — *Conway v. Waverly Tp.*, 15 Mich. 263, cited in *Cheney v. Jones*, 14 Fla. 587.

*New Jersey.* — *Perkins v. Collins*, 3 N. J. Eq. 482.

*New York.* — *Allison Bros. Co. v. Allison*, (Supreme Ct.) 7 N. Y. Supp. 268; *Strange v. Longley*, 3 Barb. Ch. (N. Y.) 650.

In *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371, *Harris, J.*, said: "Before a party can claim the summary interposition of the court to restrain an act which, if committed, will result in injury to him, he must clearly show that the act itself is illegal."

*Rhode Island.* — *McCulla v. Beadleston*, 17 R. I. 20.

*Wisconsin.* — *Judd v. Fox Lake*, 28 Wis. 583; *Mills v. Gleason*, 11 Wis. 470.

*United States.* — *Kidwell v. Master-son*, 3 Cranch (C. C.) 52; *Andrae v. Redfield*, 12 Blatchf. (U. S.) 407; *Leo v. Union Pac. R. Co.*, 22 Blatchf. (U. S.) 22; *McKenzie v. Cowing*, 4 Cranch (C. C.) 479.

1. *Baltimore v. Warren Mfg. Co.*, 59 Md. 96.

**Injunction Ancillary to Action at Law.**

— Where a bill is filed to enjoin a trespass and for discovery, pending the trial of an action at law involving title, and only invokes the ancillary jurisdiction of the chancellor to prevent the defendant from depriving the plaintiff of the fruits of his action at law, the same certainty and particularity are not requisite as in a bill requiring the chancellor to grant or withhold final relief upon his own ascertainment of facts, and it will suffice that the bill shall show certainly that the action at law is brought in good faith, and that the plaintiff verily believes, and has good cause to believe, that the defendant is guilty and will be convicted of the trespass alleged. *Cottrell v. Moody*, 12 B. Mon. (Ky.) 500.

**Description of Land.** — Land should be described by giving its location, extent, and boundaries. *Avery v. Onillon*, 10 La. Ann. 127, in which case injunction was sought against a trespass upon land.

In *Barham v. Hostetter*, 67 Cal. 272, an injunction was sought against the diversion of water, and the complaint was considered ambiguous, unintelligible, and uncertain, because the plaintiff's land and ditches were not described with sufficient certainty. See also *Ross v. Crews*, 33 Ind. 120, holding that a complaint praying an injunction against the further prosecution of a judgment for the recovery of the possession of land should describe the premises.

**Illegal Tax.** — Where the bill seeks to enjoin the collection of a tax it must show what portion is illegal, because if a part of the tax has been legally imposed collection of such part should



**Reasonable Certainty Sufficient.** — The plaintiff need do no more than state the facts upon which he relies with reasonable certainty;<sup>1</sup> and as in other suits in equity, the same strictness is not required as in suits at law.<sup>2</sup>

**Argumentativeness.** — The allegation of an injunction bill should not be argumentative, but should charge the facts relied upon for an injunction in direct and positive terms.<sup>3</sup>

**6. Allegation of Facts** — *a.* **NECESSITY TO CHARGE FACTS.** — The plaintiff should set forth in a brief but clear manner all the facts and circumstances out of which the principles of equity arise upon which he asks relief. It is a well-settled rule of pleading

not be enjoined. *Cheney v. Jones*, 14 Fla. 587; *O'Kane v. Treat*, 25 Ill. 557; *Taylor v. Thompson*, 42 Ill. 17; *Briscoe v. Allison*, 43 Ill. 291; *Conway v. Waverly Tp.*, 15 Mich. 263; *Mills v. Gleason*, 11 Wis. 470. See also the article **TAXES**.

1. *Casey v. Holmes*, 10 Ala. 776; *Hooper v. Dora Coal Min. Co.*, 95 Ala. 235; *Paterson, etc., R. Co. v. Jersey City*, 9 N. J. Eq. 434; *St. Louis v. Knapp Co.*, 104 U. S. 658. See also article **DEFINITENESS AND CERTAINTY IN PLEADINGS**, vol. 6, p. 246.

In *Crane v. Winsor*, 2 Utah 248, it was declared that if the complaint sets out with sufficient clearness and certainty the character or nature of the plaintiff's claim, the character, nature, and extent of the interference on the part of the defendant, and the character in which the plaintiff sues, it will be upheld, although it is inartificially drawn.

**Under the Code** it is only required that the petition or complaint shall show a substantial cause of action by a fair and natural construction of the language in which the facts are stated, and all technical forms are abolished. *Heichew v. Hamilton*, 3 Greene (Iowa) 596.

**Motion to Make More Definite and Certain.** — A motion to require the plaintiff to make his petition more definite and certain should be overruled where the defendant does not state in his motion wherein or in what particular the plaintiff's petition is indefinite or uncertain. *Gilmore v. Norton*, 10 Kan. 491.

2. *Marselis v. Morris Canal, etc., Co.*, 1 N. J. Eq. 31, wherein Chancellor Vroom said: "The rules of pleading in a court of equity are not so technical and precise as in the courts of law. The general powers of this court, and

its peculiar modes of administering relief, authorize and require a greater degree of liberality than would be expedient in the courts of common law."

3. *Ferguson v. Selma*, 43 Ala. 398; *Mead v. Stirling*, 62 Conn. 586; *Battle v. Stephens*, 32 Ga. 25.

In *Ellis v. Karl*, 7 Neb. 381, an injunction was sought against the removal of a county seat, and the petition contained general averments to the effect that a large number of voters failed to receive any notice whatever of the election, and that those who did receive it did not have time to inform themselves of the question to be voted on, by reason of which the election was carried in favor of relocating the county seat; and no facts were stated to show that any different result would have been obtained by giving the full statutory notice. It was held that the allegations were merely conjectural and argumentative, and that the petition was insufficient.

**Denial of Existence of Facts.** — Whenever it is necessary to allege the non-existence of a fact, the best and only proper way to do it is to allege its non-existence in positive and direct terms, and it is not sufficient to allege simply the existence of other facts. *Gilmore v. Norton*, 10 Kan. 491.

In *Garrett County v. Franklin Coal Co.*, 45 Md. 470, it was held that a mere allegation of the fact that one county has undertaken to exercise the right to assess and collect taxes from the plaintiff is not sufficient to show its authority to do so and to show that another county is not authorized to assess and collect taxes from the plaintiff.

It is insufficient to aver the non-existence of the evidence of a fact, but the non-existence of the fact should be alleged. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124.

that bare allegations of conclusions cannot avail the pleader, especially where demurrer is interposed, without a statement of the probative facts upon which his conclusions are based; and even when the facts are alleged, the averments of the pleader's conclusions may often be stricken out upon motion as irrelevant and redundant. Because of the harshness of the remedy by injunction, strict adherence to this rule of pleading is required in a suit for an injunction.<sup>1</sup>

1. *Alabama*. — *Louisville, etc., R. Co. v. Bessemer*, 108 Ala. 238; *Kelly v. Martin*, 107 Ala. 479; *Headley v. Bell*, 84 Ala. 346; *Walker v. Allen*, 72 Ala. 456; *Security Loan Assoc. v. Lake*, 69 Ala. 456; *Kingsbury v. Flowers*, 65 Ala. 479; *Vaughan v. Marable*, 64 Ala. 60; *Jones v. Black*, 48 Ala. 540; *Spence v. Duren*, 3 Ala. 251, holding that it is not sufficient to allege mere suspicions and conjectures. See also *Pharr v. Reynolds*, 3 Ala. 521, and *McBrom v. Sommerville*, 2 Stew. (Ala.) 515.

In *Wingo v. Hardy*, 94 Ala. 184, it was held that averments that the plaintiff "has done all that was in his power to hasten the opening and developing of said mines," and that he was "delayed from six to eight weeks in obtaining rights of way for the railroad," were not sufficiently specific, and that the bill should have set forth what caused the delay, with such particularity of language both as to persons and the nature of the proceedings as to enable the court to determine the character of the impediments or hindrances.

Again, in *Norris v. Norris*, 27 Ala. 519, the plaintiff, in a suit for divorce, asked an injunction against the removal and disposition by the defendant of his property, and it was held that it was not sufficient to charge that the property of the defendant would be removed and disposed of, and that the plaintiff should have charged the facts and circumstances upon which her fears were grounded.

*Arkansas*. — *Greedup v. Franklin County*, 30 Ark. xoi.

*California*. — *McMenomy v. Baud*, 87 Cal. 134; *Borland v. Thornton*, 12 Cal. 440.

*Georgia*. — In *Coast Line R. Co. v. Cohen*, 50 Ga. 451, it was said: "Facts must be set forth, specifications of the injury made, so that an intelligent mind may understand how and to what extent there will be injury."

To the same effect are the following cases: *Simmons v. Martin*, 53 Ga. 620;

*Harrell v. Hannum*, 56 Ga. 508; *Cantrell v. Cobb*, 43 Ga. 193. In the last-mentioned case it was held that where an injunction is sought against the collection by a vendor of land of the purchase-money, it is not sufficient to allege that the purchaser fears a failure of the vendor's title, but such facts must be stated as will affirmatively show that there is such a prayer incumbent or outstanding title as will defeat the vendor's title.

*Illinois*. — *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Northern Electric R. Co. v. Chicago, etc., R. Co.*, 57 Ill. App. 409; *Cook County v. Chicago, etc., R. Co.*, 35 Ill. 460.

*Indiana*. — *Tyner v. People's Gas Co.*, 131 Ind. 408; *Ross v. Crews*, 33 Ind. 120.

In *Sutherland v. Lagro, etc., Plank Road Co.*, 19 Ind. 192, it was held insufficient to allege that the corporation had ceased to keep up its organization without setting up particularly the manner in which the corporation powers had ceased.

*Iowa*. — *Berger v. Armstrong*, 41 Iowa 447; *Iowa R. Land Co. v. Sac County*, 39 Iowa 124; *Miller v. McGuire*, 1 Morr. (Iowa) 150.

*Kansas*. — *Mariner v. Mackey*, 25 Kan. 669; *Osborne County v. Blake*, 19 Kan. 299.

*Maryland*. — *Lamm v. Burrell*, 69 Md. 272; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Conolly v. Riley*, 25 Md. 402, holding that strong *prima facie* evidence of the facts in which the plaintiff's equity rests must be presented in the bill; *Salmon v. Clagett*, 3 Bland (Md.) 125; *Laupheimer v. Rosenbaum*, 25 Md. 219; *Union Bank v. Poultney*, 8 Gill & J. (Md.) 332; *Mahaney v. Lazier*, 16 Md. 73; *Nusbaum v. Stein*, 12 Md. 315; *Adams v. Michael*, 38 Md. 125, 17 Am. Rep. 516.

*Minnesota*. — *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, cited in *Longshore Printing Co. v. Howell*, 26 Oregon 527.

*Mississippi*. — In *Gaillard v. Thomas*,

**The Rule Is of Universal Applicability,** and obtains in all suits for injunctions, regardless of the particular equities upon which the plaintiff relies; and it may be laid down as a general proposition that the only safe course to be pursued by the pleader is to state facts and not mere conclusions of law. For instance, it is not sufficient to allege the bare fact that acts complained of are invalid, that the defendant has been or is guilty of an abuse of trust, that a mistake has been committed, that a river is navigable, that the defendant has erected and is maintaining a nuisance, or has committed and is committing waste, or that a tribunal is proceeding without jurisdiction; in each particular instance such facts must be alleged as to enable the court to determine that the grounds relied upon for an injunction actually exist, and the materiality of the matters alleged when taken in connection with the surrounding circumstances.<sup>1</sup>

61 Miss. 166, it was held that an allegation that the plaintiff had paid certain distributees in full their shares in a decedent's estate, taking receipts in full "whereby he became assignee of their interests in the estate," was considered insufficient as a charge that the plaintiff took an assignment of the interests of the distributees.

*Nevada.* — *Sherman v. Clark*, 4 Nev. 138, holding that it is insufficient to state in the bill mere expressions of opinion.

*New Jersey.* — *Lord v. Carbon Iron Mfg. Co.*, 38 N. J. Eq. 452; *Cornelius v. Post*, 9 N. J. Eq. 196; *Shreve v. Voorhees*, 3 N. J. Eq. 25.

*New York.* — *McHenry v. Jewett*, 90 N. Y. 58; *People v. Canal Board*, 55 N. Y. 390; *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193; *Galusha v. Flour City Nat. Bank*, 1 Hun (N. Y.) 573; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Heywood v. Buffalo*, 14 N. Y. 534; *Champlin v. New York*, 3 Paige (N. Y.) 573; *Buffalo v. Holloway*, 7 N. Y. 493; *McKyring v. Bull*, 16 N. Y. 303, which two last-mentioned cases were cited in *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193.

In *Pomeroy v. Hindmarsh*, 5 How. Pr. (N. Y. Supreme Ct.) 437, it was held that where an injunction is sought under the code "during the pendency of the action," the affidavit must state facts, and not mere conclusions.

*Oregon.* — *Longshore Printing Co. v. Howell*, 26 Oregon 527; *Ewing v. Rourke*, 14 Oregon 514.

*Rhode Island.* — *McCulla v. Beadleston*, 17 R. I. 20.

*Texas.* — *Larson v. Moore*, 1 Tex. 21. *Virginia.* — *Yancy v. Fenwick*, 4 Hen. & M. (Va.) 423, holding that the circumstances must always be stated in the bill, that the court may judge of them.

*Washington.* — *Rockford Watch Co. v. Rumpf*, 12 Wash. 647, in which case it was held that an allegation that the defendant would sell real estate unless restrained was but the expression of an opinion. See also *Spokane St. R. Co. v. Spokane*, 5 Wash. 634.

*United States.* — *Wilson v. Bastable*, 1 Cranch (C. C.) 394; *Woodman v. Kilbourn Mfg. Co.*, 1 Biss. (U. S.) 546; *Wilkinson v. Dobbie*, 12 Blatchf. (U. S.) 298; *St. Louis Type Foundry v. Carter, etc., Printing Co.*, 31 Fed. Rep. 524.

In *Francis v. Flinn*, 118 U. S. 385, it was held that an allegation that the defendants have combined and confederated together for the purpose of destroying the business and property of the plaintiff by publications in newspapers, and by divers and sundry suits, and by injunctions, is insufficient because of its failure to state what the publications are, and what the divers suits are, other than the injunction suits.

**1. Facts Constituting Invalidity.** — It is insufficient to allege that a proceeding is void, as this is a mere conclusion of law. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, holding that it is necessary to set forth the facts upon which the conclusion that a judgment is void is based; *Mariner v. Mackey*, 25 Kan. 669, which is to the same effect as the first-mentioned case;

**Illegality.** — Allegations that the defendant is proceeding "without authority of law," and that the acts complained of are being

*Iler v. Colson*, 8 Neb. 331, holding that it is insufficient to charge that a tax is void, and that the conclusion of the pleader should be supported by allegations of fact. See also *Kleyla v. Haskett*, 112 Ind. 515; *McClamrock v. Flint*, 101 Ind. 278; *Guerin v. Kraner*, 97 Ind. 533; *Clark v. Lineberger*, 44 Ind. 223; *Kern v. Hazlerigg*, 11 Ind. 443; which cases were cited in *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158.

**Abuse of Trust.** — In order to authorize an injunction restraining an executor or other trustee from further interfering with the estate, a general charge of abuse of trust is not sufficient, but facts showing such abuse should be made to appear. *Cooper v. Cooper*, 5 N. J. Eq. 9.

**Mistake.** — In *Kidwell v. Masterson*, 3 Cranch (C. C.) 52, it was held that a bill charging that an award was made by arbitrators under a mistaken impression of the facts as well as the law, without setting forth in what particulars the arbitrators were mistaken, so as to enable the court to see whether the facts or the law mistaken by the arbitrators were material to the cause, was without equity.

**Navigability of River.** — Where an injunction is sought against obstruction of a river, it is insufficient to allege merely that the river is navigable, but it should be alleged whether or not it has been at any previous time used for the purpose of transportation or floatage, the distance for which it was capable of such use, and the seasons or periods of the year when it could be so used. *Walker v. Allen*, 72 Ala. 456, citing *Duckworth v. Duckworth*, 35 Ala. 70. To the same effect is *Morrison v. Coleman*, 87 Ala. 655.

**Nuisance.** — In an action to enjoin a nuisance the plaintiff must allege the particular location of his property and the improper or negligent manner in which the defendant is conducting his business, or other facts showing that there is a nuisance and to what extent the plaintiff will suffer. *McMenomy v. Baud*, 87 Cal. 134; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96. See also the article NUISANCE.

**Payment.** — An allegation of payment should state when and how the payment was made. *Prout v. Gibson*, 1 Cranch (C. C.) 389.

**Want of Consideration.** — In an action to enjoin an execution issued on a judgment recovered on a note, it is insufficient to allege that the note was given without consideration, without stating for what purpose it was given. *Larson v. Moore*, 1 Tex. 21.

**Want of Jurisdiction.** — An allegation that a petition addressed to the county board was never signed as the law required, and that the county board, for want of a legal petition, never acquired jurisdiction, is insufficient, as it states merely the pleader's conclusions from facts which are not alleged and which are not apparent. *Logansport v. La Rose*, 99 Ind. 117.

**Waste.** — It is not sufficient to charge waste, but facts constituting waste must be alleged. *Montgomery v. Walker*, 36 Ga. 515; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467. See also the article WASTE.

**Injunction against Judgment at Law — Newly Discovered Evidence.** — Vague and general allegations of newly discovered testimony, without setting forth the newly discovered testimony to enable the court to judge of its materiality, are not sufficient. *Miller v. McGuire*, 1 Morr. (Iowa) 150.

Nor is it sufficient to aver that the plaintiff had a valid defense of which he had no knowledge until after judgment, without alleging facts showing that the plaintiff was prevented from making his defense by fraud, accident, or the act of the opposite party, unmixed with fraud or neglect on his own part. *Headley v. Bell*, 84 Ala. 346, citing *French v. Garner*, 7 Port. (Ala.) 549.

**Mistake or Omission.** — In *Simmons v. Martin*, 53 Ga. 620, it was held that it is insufficient to allege that the plaintiff was prevented from making his defense at law by mistake or accidental omission, but that he must allege further how the mistake or omission occurred, so that the court may see there was no fault or want of diligence on his part.

**Sickness.** — In *Kelly v. Martin*, 107 Ala. 479, it was held that it is insufficient to charge that the plaintiff was prevented from making his defense by sickness, without stating by whose sickness the default was caused or the nature and extent of the sickness.

performed "unlawfully," are insufficient. That an act is wrongful or unlawful, is usually a conclusion of law. The facts logically showing that an act or acts are unlawful should be stated.<sup>1</sup>

**b. MATTERS OF EVIDENCE.** — It is sufficient that the bill apprises the defendant of the precise case which he is required to meet, and it is not necessary to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill.<sup>2</sup>

**c. WAIVER OF OBJECTIONS TO AVERMENTS OF CONCLUSIONS.** — Where the plaintiff alleges conclusions of law merely, without setting forth facts in support of them, it is competent for the defendant to consent to such method of pleading, and in the absence of objection by demurrer evidence of facts will be admitted.<sup>3</sup>

**7. Allegations on Information and Belief.** — As a general rule, in an ordinary injunction bill which is sworn to by the plaintiff, it is necessary to state the matters which are relied upon for an injunction in positive and direct terms, as being within the plaintiff's personal knowledge, and allegations made upon information and belief are insufficient.<sup>4</sup> But this, like many other general rules, is not

*Citing Pharr v. Reynolds*, 3 Ala. 521, and *McBroom v. Sommerville*, 2 Stew. (Ala.) 515.

1. *Sim v. Hurst*, 44 Ind. 579, holding that an allegation that an appraiser did not make any legal report is not the allegation of any fact, and is insufficient. *Palmer v. Logansport, etc.*, Gravel Road Co., 108 Ind. 137, holding that an allegation for the erection of toll-houses, and gates upon a road was without any authority at law is not a statement of any fact. *Kemper v. Campbell*, 45 Kan. 529; *Olmstead v. Koester*, 14 Kan. 463; *Lamm v. Burrell*, 69 Md. 272; *Sherman v. Clark*, 4 Nev. 138; *Mace v. Carteret County*, 99 N. Car. 65, holding that it is insufficient to allege in general terms that taxes were "levied for an illegal or unauthorized purpose," and that the constitutional facts necessary to show that the purpose was unauthorized must be averred. See also *Methodist Episcopal Church, etc., v. Wyandotte*, 31 Kan. 721. See *Gilmore v. Norton*, 10 Kan. 491, wherein it was held that a petition praying an injunction to restrain the collection of an assessment for the payment of a public improvement by a municipal corporation, which alleged that divers persons had done curbing, guttering, etc., "without any contract or authority of law whatever to do the same," was not open to the objection that it did not sufficiently state the facts.

**Violation of Statute.** — An averment that the defendant has acted contrary to a statute, without setting forth in what manner, is not sufficient to entitle the plaintiff to any redress. *Smith v. Lockwood*, 13 Barb. (N. Y.) 209.

2. *Per Harlan, J.*, in *St. Louis v. Knapp Co.*, 104 U. S. 658.

**Under the Code** there is no distinction between the pleadings in actions at law and in suits in equity; and consequently the complaint, where an injunction is sought, as in an action at law, should merely present the facts, and matters stated as evidence are redundant, and upon a proper application will be stricken out. *Milliken v. Cary*, 5 How. Pr. (N. Y.) Supreme Ct. 272, in which case Sill, J., said: "It was competent under the old equity practice to omit the statement of circumstances and evidence in the bill, and to supply them by affidavit; such was the common mode when the oath of a person other than the complainant was required to obtain the writ."

3. *Louisville, etc., R. Co. v. Bessemer*, 108 Ala. 238.

Where the bill is not sufficiently specific in averring facts out of which the complainant's alleged equity springs, its insufficiency in this respect is waived by not demurring or making a motion to dismiss or dissolve. *Headley v. Bell*, 84 Ala. 346.

4. *Connecticut.* — *Wells v. Bridgeport*

of universal application.<sup>1</sup> Thus where the facts lie only in the knowledge of the defendant, and discovery is sought, the plaintiff may state that he is informed and believes that the fact is true and that therefore he charges the fact to be true.<sup>2</sup> Again, where the matters do not lie within the personal knowledge of the plaintiff, allegations on information and belief, accompanied by a sworn statement of the plaintiff's informants, are sufficient.<sup>3</sup> Another exception to the rule exists where it appears that the plaintiff is without personal knowledge of the facts alleged and cannot obtain the affidavit of his informant, *e. g.*, where the informant is a non-resident of the state.<sup>4</sup>

Hydraulic Co., 30 Conn. 316, wherein the rule is recognized.

*Florida.*—Cunningham v. Tucker, 14 Fla. 251.

*Georgia.*—Taylor v. Harp, 37 Ga. 358; Jones v. Macon, etc., R. Co., 39 Ga. 138; Lee v. Clark, 49 Ga. 81. See also Bryan v. King, 51 Ga. 291.

*Kentucky.*—Loudon v. Warfield, 5 J. Marsh. (Ky.) 196.

*Illinois.*—Campbell v. Paris, etc., R. Co., 71 Ill. 611.

*Maryland.*—Blondheim v. Moore, 11 Md. 365.

*Michigan.*—In Caulfield v. Curry, 63 Mich. 594, the court said: "It is questionable whether any injunction should ever issue to interfere with the rights of one in property in his possession, upon a showing made only upon information and belief. The courts certainly do not look with favor upon such a proceeding, and only in extreme cases, where the facts relied upon are entirely within the knowledge and possession of the defendant, is it justified."

*Minnesota.*—Armstrong v. Sanford, 7 Minn. 49.

*New York.*—Champlin v. New York, 3 Paige (N. Y.) 573; Van Rensselaer v. Kidd, 4 Barb. (N. Y.) 17; French v. Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471; Hecker v. New York, 28 How. Pr. (N. Y. Supreme Ct.) 211; Hill v. Bond, 22 How. Pr. (N. Y. Supreme Ct.) 272; People v. New York, 9 Abb. Pr. (N. Y. Supreme Ct.) 253; Pomeroy v. Hindmarsh, 5 How. Pr. (N. Y. Supreme Ct.) 437; Fowler v. Burns, 7 Bosw. (N. Y.) 637; Roome v. Webb, 3 How. Pr. (N. Y. Supreme Ct.) 328; Williams v. Lockwood, Clarke Ch. (N. Y.) 172; Livingston v. State Bank, 26 Barb. (N. Y.) 304; Orleans Bank v. Skinner, 9 Paige (N. Y.) 305; Woodruff v. Fisher, 17 Barb. (N. Y.) 224; Jewett

v. Allen, 3 How. Pr. (N. Y. Supreme Ct.) 129; Campbell v. Morrison, 7 Paige (N. Y.) 157; Middletown v. Rondout, etc., R. Co., 43 How. Pr. (N. Y. Supreme Ct.) 481; Pierce v. Wright, 6 Lans. (N. Y.) 306.

*North Carolina.*—Wright v. Grist, Busb. Eq. (N. Car.) 203.

*United States.*—Brooks v. O'Hara, 2 McCrary (U. S.) 644.

1. *Per* Daniels, J., in French v. Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471.

2. Campbell v. Morrison, 7 Paige (N. Y.) 157, wherein Chancellor Walworth said that an allegation on information and belief is sufficient where a discovery is sought and the plaintiff does not ask a general injunction *ex parte*. See also Campbell v. Morrison, 7 Paige (N. Y.) 157.

3. Lee v. Clark, 49 Ga. 81; Jones v. Macon, etc., R. Co., 39 Ga. 138; Taylor v. Harp, 37 Ga. 358; Campbell v. Morrison, 7 Paige (N. Y.) 157.

In Orleans Bank v. Skinner, 9 Paige (N. Y.) 305, Chancellor Walworth said: "Bills which are to be verified by the oath of the agent or attorney for a complainant should be drawn in the same manner as bills which are to be sworn to by the complainant himself; stating those matters which are within the personal knowledge of such agent or attorney positively. And those which he has derived from the information of others should be stated or charged upon the information and belief of the complainant."

4. French v. Maguire, 55 How. Pr. (N. Y. Supreme Ct.) 471, in which case it was said: "Defendant resided, and was engaged in the execution of the apprehended purpose, in another state. Action more prompt than was consistent with the long delay necessary to obtain the affidavits of these foreign

**8. Necessity for Full and Candid Statement.** — It is the duty of the plaintiff to make in his bill a full and candid disclosure of all the facts in his knowledge touching the subject-matter in regard to which relief is sought, with the utmost good faith and without any attempt at suppression or evasion, and the plaintiff should not withhold or omit facts of which the court ought to be advised.<sup>1</sup>

informants was required for the protection of the plaintiffs' rights. And if their information could not be properly acted upon, the plaintiffs would necessarily be deprived of redress. Under such circumstances and in such an emergency, the reason of the rule requiring the best evidence before action could ordinarily be taken justified its relaxation. The plaintiffs presented the best evidence in their power, and on that the court could, under the peculiar circumstances existing, act with propriety." See also *Campbell v. Morrison*, 7 Paige (N. Y.) 157, in which case it was held that where the plaintiff cannot swear positively to the existence of the facts upon which he seeks an injunction, and cannot procure the affidavit of any third person, he should charge the facts upon his information and belief and show why it is impossible to procure the affidavit of the person from whom he derived his information; and that where the bill contains such allegation the chancellor may in his discretion, in cases of emergency where serious injury would probably be done to the plaintiff before a reasonable time to show cause would expire, allow a temporary injunction pending the order to show cause. Citing *Mumford v. Sales*, Chan. March 20, 1838; and *Atty.-Gen. v. Columbia Bank*, 1 Paige (N. Y.) 511.

**Effect of Demurrer.** — In *Georgia* it has been held that although a bill which alleges facts on information and belief is insufficient as a basis of preliminary injunction, it is not demurrable, as the demurrer admits the facts alleged on information and belief, and that therefore the bill should not be dismissed. *Lee v. Clark*, 49 Ga. 81.

**The Code of Procedure** did not change the rule as to the character of the evidence required upon an application for an injunction, and the facts showing the plaintiff's right to relief and to the injunction must be stated in the bill or accompanying affidavits in direct terms, and not upon information and

belief alone. *Cunningham v. Tucker*, 14 Fla. 251.

**Proof Adduced on Motion to Dissolve.** — In *Levy v. Steinbach*, 43 Md. 212, an allegation on information and belief that the defendant was insolvent was considered sufficient on a motion to dissolve, because it was supported by proof at the hearing of the motion to dissolve that the defendant had no assets whatever, and that other creditors had made fruitless efforts to collect their debts from him.

**Form of Averment.** — In *Connecticut* an allegation that the plaintiff "is informed and verily believes and thereupon avers," etc., has been construed a direct and positive averment and not an allegation upon information and belief. *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316, in which case the court said: "Not only is it in the form very commonly adopted in bills in equity, but it is in no degree impaired by the statement that it is made upon information which the petitioner verily believes to be true. It is still a direct and positive averment."

1. *Daglish v. Jarvie*, 2 Macn. & G. 242, in which case an application for a special injunction, *i. e.*, one which is issued only on due notice and is founded on the circumstances of each case, was likened to an application for insurance. See also *Garrett v. Lynch*, 44 Ala. 683; *Stoddart v. Vanlaningham*, 14 Kan. 18; *Sauvinet v. New Orleans*, 1 La. Ann. 346; *Garrett County v. Franklin Coal Co.*, 45 Md. 470; *Johnston v. Glenn*, 40 Md. 200; *Shoemaker v. National Mechanics' Bank*, 31 Md. 396; *Canton Co. v. Northern Cent. R. Co.*, 21 Md. 383, wherein it was held that if a full disclosure has not been made the court is authorized to refuse an injunction; *Lamm v. Burrell*, 69 Md. 272; *Reddall v. Bryan*, 14 Md. 444; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Sprigg v. Western Tel. Co.*, 46 Md. 67.

In *Olmstead v. Koester*, 14 Kan. 463, it was said that there should be a full and clear showing of the facts, that the

**9. Coming into Equity with Clean Hands.** — To entitle the plaintiff to relief he should state in his bill a case which rebuts all inferences against him; he must show that he himself is not in fault, or, as it has been frequently expressed, he must come into equity with clean hands. This rule is enforced strictly.<sup>1</sup>

**10. Plaintiff's Willingness to Do Equity** — *a.* IN GENERAL. — In drawing the bill the plaintiff must recognize the familiar rule that he who seeks equity must do or offer to do equity.<sup>2</sup>

court may act advisedly and upon a clear understanding of the whole case.

1. In *Bennett v. American Art Union*, 5 Sandf. (N. Y.) 614, Duer, J., said that when the plaintiff's claim arises out of an illegal contract to which he was a voluntary party, the maxim *in pari delicto potior est conditio defendentis* is the stern reply that dismisses his complaint. See also *Brough v. Schanzenbach*, 59 Ill. App. 407; *Creanor v. Nelson*, 23 Cal. 464; *Carson v. Coleman*, 11 N. J. Eq. 106; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Tate v. Vance*, 27 Gratt. (Va.) 571.

**Parties in Pari Delicto.** — In *Leigh v. Clark*, 11 N. J. Eq. 110, the plaintiff sought an injunction staying the prosecution of a suit at law on a bond which he alleged he had given to a woman who had fraudulently represented that he had gotten her with child, and it was held that the bill was without equity because it did not allege that he had not had sexual intercourse with the woman, and that it was not sufficient to deny the fact that he had gotten her with child. See also *Comstock v. Johnson*, 46 N. Y. 615, in which case the plaintiff was in the wrong in placing his buzz saw on the defendant's premises, and the defendant was in the wrong in shutting off the water, and it was held that substantial justice would be done by enjoining the plaintiff from using the buzz saw on the defendant's premises. *Citing* *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *M'Donald v. Neilson*, 2 Cow. (N. Y.) 190; *Casler v. Shipman*, 35 N. Y. 533.

**Plaintiff's Performance of His Part of a Contract.** — Where the plaintiff's claim to an injunction arises out of a contract, he must show that he has performed his part of the contract and that he is in a position to ask the equitable interposition of the court. *Runyon v. Brokaw*, 5 N. J. Eq. 340; *Thorp v. Pettit*, 16 N. J. Eq. 488.

In *Casey v. Holmes*, 10 Ala. 776, an allegation that the plaintiff did fulfil

and perform and was desirous of fulfilling the contract on his part, that the defendant threatened to break and was making preparations to break the contract, setting out the proposed breaches, was considered sufficient.

**Specific Performance.** — Where the object of the bill is to obtain specific performance, the plaintiff must show that he has been in no default and that he has taken all proper steps towards the performance of the contract on his part. *Anderson v. Frye*, 18 Ill. 94. See also *Hollis v. Shaffer*, 38 Kan. 492, in which case the plaintiff sought an injunction against the violation of a contract whereby the defendant had sold his good will, and it was held necessary on the part of the plaintiff to charge that he had performed his part of the contract in full or that he was ready and willing to do so. See further the article SPECIFIC PERFORMANCE.

**Excuse for Laches.** — If the plaintiff has been guilty of laches he must show an equitable excuse for the delay, otherwise his bill will be without equity and will be dismissed. *Anderson v. Frye*, 18 Ill. 94. See also the article LACHES.

**Relief Against Judgment.** — In *Ewing v. Nickle*, 45 Md. 413, it was held necessary, in a suit to enjoin the enforcement of a judgment, to allege not only that the enforcement of the judgment would be against equity and good conscience, but also that the plaintiff's conduct and dealings had been in all respects fair and consistent with equity.

2. *Williams v. Troy*, 39 Ala. 118; *Yonge v. Shepperd*, 44 Ala. 315; *Worthen v. Badgett*, 32 Ark. 496; *Guttenberger v. Woods*, 51 Cal. 523; *Landes v. Globe Planter Mfg. Co.*, 73 Ga. 176; *Alexander v. Merrick*, 121 Ill. 606; *Chicago, etc., R. Co. v. Kamman*, 119 Ill. 362; *Sloan v. Coolbaugh*, 10 Iowa 31; *Hagaman v. Cloud County*, 19 Kan. 394; *Elder v. Ottawa First Nat. Bank*, 12 Kan. 238; *Iler v. Colson*,



*b. RESCISSION AND RESTORATION.* — As in suits for specific performance, where relief is asked against a contract on the ground of fraud or failure of title the plaintiff must offer to rescind the contract, and to restore to the defendant what he has received the reunder.<sup>1</sup>

*c. TENDER* — (1) *General Rule as to Averment of Tender.* — The bill must show that the plaintiff has paid or has offered to pay, or must contain an averment of the plaintiff's willingness to pay, whatever sum of money the plaintiff admits to be due or is equitably due to the defendant.<sup>2</sup>

(2) *Illustrations of the Rule.* — Among the most familiar

8 Neb. 331; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Litchfield v. Brooklyn*, 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 74; *State Railroad Tax Cases*, 92 U. S. 575; *Spokane St. R. Co. v. Spokane Falls*, 46 Fed. Rep. 322.

1. *Jackson v. Norton*, 6 Cal. 187; *Wood v. Bangs*, 1 Dakota 172; *Ponder v. Cox*, 26 Ga. 485; *Wallace v. McVey*, 6 Ind. 303; *Robinson v. Gilbreth*, 4 Bibb (Ky.) 183; *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 367; *Williamson v. Raney*, Freem (Miss.) 112. See also *Williams v. Troy*, 39 Ala. 118; and see in general article SPECIFIC PERFORMANCE.

**Insufficient to Exhibit Contract.** — In a suit to cancel a contract of sale on the ground of fraud, and to enjoin the removal of the property sold beyond the jurisdiction of the court, the plaintiff must offer to rescind the contract of sale, and it is not sufficient to make the contract an exhibit. *Wallace v. McVey*, 6 Ind. 303.

**Where Rescission of a Contract is Not Sought**, but merely an injunction against the collection of purchase-money until the vendor has made good his representations respecting the title to the premises sold, an offer to rescind is unnecessary. *Warren v. Carey*, 5 Ind. 319 [following *Addleman v. Mormon*, 7 Blackf. (Ind.) 31; and citing *Fitch v. Polke*, 7 Blackf. (Ind.) 564, and *Buell v. Tate*, 7 Blackf. (Ind.) 55].

2. *Nelson v. Dunn*, 15 Ala. 501; *Stilz v. Indianapolis*, 81 Ind. 582; *South Bend v. Notre Dame Du Lac University*, 69 Ind. 344; *Brown v. Herron*, 59 Ind. 61; *Montgomery County v. Elston*, 32 Ind. 27; *Roseberry v. Huff*, 27 Ind. 12; *Anamosa v. Wurzbacher*, 37 Iowa 25; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402; *State Rail-*

*road Tax Cases*, 92 U. S. 617. This question most frequently arises in suits for special performance and injunction. See the article SPECIFIC PERFORMANCE.

**Right to Injunction Regardless of Stipulation in Contract.** — Where the plaintiff is entitled to an injunction to restrain an actor from performing at any other theatre than the plaintiff's, in violation of a contract, and the right to such injunction is independent of a stipulation in the contract that if the actor should attempt to perform at any other theatre the plaintiff may restrain him from so performing upon payment of a sum equal to one quarter the actor's salary, no previous payment or tender is necessary to the maintenance of an action for an injunction. *Daly v. Smith*, 38 N. Y. Super. Ct. 158, in which case the injunction was ordered on condition that the plaintiff should pay the salary stipulated for under the contract.

**Bill for Account.** — It seems that where the bill asks for an account it is not necessary for the plaintiff to offer to pay whatever balance may be found against him. *Nelson v. Dunn*, 15 Ala. 501, citing *Colombian Government v. Rothschild*, 1 Sim. 95; 1 Smith Ch. Pr. 8; *Dan. Ch. Pr.* 442. But see *Elliott v. Sibley*, 101 Ala. 344. See further the articles ACCOUNTS AND ACCOUNTING, vol. 1, p. 98; BILLS IN EQUITY, vol. 3, p. 368, note; and OFFERS IN PLEADING.

**Upon the Dissolution of a Partnership** the absolute refusal of one partner, who has acquired title to the signs, to discontinue the use of them with the other partner's name on them entitles such other partner to bring a suit for injunction without first offering to pay part of the expenses of removing the signs and allowing a reasonable time in which to do it. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394.

instances in which this rule of pleading has been applied to suits for injunctions are, where an injunction is sought by a mortgagor against a sale under a mortgage, in which case he must make a tender of the amount due; <sup>1</sup> and where an injunction against proceedings at law or a stay of proceedings under a judgment or an execution is sought, in which case the plaintiff must allege that he has paid or must offer to pay what he really owes, or show some sufficient excuse for his failure to do so. <sup>2</sup>

**Enjoining Taxes and Assessments.** — Likewise, in a suit to enjoin the collection of a tax on the ground that it is invalid, the plaintiff must not seek to shield himself from his confessed liability, but he must allege that he has paid or must tender whatever portion of the tax is valid or is properly collectible from him; <sup>3</sup> and after

1. *Mooney v. Walter*, 69 Ala. 75, in which case the plaintiff sought to enjoin a sale of land under a power contained in a mortgage, on the ground of usury and payment; *Williams v. Troy*, 39 Ala. 118; *Stringham v. Brown*, 7 Iowa 33, in which case it was held that an injunction against a sale of land under a trust deed, except as to so much of the debt as is not admitted to be due, should not be granted; *Foster v. Wightman*, 123 Mass. 100.

In Maryland it has been provided by statute that the complaint shall on oath allege that the mortgage debt and all interest due thereon have been fully paid, or that some part of such debt or interest, the amount of which he shall state, has been paid, and that the mortgagee or the person acting under him refuses to give credit to such amount. *Powell v. Hopkins*, 38 Md. 1, in which case it was said that this provision is only declaratory of the general principles of equity.

2. *Yonge v. Shepperd*, 44 Ala. 315; *Williams v. Troy*, 39 Ala. 118; *Tucker v. Holley*, 20 Ala. 426; *Hill v. Harris*, 42 Ga. 412; *Powell v. Chamberlain*, 22 Ga. 123; *Williams v. Hitzie*, 83 Ind. 303; *Levy v. Steinback*, 43 Md. 212; *Gardner v. Jenkins*, 14 Md. 58; *Reeves v. Cooper*, 12 N. J. Eq. 223.

**An Injunction Against a Purchaser** at a sale under a mortgage will not be allowed, unless the amount admitted to be due on the mortgage is tendered. *Sloan v. Coolbaugh*, 10 Iowa 31.

3. *Alabama*. — *Montgomery v. Sayre*, 65 Ala. 564, in which case it was held that the bill must allege that the plaintiff has made an effort to procure a separation of the taxes confessedly legal from those which are supposed to

be illegal, and must allege a tender, or offer to pay the portion which is legal; *Tallassee Mfg. Co. v. Spigener*, 49 Ala. 262; *Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499; *Mobile v. Waring*, 41 Ala. 139.

*Arkansas*. — *Worthen v. Badgett*, 32 Ark. 496, citing *Parmley v. St. Louis*, etc., R. Co., 3 Dill. (U. S.) 34.

*California*. — *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 26.

*Illinois*. — *Johnson v. Roberts*, 102 Ill. 655; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Ottawa Glass Co. v. McCaleb*, 31 Ill. 562; *Chicago, etc., R. Co. v. Frary*, 22 Ill. 34; *Briscoe v. Allison*, 43 Ill. 291; *O'Kane v. Treat*, 25 Ill. 557.

*Indiana*. — *Rowe v. Peabody*, 102 Ind. 198; *Brown v. Herron*, 59 Ind. 61; *Harrison v. Haas*, 25 Ind. 281; *Mullikin v. Reeves*, 71 Ind. 281; *South Bend v. Notre Dame du Lac University*, 69 Ind. 344; *Delphi v. Bowen*, 61 Ind. 29; *Montgomery County v. Elston*, 32 Ind. 27; *Roseberry v. Huff*, 27 Ind. 12; *Indianapolis v. Gilmore*, 30 Ind. 415; *Jones v. Summer*, 27 Ind. 512.

*Iowa*. — *Morrison v. Hershire*, 32 Iowa 271; *Stringham v. Brown*, 7 Iowa 33; *Casady v. Bosler*, 11 Iowa 242; *Corbin v. Woodbine*, 33 Iowa 297.

*Kansas*. — *Rogers v. Kansas City, etc., R. Co.*, 48 Kan. 471; *Wilson v. Longendyke*, 32 Kan. 267; *Challiss v. Atchison County*, 15 Kan. 49; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 231; *Leavenworth County v. Lang*, 8 Kan. 284; *Ottawa v. Barney*, 10 Kan. 270; *Shelton v. Dunn*, 6 Kan. 128; *Lawrence v. Killam*, 11 Kan. 499; *Hagaman v. Cloud County*, 19 Kan. 394; *Franz v. Krebs*, 41 Kan. 223; *Knox v. Dunn*, 22 Kan. 683; *Miller v.*

a municipal improvement has been made, a lot owner cannot enjoin the collection of a special assessment upon his property, and retain the benefits derived from the improvement, without doing equity by tendering the amount which is properly chargeable against his property.<sup>1</sup> See generally articles LOCAL IMPROVEMENTS; TAXES.

**Usury.** — Where the equity upon which the bill rests consists of usury in a contract, the bill must contain a proposal to pay the

Ziegler, 31 Kan. 417; *Miller v. Madden*, 35 Kan. 455.

*Maryland.* — *Allegany County v. Union Min. Co.*, 61 Md. 545.

*Michigan.* — *Merrill v. Humphrey*, 24 Mich. 170; *Palmer v. Napoleon Tp.*, 16 Mich. 176; *Conway v. Waverley Tp.*, 15 Mich. 257.

*Mississippi.* — *Mobile, etc.*, R. Co. v. Moseley, 52 Miss. 127.

*Nebraska.* — *Burlington, etc.*, R. Co. v. York County, 7 Neb. 487; *Iler v. Colson*, 8 Neb. 331; *Hallenbeck v. Hahn*, 2 Neb. 426; *Hunt v. Easterday*, 10 Neb. 165; *Wood v. Helmer*, 10 Neb. 65.

*Ohio.* — *Frazer v. Siebern*, 16 Ohio St. 614, which case was cited in *Wood v. Helmer*, 10 Neb. 65, and in *Burlington, etc.*, R. Co. v. York County, 7 Neb. 487.

*Oregon.* — *Welch v. Clatsop County*, 24 Oregon 452; *Brown v. School District No. 1*, 12 Oregon 345; *Oregon, etc.*, R. Co. v. Lane County, 23 Oregon 386; *Goodnough v. Powell*, 23 Oregon 525.

*Wisconsin.* — *Howes v. Racine*, 21 Wis. 514; *Mills v. Johnson*, 17 Wis. 598; *Bond v. Kenosha*, 17 Wis. 284; *Hersey v. Milwaukee County*, 16 Wis. 185; *Mills v. Charleton*, 29 Wis. 400.

*Wyoming.* — *Union Pac. R. Co. v. Ryan*, 2 Wyoming 408.

*United States.* — *State Railroad Tax Cases*, 92 U. S. 575; *Northern Pac. R. Co. v. Clark*, 153 U. S. 252; *National Bank v. Kimball*, 103 U. S. 732; *Albuquerque Bank v. Perea*, 147 U. S. 87; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Huntington v. Palmer*, 7 Sawy. (U. S.) 355; *Dundee Mortg. Trust Invest. Co. v. Parrish*, 24 Fed. Rep. 197; *Stanley v. Gadsby*, 10 Pet. (U. S.) 521; *Parmley v. St. Louis, etc.*, R. Co., 3 Dill. (U. S.) 34.

The Supreme Court of the United States has laid down the rule in *State Railroad Tax Cases*, 92 U. S. 575, that it is insufficient to say in the bill that the

plaintiff is ready and willing to pay whatever is found to be due, but he must first pay what is conceded to be due or what can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not; and in that case the court remarked: "We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases." This case has been frequently cited, and among the numerous cases in which it has been relied upon as an authority are the following: *Montgomery v. Sayre*, 65 Ala. 564; *Worthen v. Badgett*, 32 Ark. 496; *Hagaman v. Cloud County*, 19 Kan. 394; *Allegany County v. Union Min. Co.*, 61 Md. 545; *Goodnough v. Powell*, 23 Oregon 525; *Union Pac. R. Co. v. Ryan*, 2 Wyoming 408.

**Suit to Enjoin Sale of Realty Before Exhaustion of Personality.** — Where an injunction is sought against a sale of land for taxes on the ground of failure to collect them out of personal property, it is not enough to allege simply that the county treasurer might have made the collection without resorting to a sale of the realty, but in addition the plaintiff must either show sufficient personality subject to seizure to satisfy the tax, or, in lieu thereof, offer to pay the full amount justly due for the tax, penalty, and interest. *Iler v. Colson*, 8 Neb. 331, citing *Hallenbeck v. Hahn*, 2 Neb. 377.

1. *Evansville v. Pfisterer*, 34 Ind. 36; *Indianapolis v. Gilmore*, 30 Ind. 414; *Grimmell v. Des Moines*, 57 Iowa 144; *Morrison v. Hershire*, 32 Iowa 271; *Barker v. Omaha*, 16 Neb. 269, 7 Am. & Eng. Corp. Cas. 293. But see *Ladd v. Spencer*, 23 Oregon 193; *Hassan v. Rochester*, 67 N. Y. 528, in which latter cases it was held that a lot owner is entitled to maintain an action to restrain the collection of an illegal and void municipal assessment without offering to pay any portion of the assessment.

equitable and the legal interest, and a statement that the plaintiff "hereby offers to pay the real advance and lawful interest" is sufficient.<sup>1</sup> See article USURY.

(3) *Requisites and Sufficiency of Allegations as to Tender.* — An allegation that the plaintiff "is still willing and now offers to pay whatever amount he may be justly chargeable with, if any, and in this respect submits himself to the order and decree of the court," is a sufficient offer to do equity, and the plaintiff need not actually bring the money into court.<sup>2</sup>

(4) *Dismissal for Failure to Make Tender.* — Although the authorities are not uniform upon the question, it would seem that the bill should be dismissed if it does not contain proper aver-

1. *Miller v. Bates*, 35 Ala. 580, *per* Walker, C. J. See also *Henkle v. Royal Exch. Assur. Co.*, 1 Ves. 317.

In *Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122, Chancellor Kent said: "The equity cases speak one uniform language, and I do not know of a case in which relief has ever been afforded to a plaintiff seeking relief against usury by bill upon any other terms."

See further, for applications to suits for injunction of the rule that the plaintiff must either bring the money borrowed and interest thereon into court, or he must in his bill offer to submit himself to the authority and jurisdiction of the court, so that without more the court may compel him to do equity as a condition upon which the relief prayed for be granted, the following cases: *Eslava v. Crampton*, 61 Ala. 507; *Tooke v. Newman*, 75 Ill. 215; *Casady v. Bosler*, 11 Iowa 242; *Elder v. Ottawa First Nat. Bank*, 12 Kan. 238, *per* Brewer, J.; *Neurath v. Hecht*, 62 Md. 221; *Powell v. Hopkins*, 38 Md. 1; *Hill v. Reifsnider*, 39 Md. 429; *Miller v. Ford*, 1 N. J. Eq. 358; *Morgan v. Schermerhorn*, 1 Paige (N. Y.) 544; *Tupper v. Powell*, 1 Johns. Ch. (N. Y.) 439; *Rogers v. Rathbun*, 1 Johns. Ch. (N. Y.) 367; *Shelton v. Gill*, 11 Ohio 417.

**Usury and Fraud.** — Where the plaintiff seeks relief because of both usury and fraud, he may and should offer to pay the amount which is admitted to be due, together with so much more as may appear to be *bona fide* due after the question of fraud shall have been investigated. *Miller v. Ford*, 1 N. J. Eq. 358.

2. *Security Loan Assoc. v. Lake*, 69 Ala. 456; *Rogers v. Torbut*, 58 Ala. 523; *Nelson v. Dunn*, 15 Ala. 501; *Binford v. Boardman*, 44 Iowa 53.

**Approved Form.** — In *Eslava v. Crampton*, 61 Ala. 507, the following allegation was considered sufficient: "And she also says that she is ready and willing to pay whatever sum may be actually and truly due to the parties severally interested in her said mortgage notes, allowing to your oratrix such abatements as she may be entitled to by law, and she tenders to pay any sum that may be found due by her to said parties in interest, and she submits herself to this court in that behalf."

**Where the Defendant Refusés to Receive** what is justly due to him, upon a tender being made of the same, the plaintiff need only repeat his offer in the bill and need not make a formal tender of the money. *Morgan v. Schermerhorn*, 1 Paige (N. Y.) 544. See also *Binford v. Boardman*, 44 Iowa 53; *Edrington v. Allsbrooks*, 21 Tex. 186, holding that the money need not be brought into court.

**Sufficiency of the Bill on Demurrer.** — Where a bill seeking to enjoin the collection of money alleges that the plaintiff tendered an amount admitted to be due, his failure to repeat his offer in the bill does not make the bill demurrable; but should the defendant call on him for such sum and be denied payment, it will be a proper matter for the consideration of the chancellor upon an application to discharge the injunction. *Meridian v. Ragsdale*, 67 Miss. 86.

**In New Jersey** it has been provided by statute that injunctions shall not issue to stay proceedings in a personal action for a verdict unless a sum of money equivalent to the amount of the judgment be first paid into court. *Morris Canal, etc., Co. v. Bartlett*, 3 N. J. Eq. 9; *Kinney v. Ogden*, 3 N. J. Eq. 168.

ments as to the plaintiff's willingness to pay what is justly due the defendant.<sup>1</sup>

**11. Discovery.** — As a general rule, when a plaintiff is entitled to relief by injunction he is also entitled to a discovery of the facts upon which his right to relief is based.<sup>2</sup> The allegations of the bill should not be so uncertain as to render it impossible to ascertain whether the plaintiff really needs discovery.<sup>3</sup> See the article DISCOVERY, PRODUCTION, AND INSPECTION, vol. 6, p. 728.

1. *Brown v. School Dist. No. 1*, 12 Oregon 345.

**Dismissal Without Prejudice.** — In *Union Pac. R. Co. v. Ryan*, 2 Wyoming 408, the court dismissed the bill seeking an injunction against the collection of taxes, because the bill showed on its face that the plaintiff had not paid the taxes fairly conceded or shown to be due, but dismissed it without prejudice, following *Merrill v. Humphrey*, 24 Mich. 170.

2. *Metler v. Metler*, 19 N. J. Eq. 457; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932.

**By the Code** the examination of a defendant by bill of discovery has been done away with, as has also all occasion for resorting to the peculiar mode of pleading to which the bill of discovery gave rise. *Millikin v. Cary*, 5 How. Pr. (N. Y. Supreme Ct.) 272. See article DISCOVERY, PRODUCTION, AND INSPECTION, vol. 6, p. 728.

**To Enable the Plaintiff to Make Tender.** — Where the plaintiff is unable to state the actual amount due by him so as to enable him to make a tender thereof, he is entitled to discovery. *Hill v. Reifsnider*, 39 Md. 429.

**Disclosure of Defendant's Title.** — The bill should not call upon the defendant to disclose the nature and character of his own title to the subject-matter of the controversy, where such inquiries do not pertain to and are not necessary to maintain the title of the plaintiff. *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932. See also *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 936.

**Injunction Irrespective of Discovery.** — Where a bill asks for discovery as well as an injunction, and sets forth matters sufficient in substance and form to entitle the plaintiff to an injunction, he is entitled to the injunction, irrespective of the discovery. *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39.

3. *Powell v. Chamberlain*, 22 Ga. 123.

**Fishing Bills.** — Upon a bill asking discovery in aid of the prosecution of a suit at law, an injunction should not be granted where the bill is a mere fishing bill. *Burgess v. Smith*, 2 Barb. Ch. (N. Y.) 276, in which case no fact was positively sworn to as being within the knowledge of the defendant which, if proved, would aid the plaintiff; citing *Williams v. Harden*, 1 Barb. Ch. (N. Y.) 208.

In *Chappell v. Funk*, 57 Md. 465, the bill alleged that the injury complained of was being committed by two defendants and prayed that they might, upon their several and respective oaths, answer the premises, and "set forth and discover whether they, or one of them (and if one, which one), do not conduct, control, and operate," etc. It was urged that the plaintiff did not know whether the wrong complained of was the act of one defendant only, or of which of the two it was, or whether it was the act of either, and that the bill was a fishing bill; but the court construed the bill as plainly charging that both of the defendants were perpetrating the wrong complained of, and as asking for an injunction against both of them. Said the court: "If one admits and the other denies participation in the conduct of the business, then it will only be incumbent on the complainant to prove the charge against the party denying it."

**Defendant's Exclusive Knowledge.** — Where the bill asks a discovery and also an injunction, there need be no allegation in the bill that the facts a discovery of which is sought are within the exclusive knowledge of the defendant. *Metler v. Metler*, 19 N. J. Eq. 457.

**In Aid of Defense at Law.** — In a bill for discovery merely it will be sufficient for the court to see that the dis-

**12. Written Instruments and Exhibits.** — Where the right to an injunction is based upon a written instrument in the possession of the plaintiff or to which he has ready access, the instrument itself or a copy thereof should be filed with the bill to enable the court to construe such written document and determine whether the plaintiff is entitled to the relief prayed.<sup>1</sup> If, however, it is not stated in the bill that a contract upon which the plaintiff relies for relief is in writing, it will be intended that it is only a parol contract.<sup>2</sup>

covery is material to the defense at law of the party seeking the discovery, and how and in what manner it is material. *Turner v. Dickerson*, 9 N. J. Eq. 140, citing *Story Eq. Jur.* 324.

But where the bill asks that a suit at law should be delayed, or prays for relief as well as discovery, a different rule prevails, and the plaintiff must aver that the discovery sought for is necessary to his defense, and not merely that it is material to his defense. *Turner v. Dickerson*, 9 N. J. Eq. 140. Citing *Appleyard v. Seton*, 16 Ves. Jr. 223; *Gelston v. Hoyt*, 1 Johns. Ch. (N. Y.) 547; *March v. Davison*, 9 Paige (N. Y.) 580.

1. *Mason v. Richards*, 8 Ill. 25; *Bradley v. Lamb*, Hard. (Ky.) 536; *Baltimore v. Keyser*, 72 Md. 106; *Miller v. Baltimore County Marble Co.*, 52 Md. 645; *Nusbaum v. Stein*, 12 Md. 315; *Banks v. Busey*, 34 Md. 437; *Laupheimer v. Rosenbaum*, 25 Md. 219; *Morton v. Grafflin*, 68 Md. 545; *Gottschalk v. Stein*, 69 Md. 51; *Mahaney v. Lazier*, 16 Md. 69; *Hankey v. Abrahams*, 28 Md. 590; *Haight v. Burr*, 19 Md. 130; *Union Bank v. Poultney*, 8 Gill & J. (Md.) 332; *Marshall v. Turnbull*, 34 Fed. Rep. 827.

In California a contract should be set out either *in hæc verba* or according to its legal intentment and effect. *Wheeler v. West*, 71 Cal. 126.

In Indiana, under the code, when the cause of action arises out of a note, mortgage, or other contract in writing, it is necessary to file a copy of the same with the pleading, but when the cancellation or legal destruction of such an instrument is demanded, this rule does not apply. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, in which case the plaintiff sought an injunction against the enforcement of a judgment, and it was held that a certified transcript of the judgment which was filed with the complaint as an exhibit did not thereby become a part of

the record and could not be considered in determining the sufficiency of the complaint. See also *Knight v. Flatrock*, etc., *Turnpike Co.*, 45 Ind. 134; *Mitchell v. Boyer*, 58 Ind. 19; *Wilkinson v. Peru*, 61 Ind. 1; *Hopkins v. Greensburg*, etc., *Turnpike Co.*, 40 Ind. 44, in which last-mentioned case it was held that the complaint need not set out papers or a copy thereof which were not the foundation of the action. *Trueblood v. Hollingsworth*, 48 Ind. 537.

**Public Documents.** — Copies of documents of a public nature which are accessible to the plaintiff must be exhibited with the bill, or a sufficient reason must be assigned for the omission to do so. *Baltimore v. Weatherby*, 52 Md. 442; *Myers v. Amey*, 21 Md. 302; *Canton Co. v. Northern Cent. R. Co.*, 21 Md. 383, in which case the court objected that a city ordinance was neither set forth in substance, produced, nor referred to in the bill; *Shoemaker v. National Mechanic's Bank*, 31 Md. 396, in which case an injunction was sought against the prosecution of certain suits, and the failure of the plaintiff to file copies of the pleadings or proceedings was considered a fatal defect; *Conolly v. Riley*, 25 Md. 402, holding that a short copy of a judgment duly certified by the clerk of the court, with a certificate that the docket entries do not show that a judgment has been satisfied, either in whole or in part, is sufficient; *Lamm v. Burrell*, 69 Md. 272, in which case it was held that the bill was insufficient because no copy of a writ whereby, as alleged, the sheriff was directed to eject the plaintiff from certain premises, was exhibited.

2. *Bradley v. Lamb*, Hard. (Ky.) 536.

**Names of Fraudulent Grantees.** — The names of the grantees in a fraudulent conveyance are not material to the granting of an injunction asked because of such fraudulent conveyance, and it is immaterial that a list of the

Failure to File Exhibits is excusable where the writings are in the hands of the plaintiff's adversary, and cannot be produced.<sup>1</sup> See article EXHIBITS, vol. 8, p. 736.

**13. Bill Praying Ancillary Injunction.** — Where the plaintiff is not entitled to an injunction except as ancillary to other relief, the bill must present a case showing that the plaintiff is entitled to the main relief sought and must show that an injunction is essential to the principal inquiry and to the relief sought in the bill.<sup>2</sup>

names of the grantees is not produced and filed as an exhibit with the bill. *Webb v. Ridgely*, 38 Md. 364, *citing* as an analogous case *Campbell v. Poultney*, 6 Gill & J. (Md.) 94. See also the article CREDITORS' BILLS, vol. 5, p. 507.

1. *Haight v. Burr*, 19 Md. 130, in which case it was held that an averment with reference to certain writings that "they were left in the hands of the defendant" was sufficient to prevent the plaintiff's failure to produce them from depriving him of the relief to which he appeared to be entitled upon the allegations of the bill, verified by his oath.

**Voluminous Record.** — In *Georgia* it is sufficient to allege that a deed is voluminous, and, without filing it as an exhibit, make reference to the book and page, and offer to tender the original in court at such times and places as the chancellor shall desire. *Millbank v. Penniman*, 73 Ga. 136.

**Accounts and Vouchers of Executors.** — "The usual practice is, especially in cases of executors or administrators, where accounts necessarily exist, to refer them to a commissioner, and not to burthen the record in the first instance with voluminous accounts and vouchers; and this reason would also apply to partnership accounts, which are generally not only intricate, but voluminous." *Deloney v. Hutcheson*, 2 Rand. (Va.) 183. See also the article EXECUTORS AND ADMINISTRATORS, vol. 8, p. 650.

**References to Records Not Exhibited.** — Where by a statute the plaintiff is relieved of the necessity of producing a transcript of the record, the bill should nevertheless refer to the record, so as to make it a part of the bill and enable it to be easily found. *Morton v. Grafflin*, 68 Md. 545.

**Consideration of References.** — References to another bill are part of the bill, and may be considered on the

application for injunction. *Bolton v. Flournoy*, R. M. Charlt. (Ga.) 125, in which case the bill referred to another bill pending in the same court *in pari materia*.

**Annexation of Exhibits.** — Exhibits referred to in the bill must be annexed thereto. *Wells v. Wall*, 1 Oregon 295.

**Waiver of Defect by Demurrer.** — Where the bill is defective because documents have not been made exhibits, but this defect applies only to the right to an injunction, and does not in any manner affect the general relief for which the plaintiff prays and to which he is entitled, such defect nevertheless is not waived by general demurrer to the whole bill; and although the demurrer should be overruled because it covers or applies to the whole bill and is good to a part only, the injunction should be denied. *Miller v. Baltimore County Marble Co.*, 52 Md. 642.

2. *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393; *Geiger v. Green*, 4 Gill (Md.) 472; *Geiston v. Sigmund*, 27 Md. 334; *Allen v. Burke*, 2 Md. Ch. 534; *Canton Co. v. Northern Cent. R. Co.*, 21 Md. 383.

**Injunction Without Specific Performance.** — It is now firmly established that the court will often interfere by injunction when it cannot decree performance. Thus, where the contract is of such a nature that the court cannot superintend the details of its performance, *e. g.*, contracts for personal service, the court, although it cannot decree specific performance, will retain the bill as an injunction bill and enjoin the defendant from violating his engagement. *Singer Sewing-Mach. Co. v. Union Button-Hole, etc., Co.*, 1 Holmes (U. S.) 253 [*citing* *Lumley v. Wagner*, 1 De G. M. & G. 604; *Hooper v. Brodick*, 11 Sim. 47; *Great Northern R. Co. v. Manchester, etc., R. Co.*, 5 De G. & Sm. 138; *Webster v. Dillon*, 5 W. R. 867; *Stiff v. Cassell*, 2 Jur. N. S. 348; *Dietrichsen v. Cabburn*, 2 Phil. 52].

**14. Matters of Equitable Cognizance** — *a*. **NECESSITY TO MAKE OUT CASE FOR INJUNCTIVE RELIEF.** — A bill for injunction must state with certainty the plaintiff's title or right to relief, by clear and unambiguous and direct averment, so that the defendant may be distinctly informed of the nature of the case he is to meet, and the court, if a decree *pro confesso* is to be rendered, may be fully apprised of the character of the final decree it should render; and the bill must invariably set forth a case which comes under some head of equity jurisprudence, and show a proper cause for the interposition of the court of chancery.<sup>1</sup>

The earlier cases, *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; *Baldwin v. Society*, etc., 9 Sim. 393, in which the courts refused to restrain actors and authors from violating engagements because they could not be obliged specifically to keep them, were *overruled* in *Lumley v. Wagner*, 1 De G. M. & G. 616. See further the article **SPECIFIC PERFORMANCE**.

1. *Alabama*. — *Hart v. Life Assoc.*, 54 Ala. 495; *Demopolis v. Webb*, 87 Ala. 659; *Vaughan v. Marable*, 64 Ala. 60; *Rea v. Longstreet*, 54 Ala. 291; *Garrett v. Lynch*, 45 Ala. 204; *Hair v. Lowe*, 19 Ala. 224.

*Arkansas*. — *Blakeney v. Ferguson*, 14 Ark. 640; *Ex p. Foster*, 11 Ark. 304; *Bently v. Dillard*, 6 Ark. 79; *Ex p. Jones*, 2 Ark. 93.

*California*. — *Schuyler v. Broughton*, 65 Cal. 252; *Wells v. Coleman*, 53 Cal. 416; *Sanchez v. Carriaga*, 31 Cal. 170; *Tevis v. Ellis*, 25 Cal. 515; *Crenor v. Nelson*, 23 Cal. 464; *Jackson v. Norton*, 6 Cal. 187; *State v. McGlynn*, 20 Cal. 233.

*Colorado*. — *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554; *Breeze v. Haley*, 10 Colo. 5.

*Connecticut*. — *Arnold v. Middletown*, 39 Conn. 401.

*Florida*. — *Pensacola*, etc., R. Co. v. *Spratt*, 12 Fla. 26, wherein it was said: "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated without the interposition of the court." See also *Bowes v. Hoeg*, 15 Fla. 403.

*Georgia*. — *Neal v. Henderson*, 72 Ga. 209; *Mayer v. Wood*, 56 Ga. 427; *Remshart v. Savannah*, etc., R. Co., 54 Ga. 579; *Tompkins v. Tumlin*, 49 Ga. 460; *Kenan v. Johnson*, 48 Ga. 28; *Hambrick v. Dickey*, 48 Ga. 578; *Hart v. Lazaron*, 46 Ga. 396; *Jones v.*

*Macon*, etc., R. Co., 39 Ga. 138; *Powell v. Parker*, 38 Ga. 644; *Smith v. Lard*, 28 Ga. 585; *Miller v. Maddox*, 21 Ga. 327.

*Illinois*. — *Lawrence v. Traner*, 136 Ill. 474; *Brush v. Carbondale*, 78 Ill. 74; *Swinney v. Beard*, 71 Ill. 27; *Buntain v. Blackburn*, 27 Ill. 406; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Brough v. Schanzenbach*, 59 Ill. App. 407; *Duncan v. Morrison*, 1 Ill. 151.

In *Dickey v. Reed*, 78 Ill. 261, it was said: "There must be a matter about which rights are claimed, and that matter must be within the power of the court, when properly before it, to act upon or control it by its sentence, before it can adjudge and decree that parties shall be restrained from acting in reference to the thing in litigation."

*Indiana*. — *Palmer v. Logansport*, etc., *Gravel Road Co.*, 108 Ind. 137; *Wallace v. McVey*, 6 Ind. 303; *Hurd v. Walters*, 48 Ind. 148, wherein it was said that "one who seeks injunctive relief should show very clearly that he is entitled to it."

*Iowa*. — *Berger v. Armstrong*, 41 Iowa 447, wherein it was said: "To entitle a party to an injunction he must allege the facts upon which his right thereto rests." See also *Lamb v. Drew*, 20 Iowa 15, and *Zorger v. Rapids Tp.*, 36 Iowa 175, which latter case was cited in *Chicago*, etc., R. Co. v. *Minnesota*, etc., R. Co., 29 Fed. Rep. 337.

*Kansas*. — *Henderson v. Marcell*, 1 Kan. 137, holding that plaintiff must charge facts showing his right to bring suit and interest in the result. *Davis v. Stark*, 30 Kan. 565.

*Louisiana*. — *Pittman v. Robicheau*, 14 La. Ann. 108; *Ricard v. Hiriart*, 5 La. 244, holding that a party who claims an injunction must state in his petition facts which render an injunction necessary.



To Ascertain Whether a Case Is Presented which shows a right in the plaintiff to be protected, or a wrong to be redressed, it is neces-

*Maine.* — *Galvin v. Shaw*, 12 Me. 454; *Russ v. Wilson*, 22 Me. 207.

*Maryland.* — *Suit v. Creswell*, 45 Md. 529, holding that the bill must show that the plaintiff's application rests upon some solid and primary equity. *Warfield v. Owens*, 4 Gill (Md.) 364. In *Lamm v. Burrell*, 69 Md. 272, *McSherry, J.*, said: "The court must be informed by the bill itself and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may be seen whether there is a just and proper ground for the application of so summary a remedy."

*Michigan.* — *Carroll v. Farmers', etc.*, Bank, Harr. Ch. (Mich.) 197.

*Mississippi.* — *Coulson v. Harris*, 43 Miss. 728; *Stewart v. Brooks*, 62 Miss. 492.

*Nebraska.* — *Rickards v. Coon*, 13 Neb. 420, in which it was said: "A court of equity will not interfere unless the case is brought under some head of equity jurisprudence and a case is made entitling the plaintiff to the relief sought."

*Nevada.* — *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516.

*New Hampshire.* — *Coe v. Winne-  
pisiogee Lake Cotton, etc., Mfg. Co.*, 37 N. H. 254.

*New Jersey.* — *Schanck v. Schanck*, 7 N. J. Eq. 140; *Wakeman v. New York, etc., R. Co.*, 35 N. J. Eq. 496.

*New Mexico.* — In *Matter of Sloan*, 5 N. Mex. 590, *McFie, J.*, said that, except in cases of special injunction to stay waste or prevent irreparable injury, the bill should show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought.

*New York.* — *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277; *Heywood v. Buffalo*, 14 N. Y. 534; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72; *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371; *People v. Ingersoll*, 58 N. Y. 1. In *Hart v. Harvey*, 32 Barb. (N. Y.) 55, it was said: "The code requires as prerequisite to the injunction that it shall appear by the complaint that the party is entitled to the relief demanded."

*North Carolina.* — *Washington v.*

*Emery*, 4 Jones Eq. (N. Car.) 29, in which case it was declared that "a bill will not lie simply for an injunction except in case of torts," and that in all other cases "some primary equity must be alleged or the bill cannot stand." See also *Patterson v. Miller*, 4 Jones Eq. (N. Car.) 451. These cases are cited in *Matter of Sloan*, 5 N. Mex. 590.

*Oregon.* — *Longshore Printing Co. v. Howell*, 26 Oregon 527, holding that the plaintiff must bring himself within the rules of the particular jurisdiction of equity upon which he relies; *Bingham v. Salene*, 15 Oregon 208; *Weiss v. Jackson County*, 9 Oregon 470, wherein it was said that "the party seeking this peculiar equitable relief should show that he has a right under all the circumstances to this extraordinary writ."

*Pennsylvania.* — *Delaware County's Appeal*, 119 Pa. St. 159, 22 Am. & Eng. Corp. Cas. 381; *Waring v. Cram*, 1 Pars. Eq. Cas. (Pa.) 516.

*Rhode Island.* — *McCulla v. Beadle-  
ston*, 17 R. I. 20.

*South Carolina.* — *Wilson v. Cohen*, Rice Eq. (S. Car.) 80, wherein it was said: "It is incumbent on the complainant clearly to make out a substantial grievance."

*Texas.* — *Larson v. Moore*, 1 Tex. 21, holding that the bill must set up a clear and definite ground for injunction.

*Utah.* — *Bailey v. Stevens*, 11 Utah 175.

*Virginia.* — *Tate v. Vance*, 27 Gratt. (Va.) 571; *Muller v. Bayly*, 21 Gratt. (Va.) 521.

*Washington.* — *Rockford Watch Co. v. Rumpf*, 12 Wash. 647.

*Wisconsin.* — *Judd v. Fox Lake*, 28 Wis. 583, holding that the bill must present a cause falling within some acknowledged and well-defined head of equity jurisprudence.

*United States.* — *Wilkinson v. Dobbie*, 12 Blatchf. (U. S.) 298; *Kidwell v. Masterson*, 3 Cranch (C. C.) 52; *Rogers v. Cincinnati*, 5 McLean (U. S.) 337; *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337; *St. Louis Type Foundry v. Carter, etc., Printing Co.*, 31 Fed. Rep. 524; *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273.

**Injunction Against Proceedings at Law.**

— A bill seeking an injunction against

sary to look to the facts on which the suit is founded as the same are stated in the bill. As has been said by a learned judge, "the great and leading rule is that the complaint shall contain a

a judgment at law must aver (1) that the plaintiff has a good and meritorious defense to the entire cause of action, or so much of it as he proposes by his bill to litigate; (2) that his failure to defend at law was not attributable to his own omission, neglect, or fault; (3) that it was attributable to fraud, surprise, accident, or some act of his adversary. *Weems v. Weems*, 73 Ala. 462. See also *Bibb v. Hitchcock*, 49 Ala. 468; *Norman v. Burns*, 67 Ala. 248; *Collier v. Falk*, 66 Ala. 223; *James v. James*, 55 Ala. 525; *Garrett v. Lynch*, 44 Ala. 683; *McCullum v. Prewitt*, 37 Ala. 573; *Hair v. Lowe*, 19 Ala. 224; *Worthington v. Lee*, 61 Md. 536; *Fuller v. Cadwell*, 6 Allen (Mass.) 503, wherein it was said: "A court of equity does not issue an injunction to stay proceedings at law where the rights of a party can be fully sustained in a court of law;" *Dawes v. Taylor*, 35 N. J. Eq. 40; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Ballard v. Rogers*, Dall. (Tex.) 460.

**Injunction Against Illegal Tax.** — In the following cases the principles stated in the text were applied to bills to enjoin the collection of taxes, it being held that the plaintiff should show by proper allegations that he is without adequate remedy at law, with such averments of irreparable injury as to bring his case within the equitable jurisdiction of the court: *Greedup v. Franklin County*, 30 Ark. 101; *Hoagland v. Delaware Tp.*, 17 N. J. Eq. 106; *Pumpelly v. Owego*, 45 How. Pr. (N. Y. Ct. App.) 219.

In *Hanlon v. Westchester County*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 261, 57 Barb. (N. Y.) 383, it was said that the heads of equity jurisdiction within some one of which the plaintiff must bring his case are as follows: (1) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2) where they lead, in their execution, to the commission of irreparable injury to the freehold; (3) where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings are sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality; (4) where the tax is upon land, and the law allows it to

be sold to collect the tax, and the conveyance to be executed by the proper officer would be conclusive evidence of title. See likewise the following cases: *Odlin v. Woodruff*, 31 Fla. 160; *Paterson, etc., R. Co. v. Jersey City*, 9 N. J. Eq. 434; *Morris Canal, etc., Co. v. Jersey City*, 12 N. J. Eq. 227; *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 28; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Guilford v. Chenango County*, 13 N. Y. 143; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Heywood v. Buffalo*, 14 N. Y. 541; *New York L. Ins. Co. v. New York*, 4 Duer (N. Y.) 192; *Susquehanna Bank v. Broome County*, 25 N. Y. 312; *Milhau v. Sharp*, 27 N. Y. 611; *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173, citing *Welch v. Clatsop County*, 24 Oregon 457, in which case Lord, C. J., said that the consideration which will influence a court of equity to restrain the collection of a tax is confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they have proceeded fraudulently. See, further, the article TAXES.

**Interveners** are within the rule stated in the text and must make out by their petition a case entitling them to the award of an injunction. *Taylor v. Gillen*, 23 Tex. 508.

**Bill Sufficient as to One Defendant Only.** — Want of equity in the bill as to one defendant against whom an injunction is sought is no insurmountable obstacle to granting an injunction against another defendant as to whom there is ground for separate and independent relief. *Alspaugh v. Adams*, 80 Ga. 345.

**Unconstitutionality of Statute.** — "An allegation in a bill for injunction that the legislative act under which the wrong complained of is being committed is unconstitutional will not of itself confer jurisdiction upon a court of equity to grant the relief prayed for; and where the other allegations do not make a case for equitable relief a demurrer to such a bill should be sustained." *Thomas v. Rowe*, (Va. 1895) 22 S. E. Rep. 157, *per* Cardwell, J.

plain and concise statement of the facts constituting the cause of action; and it is undoubtedly true that the great test in determining the character of the action is to look at the statement of facts.<sup>1</sup> When the question is whether the bill shows a state of facts entitling the plaintiff to relief, little aid can be drawn from adjudged cases, as they rarely, if ever, present the same state of facts, and must be considered with reference to the nature, character, and condition of the property or rights to be protected.<sup>2</sup> The sufficiency of the matters charged in the bill is a question of law.<sup>3</sup>

**Reasonable Doubt.**—As an application for an injunction is addressed to the conscience and discretion of the court, the facts alleged should justify the issuance of an injunction beyond reasonable doubt.<sup>4</sup>

**Jurisdictional Amount.**—Where the amount in controversy is material to the court's jurisdiction, the bill must contain an averment that the amount in controversy is sufficient to give the court jurisdiction.<sup>5</sup>

**Laches.**—The plaintiff must show that he has been watchful of his rights and interests and that he has not lost them by his own remissness and negligence.<sup>6</sup>

**b. SUIT IN BEHALF OF STATE.**—Even where the state is a party plaintiff to a suit for injunction, it is necessary to set forth a case of equitable cognizance and a right to the particular relief demanded.<sup>7</sup>

**c. STATUTORY RIGHT OF ACTION.**—Where the right to an injunction is conferred by statute, the bill or complaint need not embody the precise words of the statute, but it is sufficient that the plaintiff substantially brings himself within the description of the act.<sup>8</sup>

**d. WAIVER OF DEFECTS IN BILL.**—Where the bill does not present a case for equitable cognizance, the defect cannot be waived by the parties;<sup>9</sup> and consequently the defendant's fail-

1. *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595, *per* Marvin, J.; *Reid v. Moulton*, 51 Ala. 255.

2. *Shipley v. Ritter*, 7 Md. 408.

3. *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214.

4. *Kelly v. Baltimore*, 53 Md. 134.

See also *Morrison v. Coleman*, 87 Ala. 655, holding that a bill must at least show a *prima facie* right. *Gottschalk v. Stein*, 69 Md. 51; *Shoemaker v. National Mechanic's Bank*, 31 Md. 396; *Binney's Case*, 2 Bland (Md.) 100.

5. *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641, in which case a bill addressed to a Circuit Court of the United States was held to be defective for the want of an averment that the amount in controversy was sufficient under an Act of Congress to give the court jurisdiction.

6. *Dulin v. Caldwell*, 23 Ga. 117. See also article LACHES.

7. *People v. Canal Board*, 55 N. Y. 395; *People v. Ingersoll*, 58 N. Y. 14, 17 Am. Rep. 178; *People v. Fields*, 58 N. Y. 491; *State v. Lord*, 28 Oregon 498.

8. *Ayers v. Lawrence*, 59 N. Y. 192. See also *Pond v. Framingham, etc., R. Co.*, 130 Mass. 194, to the effect that the bill need not state a case within the general equity powers of a court of chancery when jurisdiction is conferred by statute; *Russ v. Wilson*, 22 Me. 207, wherein it was said: "It is \* \* \* incumbent on the part of the plaintiff \* \* \* to bring his case within some one of the specifications in the statutes, authorizing the courts to take cognizance of such matters."

9. *Jones v. Ewing*, 56 Ala. 360, *per* Volume X.

ure to object to the court's jurisdiction by plea or demurrer will not prevent him from making the objection at the hearing or on appeal.<sup>1</sup>

### 15. Plaintiff's Interest in and Title to the Subject-matter—

*a.* GENERAL RULES AS TO AVERMENT OF TITLE. — The plaintiff is never entitled to an injunction unless it is apparent from the bill that he has some interest that may be injuriously affected by the act which he seeks to restrain; and, consequently, it is a general rule which is applicable to all bills for injunction, that the plaintiff must allege that he has such an interest or title, by contract, prescription, or otherwise, as the court will feel bound to protect upon the showing of the bill against the apprehended acts of the defendant.<sup>2</sup> As has been remarked by a learned

Brickell, C. J.; *Georgia Mut. Loan Assoc. v. McGowan*, 59 Ga. 811; *Yates v. Batavia*, 79 Ill. 500; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417, in which last-mentioned case it was said: "Cases not proper for equitable interference are not usually entertained, even though parties consent." *Citing New England Mut. L. Ins. Co. v. Phillips*, 141 Mass. 546, and *Dunham v. Presby*, 120 Mass. 289. See also, to the same effect, *Whelpley v. Erie R. Co.*, 6 Blatchf. (U. S.) 271.

**Written Stipulation.** — Although the defendant has, by a written stipulation given for a valuable consideration, agreed not to raise the objection that the court has no jurisdiction in the case, he may nevertheless make the objection. *Dudley v. Mayhew*, 3 N. Y. 9, wherein the court said: "It has been long and correctly settled that not even a direct assent by the parties can confer jurisdiction or render the judgment of a tribunal in a matter over which it has not by law any cognizance effectual." *Citing Coffin v. Tracy*, 3 Cai. (N. Y.) 129, and *Davis v. Packard*, 7 Pet. (U. S.) 276.

1. *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554, in which case it was held that a final decree awarding a perpetual injunction might be reversed, notwithstanding the defendant's failure to object to the court's jurisdiction; *McGoldrick v. Slevin*, 43 Ind. 522; *Kriechbaum v. Bridges*, 1 Iowa 14; *Cowles v. Shaw*, 2 Iowa 496; *People v. Central R. Co.*, 42 N. Y. 283, wherein E. D. Smith, J., said that the defendant's submission to answer after his demurrer presenting the question of jurisdiction had been overruled did not operate as a waiver of his right to question afterwards the court's jurisdiction;

*Beckley v. Palmer*, 11 Gratt. (Va.) 625; *Hudson v. Kline*, 9 Gratt. (Va.) 379; *Tapp v. Rankin*, 9 Leigh (Va.) 478; *Pollard v. Patterson*, 3 Hen. & M. (Va.) 67. See likewise the following cases: *Bryant v. Peters*, 3 Ala. 160; *Moore v. Dial*, 3 Stew. (Ala.) 155; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *Dinwiddie v. Roberts*, 1 Greene (Iowa) 363; *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420; *West v. Hall*, 3 Har. & J. (Md.) 221.

But it has been held that where a motion is made to continue an injunction *pendente lite*, the objection that it does not appear in the complaint that the plaintiff has not an adequate remedy at law must be raised by answer or demurrer, or the defendant will not be heard to urge that the injunction was improperly granted. *Glover v. Silverman*, 6 Misc. Rep. (N. Y. Super. Ct.) 347. *Citing Palmer v. Jones*, 69 Hun (N. Y.) 240, wherein the complaint was supported by evidence to which the complaint might have been made conformable; *Ehrgott v. Forgotston*, 60 N. Y. Super. Ct. 296.

2. The following cases support and illustrate the rule stated in the text. For a more precise treatment of the subject and an exhaustive citation of cases, see the particular titles under which the subject of Injunctions is discussed, such as COPYRIGHT; NUISANCES; PATENTS; TRESPASS; WASTE; and see the article TITLE, OWNERSHIP, AND POSSESSION.

*Alabama.* — *Robinson v. Joplin*, 54 Ala. 70.

*Connecticut.* — *East Haddam Cent. Baptist Church v. East Haddam Baptist Ecclesiastical Soc.*, 44 Conn. 259.

*Florida.* — *Sullivan v. Moreno*, 19 Fla. 200; *Shalley v. Spillman*, 19 Fla. 500.

judge, it is axiomatic that a party to any form of litigation, whether at law or in equity, must show a valid right.<sup>1</sup> The plaintiff will not be assumed to have any other or better title than that which is asserted in the bill.<sup>2</sup>

**Title Free from Doubt.** — The plaintiff must show that his rights are clear, and it is insufficient to state a doubtful title.<sup>3</sup>

*Georgia.* — Read *v.* Dews, R. M. Charl. (Ga.) 358, holding that the plaintiff must show an actual or probable right; Harrell *v.* Hannum, 56 Ga. 508. See also McArthur *v.* Matthewson, 67 Ga. 134.

*Idaho.* — McGinnis *v.* Friedman, 2 Idaho 361.

*Illinois.* — Dickey *v.* Reed, 78 Ill. 261; Gleason *v.* Jefferson, 78 Ill. 399; Simpson *v.* Wright, 21 Ill. App. 67.

*Indiana.* — Laughlin *v.* Lamasco City, 6 Ind. 223.

*Iowa.* — Stringham *v.* Brown, 7 Iowa 33.

*Kentucky.* — Loudon *v.* Warfield, 5 J. J. Marsh. (Ky.) 196; Brashear *v.* Macey, 3 J. J. Marsh. (Ky.) 89.

*Maryland.* — Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Busey *v.* Hooper, 35 Md. 15.

*Mississippi.* — In Nevitt *v.* Gillespie, 1 How. (Miss.) 108, the bill was considered insufficient because it had "not presented such unquestioned evidence of title as to authorize the allowance of an injunction to stay either waste or trespass," and because the bill showed that the defendant held possession under an adverse title.

*New Jersey.* — Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 53 N. J. Eq. 178; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 399; Fulton *v.* Greacen, 36 N. J. Eq. 216; Westcott *v.* Gifford, 5 N. J. Eq. 24; Outcalt *v.* Disborough, 3 N. J. Eq. 214; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419.

*New Mexico.* — Matter of Sloan, 5 N. Mex. 590.

*New York.* — In New York *v.* Mapes, 6 Johns. Ch. (N. Y.) 46, Chancellor Kent said: "The great defect of the bill is that the plaintiffs do not allege or show any vested right, legal or equitable, to the ground owned by the defendants; and I do not know the case where this remedy has been afforded without the allegation of some such right which might be greatly, if not irreparably, affected by the acts sought to be restrained." See also O'Brien *v.*

O'Connell, 7 Hun (N. Y.) 228; Fisk *v.* Wilber, 7 Barb. (N. Y.) 395; Hutchins *v.* Smith, 63 Barb. (N. Y.) 251; Bennett *v.* American Art Union, 5 Sandf. (N. Y.) 614; Storm *v.* Mann, 4 Johns. Ch. (N. Y.) 21.

*North Carolina.* — Hough *v.* Martin, 2 Dev. & E. Eq. (N. Car.) 379, 34 Am. Dec. 403.

*Pennsylvania.* — Scott *v.* Burton, Ashm. (Pa.) 312.

*South Carolina.* — Wilson *v.* Wilson, 1 Desaus. (S. Car.) 224, which case was cited in Read *v.* Dews, R. M. Charl. (Ga.) 358.

*United States.* — In Georgia *v.* Brailsford, 2 Dall. (U. S.) 402, Johnson, J., said: "In order to support a motion for an injunction, the bill should set forth a case of probable right." See also Fitzpatrick *v.* Childs, 2 Brews. (Pa.) 365; Little *v.* Gould, 2 Blatchf. (U. S.) 165; Wilkinson *v.* Dobbie, 12 Blatchf. (U. S.) 298; Jaros Hygienic Underwear Co. *v.* Fleece Hygienic Underwear Co., 60 Fed. Rep. 622.

*England.* — Jones *v.* Jones, 3 Meriv. 161; Whitelegg *v.* Whitelegg, 1 Bro. C. C. 57; Smith *v.* Collyer, 8 Ves. Jr. 89; Davis *v.* Leo, 6 Ves. Jr. 784; Field *v.* Jackson, Dick. 599; Ripon *v.* Hobart, 3 Myl. & K. 169.

1. Gleason *v.* Jefferson, 78 Ill. 399, per Walker, J., who said: "The rule is strictly elementary, and lies at and is the basis upon which all systems of jurisprudence are founded."

2. Jaros Hygienic Underwear Co. *v.* Fleece Hygienic Underwear Co., 60 Fed. Rep. 622.

3. In Pillsworth *v.* Hopton, 6 Ves. Jr. 51, which case has often been cited, Lord Eldon said: "I remember perfectly being told from the bench very early in my life that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by title adverse to his, he stated himself out of court as to the injunction." See likewise Loudon *v.* Warfield, 5 J. J. Marsh. (Ky.) 196, in which case it was said that the plaintiff must swear to his title, and that mere information and belief as to his title

**Conditions Precedent**, if any, upon which the plaintiff's title or right of action depends, must be alleged to have been performed.<sup>1</sup>

**The Plaintiff Must Rely on the Strength of His Own Title.** — In suits for injunction very much the same rule obtains as in suits at law, and the plaintiff must assert title in himself, and cannot rely upon the weakness of his adversary's title.<sup>2</sup>

**Allegations as to Title Not Jurisdictional.** — The rule requiring the plaintiff to set out his title with certainty and particularity is one of practice and convenience only, and is not a matter of jurisdiction, and after answer the rule may be administered by the court in its sound discretion.<sup>3</sup>

**b. PARTICULARITY AND CERTAINTY.** — Allegations of the bill in reference to the plaintiff's rights must be specific and definite, the usual manner of alleging the plaintiff's ownership being to aver that the plaintiff was at a particular date and still is, the owner, etc.<sup>4</sup>

will not do. See also *Delaware, etc., Canal Co. v. Camden, etc.*, R. Co., 16 N. J. Eq. 321; *Pennsylvania R. Co. v. National Docks, etc.*, R. Co., 53 N. J. Eq. 178; *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21; *Hough v. Martin*, 2 Dev. & B. Eq. (N. Car.) 379, 34 Am. Dec. 403; *North v. Kershaw*, 4 Blatchf. (U. S.) 70, in which last-mentioned case an injunction was sought against the infringement of a patent. See also *supra*, VI. *Establishment of Plaintiff's Right at Law.*

1. See article **CONDITIONS PRECEDENT**, vol. 4, p. 626.

*Parkinson v. Laselle*, 3 Sawy. (U. S.) 330, in which case injunction was sought against infringement of a copyright, and it was held necessary to charge that the plaintiff had fulfilled the requirements of the Acts of Congress upon which his right to the exclusive publication of his work depended.

**Right to Ferry Franchise.** — Where the plaintiff seeks an injunction to restrain the defendants from encroaching upon a ferry franchise, claimed by him under a statute, his bill must show that he has perfected his right to the franchise by first fulfilling all obligations imposed upon him by the act granting the franchise as conditions precedent to his right of exclusive ferriage, and that he has placed himself in a position to furnish to the public the facilities which the franchise was designed to secure. *Walker v. Armstrong*, 2 Kan. 198.

2. *Lansing v. North River Steamboat Co.*, 7 Johns. Ch. (N. Y.) 162, in which

case it was held that one in actual possession of a privilege under claim and color of title will not be restrained in favor of another party who sets up no particular right of his own, but contents himself with general denial of the defendant's title to an exclusive privilege. See also *Boulo v. New Orleans, etc.*, R. Co., 55 Ala. 480, and *Ulman v. Charles St. Ave. Co.*, 83 Md. 130. See further *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21.

**Negating Defendant's Rights.** — A bill asking an injunction against flooding the plaintiff's land, which alleges that the plaintiff is the owner of the land, and that the defendant had previously compensated the plaintiff for the injury done, but has since a stated date omitted to do so, is not open on demurrer to the objection that it does not sufficiently allege that the flowage is not under a claim of right. *Sprague v. Rhodes*, 4 R. I. 301.

3. *Thomas v. Nantahala Marble, etc.*, Co., 8 U. S. App. 429, 58 Fed. Rep. 485.

4. *Worthington v. Lee*, 61 Md. 530; *Wiggin v. New York*, 9 Paige (N. Y.) 16. See also *Laughlin v. Lamasco City*, 6 Ind. 223; *Fitzpatrick v. Childs*, 2 Brews. (Pa.) 365, in which latter case the court cited *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57, and *Davis v. Leo*, 6 Ves. Jr. 784.

**Deraignment of Title.** — In *Thomas v. Nantahala Marble, etc.*, Co., 8 U. S. App. 429, 58 Fed. Rep. 485, it was held that the plaintiff should deraign his title, that is to say, he should set out and state in detail the chain of conveniences

**c. AVERMENTS WHERE SEVERAL LANDOWNERS JOIN.** — In an action brought by several landowners, the bill should state clearly and distinctly the title or interest of each plaintiff in the several tracts of land.<sup>1</sup>

**16. Apprehension of Injury in the Future** — *a.* **ALLEGATIONS AS TO IMPENDING DANGER OF INJURY.** — The bill must allege,

or the immediate deed upon which he relies for his title.

But some of the cases have not held the plaintiff to this strictness in setting out his title. *Vanwinkle v. Curtis*, 3 N. J. Eq. 422, holding that the plaintiff in a suit to enjoin trespass or nuisance may allege that he is the owner in fee simple by purchase, and that he is in possession, without setting forth his title more precisely; *Shreve v. Black*, 4 N. J. Eq. 177.

**Heirship.** — An allegation that a named person died seized of certain realty, leaving named persons as children, is a sufficient averment of title in the children. *Per Follett, C. J.*, in *Mitchell v. Thorne*, 134 N. Y. 536.

**Ownership of Corporate Stock.** — In *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193, the plaintiff predicated his right to relief upon his ownership of corporate stock, and *Balcom, J.*, said: "I take it to be clear that such facts should have been averred in the complaint as would show the plaintiff's title to the \* \* \* stock mentioned in it, which he *says* he owns. In respect to the stock, none is shown to be standing in his name on the books of the company."

**Necessity to Plead Statute as Basis of Title.** — Where a railroad company alleges that it has a "legal right to take, hold, use, and occupy a right of way one hundred feet wide" over certain land under a statute, it is not necessary to set forth or cite the statute in the pleadings. *Chicago, etc., R. Co. v. Porter*, 72 Iowa 426, 36 Am. & Eng. R. Cas. 405.

**Title of Married Woman.** — An allegation by a married woman that she purchased the property as to which an injunction is sought with her own means, and that she always was and still is the owner thereof, is an express averment that the title is in her, and that the property is hers. *Fairchild v. Knight*, 18 Fla. 770.

**Title to Copyrighted Work.** — See *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39; *Little v. Gould*, 2 Blatchf. (U. S.) 165,

citing *Folsom v. Marsh*, 2 Story (U. S.) 100. See further the article **COPYRIGHT**, vol. 5, p. 19.

**Right of Possession.** — Where the only object of the bill is to restrain disturbance of the plaintiff's lawful possession of chattels, it need not be alleged that he is the owner thereof. *Cooper v. Newell*, 36 Miss. 316.

In *Lamm v. Burrell*, 69 Md. 272, the plaintiff sought an injunction against the execution of a writ which, as it was alleged, directed the sheriff to eject the plaintiff from certain premises "now in the occupancy and possession of your orator," and the bill was held insufficient because the character of his occupation and possession, whether as owner or tenant or trespasser, was not made to appear, and because the bill contained nothing from which the court could know that he had any right or claim to retain or continue his occupation or possession.

**Interest of Taxpayers.** — The meaning and extent of an averment that the plaintiff is a taxpayer of the city and a corporator thereof are that he contributes to the taxes arising in the city and is a member of the corporation thereof, and as such is interested in the corporate property. *Per Davies, J.*, in *Wood v. Draper*, 24 Barb. (N. Y.) 187. See also *Christopher v. New York*, 13 Barb. (N. Y.) 567.

**Boundaries.** — When the matter of boundaries is of essential importance it should be stated clearly, and an indefinite allegation of boundary, especially when it can be readily stated, is not sufficient to base an application for an injunction upon. *Sullivan v. Moreno*, 19 Fla. 200.

1. *Palmer v. Waddell*, 22 Kan. 352.

**Joinder of Legal and Equitable Owners.** — It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants, and if the owner of the entire legal title is a complainant, it is immaterial whether the equitable own-

especially where a preliminary injunction is sought, that injurious acts are about to be done, and not merely that they have been already accomplished, and it must be shown that there is imminent and actually impending danger of the plaintiff's rights being violated.<sup>1</sup> If the bill fulfils these requirements it is not essential

ers became vested by an instrument in writing or by parole. *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618.

1. *Alabama*. — *Casey v. Holmes*, 10 Ala. 776; *Lyon v. Hunt*, 11 Ala. 295; *Daniel v. Owens*, 70 Ala. 297.

*California*. — *Coker v. Simpson*, 7 Cal. 340; *Gardner v. Stroeveer*, 81 Cal. 148; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *Moore v. Clear Lake Water Works*, 68 Cal. 146.

*Colorado*. — *Crisman v. Heiderer*, 5 Colo. 589.

*Georgia*. — *Smith v. Malcolm*, 48 Ga. 343; *Wheeler v. Steele*, 50 Ga. 34; *Cook v. North, etc.*, R. Co., 46 Ga. 618.

*Illinois*. — *Fisher v. Board of Trade*, 80 Ill. 85; *Wangelin v. Goe*, 50 Ill. 459. See also *Menard v. Hood*, 68 Ill. 121; *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128.

*Indiana*. — *Roelker v. St. Louis, etc.*, R. Co., 50 Ind. 127; *Ploughe v. Boyer*, 38 Ind. 113; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; *McGoldrick v. Slevin*, 43 Ind. 522; *Anthony v. Sturgis*, 86 Ind. 479; *Markle v. Clay County*, 55 Ind. 185.

*Kansas*. — *Barber County v. Smith*, 48 Kan. 331; *Andrews v. Loye*, 46 Kan. 264; *Seward County v. Stoufer*, 47 Kan. 287; *Troy v. Doniphan County*, 32 Kan. 507; *Challiss v. Atchison*, 39 Kan. 276.

*Kentucky*. — In *Lexington City Nat. Bank v. Guynn*, 6 Bush (Ky.) 486, it was said, speaking of writ of injunction: "It is not to be used for the purpose of punishment or to compel persons to do right, but simply to prevent them from doing wrong."

*Maryland*. — *Hubbard v. Mobray*, 20 Md. 165; *Hamilton v. Ely*, 4 Gill (Md.) 34; *Murdock's Case*, 2 Bland. (Md.) 461; *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63; *Washington University v. Green*, 1 Md. Ch. 97; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 474.

*Massachusetts*. — *Melrose v. Cutter*, 159 Mass. 461; *Stowell v. Lincoln*, 11 Gray (Mass.) 434.

*Nebraska*. — *Parody v. School Dist.* No. 11, 15 Neb. 514; *Blakeslee v. Missouri Pac. R. Co.*, 43 Neb. 61.

*Nevada*. — *Sherman v. Clark*, 4 Nev. 138.

*New Jersey*. — *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157; *Pennsylvania R. Co. v. National Docks, etc.*, R. Co., 52 N. J. Eq. 555; *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136; *German Evangelical Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Mullen v. Jennings*, 9 N. J. Eq. 192; *Buck v. Backarack*, 45 N. J. Eq. 123; *Central R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 127; *Kean v. Colt*, 5 N. J. Eq. 365; *United New Jersey R., etc., Co. v. Standard Oil Co.*, 33 N. J. Eq. 123.

In *Southard v. Morris Canal, etc., Co.*, 1 N. J. Eq. 518, Chancellor Vroom said, in reference to injunctions: "It cannot make reparation for past injuries; its province is to restrain those that are in contemplation or in progress. The object is strictly preventive." See also the remarks of Chancellor Zabriskie to the same effect, in *King v. Morris, etc.*, R. Co., 18 N. J. Eq. 397.

*New Mexico*. — *Matter of Sloan*, 5 N. Mex. 590.

*New York*. — *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; *Board of Health v. Copcutt*, 140 N. Y. 12; *People v. Canal Board*, 55 N. Y. 390; *Mariposa Co. v. Garrison*, 26 How. Pr. (N. Y. Supreme Ct.) 448; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507; *Levy v. Mutual L. Ins. Co.*, 54 Hun (N. Y.) 315; *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169. See also *Reubens v. Joel*, 13 N. Y. 488, which case was cited in *McGoldrick v. Slevin*, 43 Ind. 522.

*Oregon*. — *Ewing v. Rourke*, 14 Oregon 514.

*Pennsylvania*. — *Audenried v. Philadelphia, etc.*, R. Co., 68 Pa. St. 370; *Farmers' R. Co. v. Reno, etc.*, R. Co., 53 Pa. St. 224, which cases were cited in *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128.

*West Virginia*. — *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

*United States*. — *Negro Jenny v. Crase*, 1 Cranch (C. C.) 443; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.)



that it should contain averments as to acts already done by the defendant and the effect of such acts, further than allegations of such facts may be material to show the defendant's intentions and the likelihood that the plaintiff will be injured in the future.<sup>1</sup>

189; *Poppenhusen v. New York Gutta Percha Comb Co.*, 4 Blatchf. (U. S.) 184; *Parker v. Winnipiseogee Lake Cotton, etc., Co.*, 2 Black (U. S.) 546.

*England.*—*Jesus College v. Bloome*, 3 Atk. 262, AmbL 54; *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287; *London v. Web*, 1 P. Wms. 527, in which case an injunction was sought against a lessee to prevent him from digging the ground for brick, and the lord chancellor allowed him to carry off the brick which he had dug; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Blakemore v. Glamorganshire Canal Nav.*, 1 Myl. & K. 154; *Packington's Case*, 3 Atk. 215; which cases have been frequently cited by American courts.

**Threats and Overt Acts.**—It is not sufficient to allege empty threats, but "there must be enough substance shown to presumptively be able to do the injury feared." *Trueblood v. Hollingsworth*, 48 Ind. 537; *Knight v. Flatrock, etc.*, Turnpike Co., 45 Ind. 134; *Alexander v. Mullen*, 42 Ind. 398; *Elson v. O'Dowd*, 40 Ind. 300. See also *Daniel v. Owens*, 70 Ala. 297, and *Ross v. Crews*, 33 Ind. 120.

**Obstruction of Highway.**—In *Roelker v. St. Louis, etc.*, R. Co., 50 Ind. 127, it was charged that a railroad company had taken possession of a street and laid down its track thereon, but the bill was considered bad because it did not allege or threaten to continue such use to the injury of such plaintiff. Citing *Cox v. Louisville, etc.*, R. Co., 48 Ind. 178; *McGoldrick v. Slevin*, 43 Ind. 522. See also *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128.

**Obstruction of Stream.**—In *Wheeler v. Steele*, 50 Ga. 34, a mill-dam had already been completed, and the bill was considered insufficient because it did not charge that the defendant threatened or proposed to raise it higher.

**Purchase of Real Estate by Corporation.**—In *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, the relief for which the plaintiffs applied was that the defendant corporation and its officers should be enjoined and restrained from fur-

ther purchasing real estate, but as no statement was made in the complaint that any intention existed to purchase or acquire such additional real estate, it was held that the complaint was insufficient. Cited in *Levy v. Mutual L. Ins. Co.*, 54 Hun N. Y. 315.

**Work Essentially Complete.**—Where the defendant has so far proceeded with the work sought to be enjoined that its completion will do the plaintiff no further injury, and an injunction against its completion will prevent him from using his property and deriving any benefit from it, the injunction will not be allowed. *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136, in which case the defendant had driven piles into the river and the court refused an injunction to prevent him from placing erections on such piles.

1. *Elwell v. Crowther*, 31 Beav. 169; *Dawson v. Paver*, 5 Hare 424; *Palmer v. Paul*, 2 L. J. Ch. 154; *Crisman v. Heiderer*, 5 Colo. 589; *Melrose v. Cutter*, 159 Mass. 461; *Poppenhusen v. New York Gutta Percha Comb Co.*, 4 Blatchf. (U. S.) 184. See also *Lyon v. Hunt*, 11 Ala. 295, holding that the bill need not charge the defendant with the actual commission of waste, and that it is sufficient to affirm that trespass and waste are threatened, that preparations are being made for their commission, and that by the acts of the defendant and all others acting under his authority the plaintiff is disturbed and likely to be more seriously interrupted in the enjoyment of his property.

**Necessity to Charge Facts.**—A bill is not sufficient from which it appears only from inference, and not by averments, that acts are being committed and are continuing or threatened, but facts must be stated showing that the plaintiff's apprehensions of injury in the future are well founded. *Daniel v. Owens*, 70 Ala. 297; *Ross v. Crews*, 33 Ind. 120; *Hamilton v. Ely*, 4 Gill (Md.) 34; *Blakeslee v. Missouri Pac. R. Co.*, 43 Neb. 61; *Pennsylvania R. Co. v. National Docks, etc.*, R. Co., 52 N. J. Eq. 555; *German Evangelical Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Kean v. Colt*, 5 N. J. Eq. 365; *Matter of Sloan*, 5 N. Mex. 590,

*b. AD DAMNUM CLAUSE.* — In a suit for injunction allegations of damage are not necessary in the sense that the amount which the plaintiff should recover enters into the determination of the right to equitable relief, but are essential only in order that the court may determine that the plaintiff's injuries are of such substance as to warrant the equitable intervention of the court.<sup>1</sup>

**17. Character of Injury Apprehended** — *a. SUBSTANTIAL INJURY.* — In a suit for injunction the bill must allege, and it must appear affirmatively from the facts set forth, that injury will be sustained by the plaintiff in consequence of the acts apprehended, and the injury must be a substantial one and not merely a technical wrong entitling the plaintiff to nominal damages only.<sup>2</sup>

wherein it was said that the plaintiff's apprehension of immediate injury to his rights must be well grounded; *Ewing v. Rourke*, 14 Oregon 514; *Negro Jenny v. Crase*, 1 Cranch. (C. C.) 443; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476. See also, as to the necessity generally to allege facts in an injunction bill rather than mere conclusions of law, *supra*, VIII. 6. *Allegation of Facts*; and as to the necessity to charge facts showing the character of the injury which will result to the plaintiff, *infra*, VIII. 17. *b. Irreparable Injury.*

1. *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347, *per* Gray, J. It is noteworthy that in this case, which was an action against an elevated railroad company, the action was equitable in its form only, and that the real object of the action was to recover damages. See also *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Shepard v. Manhattan R. Co.*, 131 N. Y. 215.

**A Statement of the Precise Damages** which the defendant will sustain in dollars and cents, unaccompanied by an allegation that the defendant is insolvent or that there will be extraordinary impediments in the way of a recovery at law, will render the bill demurrable. *Gardner v. Stroeve*, 81 Cal. 150. See also to the same effect *Conley v. Chedic*, 6 Nev. 222; *Sherman v. Clark*, 4 Nev. 138.

In *Musch v. Burkhart*, 83 Iowa 301, however, the plaintiff sought an injunction against the destruction of trees and shrubbery growing upon the premises occupied by him as a home, and he alleged that he would be damaged in the amount of two hundred dollars. It was held that this allegation did not preclude him from insisting that his damages would not

be reparable. The court said: "The plaintiff has an interest in the trees for which he cannot be compelled, at the election of the defendant, to accept a money consideration. A person is not obliged to suffer his property to be destroyed at the will of another, even though he may be able to recover ample pecuniary compensation therefor. This is especially true of property like trees, planted for and adapted to a certain use and serving a special purpose. Their owner has an interest in them which he may protect, and to be deprived of it without his consent would be to suffer irreparable injury within the meaning of the law."

**Amount in Controversy.** — See as to the amount in controversy in a suit for injunction, *supra*, p. 883; and also, the article AMOUNT IN CONTROVERSY, vol. I, p. 702.

2. In *People v. Canal Board*, 55 N. Y. 390, it was said: "Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable results of the action sought to be restrained." Quoted with approval in *Morgan v. Binghamton*, 102 N. Y. 500. See also *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Atty.-Gen. v. Gee*, L. R. 10 Eq. 136; *Atty.-Gen. v. Nichol*, 16 Ves. Jr. 342; *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Searle v. Abraham*, 73 Iowa 507; *Cockey v. Carroll*, 4 Md. Ch. 344; *Hart v. Marshall*, 4 Minn. 294; *Sherman v. Clark*, 4 Nev. 138; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Stanford v. Lyon*, 37 N. J. Eq. 94; *De Lacy v. Adams*, 3 Misc. Rep. (N. Y. Super. Ct.) 432; *Blake v. Brooklyn*, 26 Barb. (N. Y.) 307; *Bruce v. Delaware, etc., Canal*

*b. IRREPARABLE INJURY* — (1) *In General*. — It is insufficient to allege merely that the plaintiff will suffer injury, however grievous or intolerable such injury may be, without averring that the injury which is apprehended will be irreparable.<sup>1</sup> That courts of equity do not entertain jurisdiction of causes where there

Co., 19 Barb. (N. Y.) 371; Morgan v. Binghamton, 102 N. Y. 500, 2 N. Y. St. Rep. 449; MacLaury v. Hart, 121 N. Y. 636; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315; Campbell v. Seaman, 63 N. Y. 568; Frink v. Stewart, 94 N. Car. 484; Wellman v. Harker, 3 Oregon 253; Sargent v. George, 56 Vt. 627; Cox v. Douglass, 20 W. Va. 175.

1. *Alabama*. — Winter v. Montgomery, 93 Ala. 539; Daniel v. Owens, 70 Ala. 297.

*Arkansas*. — Earle v. Hale, 31 Ark. 473; *Ex p.* Foster, 11 Ark. 304.

*California*. — Leach v. Day, 27 Cal. 643; Ritter v. Patch, 12 Cal. 208; Burnett v. Whitesides, 13 Cal. 156; Middleton v. Franklin, 3 Cal. 238; Mechanics' Foundry v. Ryall, 75 Cal. 601.

*Florida*. — In Wiggins v. Williams, 36 Fla. 637, it was said: "The courts are practically unanimous in announcing the rule that something more than a mere trespass, susceptible of adequate remuneration, must be shown before a court of equity will exercise jurisdiction." See also Fuller v. Cason, 26 Fla. 476; Carney v. Hadley, 32 Fla. 344; Indian River Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387; Burns v. Sanderson, 13 Fla. 381.

*Georgia*. — Bethune v. Wilkins, 8 Ga. 118; Cook v. North, etc., R. Co., 46 Ga. 618; Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; Seymour v. Morgan, 45 Ga. 201; Atlanta Nat. Bank v. Fletcher, 80 Ga. 327.

*Idaho*. — McGinnis v. Friedman, 2 Idaho 361.

*Illinois*. — Herrington v. Herrington, 11 Ill. App. 121.

*Indiana*. — Miller v. Burket, 132 Ind. 472; Whitlock v. Consumers' Gas Trust Co., 127 Ind. 62; Anthony v. Sturgis, 86 Ind. 479; Caskey v. Greensburgh, 78 Ind. 233; Rogers v. Lafayette Agricultural Works, 52 Ind. 296; Indianapolis Rolling Mill Co. v. Indianapolis, 29 Ind. 245; Cooper v. Hamilton, 8 Blackf. (Ind.) 377; Centreville, etc., Turnpike Co. v. Barnett, 2 Ind. 536.

*Iowa*. — Bolton v. McShane, 67 Iowa 207; Council Bluffs v. Stewart, 51 Iowa 385; Gibbs v. McFadden, 39 Iowa 371;

Crocker v. Robinson, 8 Iowa 404; Cowles v. Shaw, 2 Iowa 496.

*Maryland*. — Chesapeake, etc., Canal Co. v. Young, 3 Md. 480. See also White v. Flannigan, 1 Md. 525; Amelung v. Seekamp, 9 Gill & J. (Md.) 468.

*Massachusetts*. — Kenney v. Consumers' Gas Co., 142 Mass. 417; Washburn v. Miller, 117 Mass. 376; Boston Water Power Co. v. Boston, etc., R. Corp., 16 Pick. (Mass.) 512; Ingraham v. Dunnell, 5 Met. (Mass.) 118.

*Michigan*. — Wykes v. Ringleberg, 49 Mich. 567; Ballentine v. Webb, 84 Mich. 38; Pardridge v. Brennan, 64 Mich. 575; Culver v. Judge, 57 Mich. 25; Brown v. Ring, 77 Mich. 159.

*Mississippi*. — Green v. Lake, 54 Miss. 540.

*Montana*. — Atchison v. Peterson, 1 Mont. 561.

*Nebraska*. — Normand v. Oteo County, 8 Neb. 18.

*Nevada*. — Wells v. Dayton, 11 Nev. 161; Conley v. Chedic, 6 Nev. 223; Champion v. Sessions, 1 Nev. 478.

*New Hampshire*. — Burnham v. Kempton, 44 N. H. 78; Coe v. Winnepesiokee Lake Cotton, etc., Mfg. Co., 37 N. H. 254.

*New Jersey*. — In West Jersey R. Co. v. Cape May, etc., R. Co., 34 N. J. Eq. 164, it was held that it was insufficient to show merely that a law will be violated, or that the plaintiff's legal rights will be invaded. Hagerty v. Lee, 45 N. J. Eq. 255; Central R. Co. v. Standard Oil Co., 33 N. J. Eq. 127; Citizens' Coach Co. v. Camden Horse R. Co., 29 N. J. Eq. 299; Black v. Delaware, etc., Canal Co., 22 N. J. Eq. 399; De Veney v. Gallagher, 20 N. J. Eq. 33; Morris Canal, etc., Co. v. Central R. Co., 16 N. J. Eq. 419; Zabriskie v. Jersey City, etc., R. Co., 13 N. J. Eq. 314; Atty.-Gen. v. Paterson, 9 N. J. Eq. 624; Warne v. Morris Canal, etc., Co., 5 N. J. Eq. 470.

*New York*. — Gentil v. Armand, 38 How. Pr. (N. Y. Super. Ct.) 94; Grill v. Wiswall, 82 Hun (N. Y.) 281; Bruce v. Delaware, etc., Canal Co., 19 Barb. (N. Y.) 371; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484; New York v. Mapes, 6 Johns. Ch. (N. Y.) 46; Mooers v. Smedley, 6 Johns. Ch. (N.

exists at law a remedy plain, adequate, and complete to redress the wrong complained of, stands prominent among the rules which serve to define the boundary of jurisdiction between courts of law and courts of equity; and this rule has been applied rigorously to suits for injunction.<sup>1</sup>

**Undisputed Title in the Plaintiff.** — The fact that the plaintiff's title is undisputed does not relieve him from the necessity of showing that irreparable injury will be done by the threatened or apprehended acts of the defendant.<sup>2</sup>

(2) *Irreparable Defined.* — Just when an injury will be irreparable, so as to justify a writ of injunction, it is perhaps not the province of a general rule to determine, because of the great variety of facts under which the allegation is made. It may be said, however, that an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which result therefrom cannot be measured by any certain pecuniary standard.<sup>3</sup>

Y.) 28; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 138; *Van Doren v. New York*, 9 Paige (N. Y.) 390; *Thompson v. Canal Fund*, 2 Abb. Pr. (N. Y. Supreme Ct.) 251; *Wilson v. New York*, 4 E. D. Smith (N. Y.) 675; *Messeck v. Columbia County*, 50 Barb. (N. Y.) 190; *Heywood v. Buffalo*, 14 N. Y. 534.

*North Carolina.* — *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728, which case was cited in *Wiggins v. Williams*, 36 Fla. 637.

*Ohio.* — *McCoy v. Chillicothe Corp.*, 3 Ohio 371, 17 Am. Dec. 607.

*Oregon.* — *Mendenhall v. Harrisburg Water Co.*, 27 Oregon 38; *Longshore Printing Co. v. Howell*, 26 Oregon 527; *Smith v. Gardner*, 12 Oregon 221; *Portland v. Baker*, 8 Oregon 356.

*Pennsylvania.* — *Richards's Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202; *Bunnell's Appeal*, 69 Pa. St. 59.

*South Carolina.* — *Lining v. Geddes*, 1 McCord Eq. (S. Car.) 304, 16 Am. Dec. 606.

*West Virginia.* — *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283; *Ferland v. Wood*, 35 W. Va. 458; *McMillann v. Ferrell*, 7 W. Va. 223.

*United States.* — *New York Grape Sugar Co. v. American Grape Sugar Co.*, 20 Blatchf. (U. S.) 386; *Dows v. Chicago*, 11 Wall. (U. S.) 110; *Hannewinkle v. Georgetown*, 15 Wall. (U. S.) 548; *Sanders v. Logan*, 2 Fisher Pat. Cas. 167; *Pullman v. Baltimore, etc., R. Co.*, 4 Hughes (U. S.) 236; *Morris v. Lowell Mfg. Co.*, 3 Fisher Pat. Cas. 67.

1. *Per Knapp, J.*, in *Jersey City v. Gardner*, 33 N. J. Eq. 622.

2. *Thorn v. Sweeney*, 12 Nev. 251, citing *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315.

3. *Troe v. Larson*, 84 Iowa 649; *Musch v. Burkhart*, 83 Iowa 301. See also the following cases: *Mooney v. Cooledge*, 30 Ark. 640; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Jones v. Brandon*, 60 Miss. 556; *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728; *Com. v. Pittsburgh, etc., R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372; *Norton v. Elwert*, 29 Oregon 583; *Sanderlin v. Baxter*, 76 Va. 299 [citing *Kerr Inj.*, p. 199, c. 15, § 1]; *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Watson v. Sutherland*, 5 Wall. (U. S.) 78; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Wilson v. Mineral Point*, 39 Wis. 160.

**The Character, Not Alone the Magnitude, of the Injury Is Considered.** — "In determining what is an irreparable injury, regard is had not only to its magnitude but to its character, and it is irreparable in the sense here meant when the plaintiff could not be recompensed by a recovery of damages at law. For the destruction or injury of property as to which there is no *pretium affectionis*, whether its value be great or small, the owner may be ordinarily fully compensated by a recovery of its value, or of an amount commensurate with the injury done; but there are rights which, though exercised over property and dependent on it, the violation of which cannot be adequately

(3) *Inadequacy of Remedy at Law*. — In every instance in which an injunction is sought, the bill should be explicit in disclosing the obstacles to adequate redress at law; the doctrine being elementary that a party who has a plain, speedy, and adequate remedy at law is not entitled to go into equity and ask for an injunction.<sup>1</sup>

redressed by any recovery of a mere sum of money. Of this character is that of preserving inviolate ground used as a family or church burial ground, trespasses on which will be restrained." *Per* Cooper, J., in *Jones v. Brandon*, 60 Miss. 556.

**Irreparable Injury under New York Code**. — "It cannot be denied that the language of the code was intended to put an end to the nice discussions which so frequently arose under the old system as to the true meaning of the term 'irreparable,' in its application to each particular case. Hence the use of the word 'injury' alone, unaccompanied by its debatable and much debated adjective; thus leaving to the court or officer a more liberal discretion in determining whether, under all the circumstances, the application should be granted or not, and taking away the temptation unduly to appeal from the decision." *Per* Roosevelt, J., in *Shaw v. Dwight*, 16 Barb. (N. Y.) 536.

1. *Alabama*. — *Colton v. Price*, 50 Ala. 424; *State v. Mobile*, 5 Port. (Ala.) 279.

*Arkansas*. — *Wingfield v. McLure*, 48 Ark. 510.

*California*. — *Gardner v. Stroeve*, 81 Cal. 150; *Tomlinson v. Rubio*, 16 Cal. 202.

*Georgia*. — *Barnes v. Hartwell*, 66 Ga. 754; *Northeastern R. Co. v. Barrett*, 65 Ga. 601; *Redd v. Blandford*, 54 Ga. 123; *Gunby v. Bell*, 40 Ga. 133; *Crown v. Leonard*, 32 Ga. 241; *Hatcher v. Hampton*, 7 Ga. 49.

*Illinois*. — *Wangelin v. Goe*, 50 Ill. 459; *Winkler v. Winkler*, 40 Ill. 179.

*Indiana*. — *Ploughe v. Boyer*, 38 Ind. 115; *Bonnell v. Allen*, 53 Ind. 130.

*Iowa*. — *Council Bluffs v. Stewart*, 51 Iowa 385. *Citing* *Harrington v. Cubbage*, 3 Greene (Iowa) 307; *Piggott v. Addicks*, 3 Greene (Iowa) 427; *Clausen v. Lafrenz*, 4 Greene (Iowa) 224; *Brainerd v. Holsapple*, 4 Greene (Iowa) 485.

*Maryland*. — *Fort v. Groves*, 29 Md. 188, which case was cited in *Keystone Bridge Co. v. Summers*, 13 W. Va. 476.

*Michigan*. — *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 61 Mich. 9.

*Minnesota*. — *Hart v. Marshall*, 4 Minn. 294, which case was cited in *Bonnell v. Allen*, 53 Ind. 130.

*Missouri*. — *Weigel v. Walsh*, 45 Mo. 560.

*Nebraska*. — In *Tigard v. Moffitt*, 13 Neb. 565, it was said that it is "an established principle that a court of equity will not lend its aid to restrain by injunction the commission of any act injurious to the complainant when he has an adequate remedy at law." See also *Sapp v. Roberts*, 18 Neb. 299.

*Nevada*. — *Sherman v. Clark*, 4 Nev. 138.

*New Hampshire*. — *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

*New Jersey*. — *Mullen v. Jennings*, 9 N. J. Eq. 192; *Higbee v. Camden, etc., R., etc., Co.*, 20 N. J. Eq. 435; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Woodbridge Tp. v. Inslee*, 37 N. J. Eq. 397 [*citing* *Atty.-Gen. v. New Jersey R., etc., Co.*, 3 N. J. Eq. 136; *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Atty.-Gen. v. Brown*, 24 N. J. Eq. 89]; *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430 [*citing* *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259; *Carlisle v. Cooper*, 21 N. J. Eq. 576].

*New York*. — *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Carter v. Ferguson*, 20 Civ. Pro. Rep. (N. Y. Supreme Ct.) 21; *O'Connor v. National Park Bank*, 8 Misc. Rep. (N. Y. C. Pl.) 288; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Mitchell v. Oakley*, 7 Paige (N. Y.) 68.

*Ohio*. — *Commercial Bank v. Bowman*, 1 Handy (Ohio) 246; *Mechanics', etc., Branch of State Bank v. Debolt*, 1 Ohio St. 591; which cases were cited in *Tigard v. Moffitt*, 13 Neb. 565.

*Vermont*. — *Bellows Falls Bank v. Rutland, etc., R. Co.*, 28 Vt. 470; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Smith v. Pettingill*, 15 Vt. 82, *citing* *Washburn v. Titus*, 9 Vt. 211.

*Virginia*. — *Bowyer v. Creigh*, 3 Rand. (Va.) 25.

(4) *Necessity to Charge Facts as to the Character of the Injury.*

— A general allegation that the acts apprehended will be irreparable, unattended by such a statement of facts as enables the court to see that such will be the result, is insufficient. The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction.<sup>1</sup>

*United States.* — *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

By the Term "the Inadequacy of the Remedy by Damages" is meant that the damages obtainable at law are not such a compensation as will in effect, though not *in specie*, place the parties in the position in which they formerly stood. The fact that the amount of damages cannot be accurately ascertained may constitute irreparable damage. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete. *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311.

The test of the right to equitable interposition is not merely that there is a remedy at law; but it must be plain and adequate, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Per Simrall, J.*, in *Irwin v. Lewis*, 50 Miss. 363.

1. *Alabama.* — *Bowling v. Crook*, 104 Ala. 130; *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520; *Kellar v. Bullington*, 101 Ala. 267; *Vaughan v. Marable*, 64 Ala. 60; *Kingsbury v. Flowers*, 65 Ala. 479; *Long v. Brown*, 4 Ala. 622.

*California.* — *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *De Witt v. Hays*, 2 Cal. 463; *Merced Min. Co. v. Fremont*, 7 Cal. 317; *Waldron v. Marsh*, 5 Cal. 119; *Payne v. McKinley*, 54 Cal. 532; *Bigley v. Nunan*, 53 Cal. 403; *George v. North Pac. Transp. Co.*, 50 Cal. 589; *Branch Turnpike Co. v. Yuba County*, 13 Cal. 190.

*Colorado.* — *Crisman v. Heiderer*, 5 Colo. 589, in which case the court cited *Waldron v. Marsh*, 5 Cal. 119, and *Carlisle v. Stevenson*, 3 Md. Ch. 505. The first mentioned case was cited in *McCormick v. Riddle*, 10 Mont. 467.

*Connecticut.* — *Mead v. Stirling*, 62 Conn. 586. See also *Goodwin v. New York, etc., R. Co.*, 43 Conn. 494.

*Florida.* — *Sullivan v. Moreno*, 19 Fla. 200; *Thebaut v. Canova*, 11 Fla. 143; *Shivery v. Streeper*, 24 Fla. 103; *Pensacola, etc., R. Co. v. Spratt*, 12 Fla. 26; *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387.

*Georgia.* — The irreparability of a trespass is a conclusion which the law draws from the character of the trespass, and where the character of the trespass is exhibited in a statement of the facts which constitute it, it is for the court to determine whether it is irreparable. *Justices, etc., v. Griffin, etc.*, *Plank Road Co.*, 11 Ga. 246. See also *Oliver v. Union Point, etc., R. Co.*, 83 Ga. 257; *Bailey v. Simpson*, 57 Ga. 523; *Morrison v. Latimer*, 51 Ga. 519.

*Illinois.* — "Facts and circumstances must be alleged in the bill from which it may be seen that irreparable mischief will be the result of the act complained of and that the law can afford the party no adequate remedy." *Goodell v. Lassen*, 69 Ill. 145; *Fort Clark Horse R. Co. v. Anderson*, 108 Ill. 64.

*Indiana.* — In *Centreville, etc., Turnpike Co. v. Barnett*, 2 Ind. 536, the court said: "We look at the particular acts charged and threatened, and the circumstances under which they were done and threatened, to discover whether the damage from them might be irreparable." *Sidener v. Haw Creek Turnpike Co.*, 91 Ind. 186; *Cooper v. Hamilton*, 8 Blackf. (Ind.) 377.

*Iowa.* — *Thomas v. Farley Mfg. Co.*, 76 Iowa 735.

*Louisiana.* — See also *Puckette v. Hicks*, 39 La. Ann. 901. The court said: "We are to examine the facts charged and the nature and character of the injury which may be inflicted by the acts complained of, and are thus to determine whether such injury may be irreparable *vel non*."

*Maryland.* — "The facts, and all the material facts, upon which reliance is

(5) *Necessity to Charge in Terms that Irreparable Injury Will Ensnue.* — In charging that irreparable injury will ensue from the

placed for relief in equity, must be set forth, so that the court may see whether the remedy, if any, be at law or in equity." *Lamm v. Burrell*, 69 Md. 272. To the same effect are the following cases: *Lewis v. Levy*, 16 Md. 85; *Mahaney v. Lazier*, 16 Md. 69, *per* Le Grand, C. J.; *Baughner v. Crane*, 27 Md. 36; *Whalen v. Dalashmutt*, 59 Md. 250; *Green v. Keen*, 4 Md. 98; *Adams v. Michael*, 38 Md. 123; *White v. Flannigain*, 1 Md. 525; *Chesapeake, etc., Canal Co. v. Young*, 3 Md. 480; *Pfeltz v. Pfeltz*, 14 Md. 376; *Davis v. Reed*, 14 Md. 152; *Roman v. Strauss*, 10 Md. 89; *Fort v. Groves*, 29 Md. 188; *Carlisle v. Stevenson*, 3 Md. Ch. 505; *Hamilton v. Ely*, 4 Gill (Md.) 34; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468.

*Montana.* — *McCormick v. Riddle*, 10 Mont. 467, in which the court cited the following cases: *Waldron v. Marsh*, 5 Cal. 119; *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Crisman v. Heiderer*, 5 Colo. 589; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Thorn v. Sweeney*, 12 Nev. 251.

*Nebraska.* — *Tigard v. Moffitt*, 13 Neb. 565.

*Nevada.* — *Wells v. Dayton*, 11 Nev. 161; *Thorn v. Sweeney*, 12 Nev. 251. The latter case was cited in *McCormick v. Riddle*, 10 Mont. 467.

*New Hampshire.* — *Coe v. Winnepisogee Lake Cotton, etc., Mfg. Co.*, 37 N. H. 254, *per* Sawyer, J.

*New Jersey.* — *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Liebstein v. Newark*, 24 N. J. Eq. 200; *West v. Walker*, 3 N. J. Eq. 279.

*New York.* — *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 333.

*North Carolina.* — *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728, citing *Bogey v. Shute*, 1 Jones Eq. (N. Car.) 180.

*Oregon.* — *Weiss v. Jackson County*, 9 Oregon 470; *Mendenhall v. Harrisburg Water Co.*, 27 Oregon 38; *Portland v. Baker*, 8 Oregon 356; *Smith v. Gardner*, 12 Oregon 221; *Cherry v. Matthews*, 25 Oregon 484; *Kendall v. Post*, 8 Oregon 144.

*Rhode Island.* — *McMaugh v. Burke*, 12 R. I. 499, citing *Roman v. Strauss*, 10 Md. 89; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468.

*Utah.* — *Leitham v. Cusick*, 1 Utah 242.

*West Virginia.* — *Farland v. Wood*, 35 W. Va. 458; *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283; *Hale v. Point Pleasant, etc., R. Co.*, 23 W. Va. 454, 20 Am. & Eng. R. Cas. 162.

*United States.* — *Spooner v. McConnell*, 1 McLean (U. S.) 337. See also *Georgia v. Brailsford*, 2 Dall. (U. S.) 402, which case was cited in *Branch Turnpike Co. v. Yuba County*, 13 Cal. 190.

**Illustrations.** — In order to show how the courts apply the rule stated in the text, reference is made to the following cases:

*Illegal Tax.* — Where the object of the bill is to restrain the collection of a tax, according to a decided preponderance of the authorities, facts must be alleged showing that an injunction is actually necessary to protect the rights of citizens who have no plain, speedy, and adequate remedy at law. *Ritter v. Patch*, 12 Cal. 298; *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *Walls v. Dayton*, 11 Nev. 161; *Conley v. Chedic*, 6 Nev. 223. See also the article TAXES.

*Multiplicity of Suits.* — A mere averment that a bill in equity is necessary to prevent a multiplicity of suits will not avail the pleader unless supported by proper charges of fact. *Bowling v. Crook*, 104 Ala. 130.

*Nuisance.* — It is not sufficient to allege merely that particular consequences will follow the defendant's acts, but facts must be stated so that the court can see and determine whether such averments are well founded; *e. g.*, the precise proximity of the plaintiff's premises to the source of the alleged nuisance, the uses which the plaintiff makes of his property, etc., must be alleged. *Adams v. Michael*, 38 Md. 123; *Middleton v. Franklin*, 3 Cal. 238. See further the article NUISANCES.

*Obliteration of Boundaries.* — In *Lewis v. North Kingstown*, 16 R. I. 15, the bill alleged not only that the defendant purposed to remove a building from a lot belonging to the plaintiff, but also to grade the lot and thereby obliterate its boundaries, so that the plaintiff would have not only to prosecute the defendant for damages, but also to establish his right as against the pub-

acts apprehended, no set form of words is required, and it is sufficient that facts are alleged disclosing that the plaintiff is entitled to an injunction, without alleging in terms that the threatened injury will be irreparable or that the plaintiff will be without any adequate remedy at law.<sup>1</sup>

(6) *Materiality of Allegation of Insolvency.* — It frequently happens that the insolvency of the defendant is a material fact which should be charged in order to show that the injury will be irreparable, especially where an injunction is sought against breach of contract, a nuisance, a trespass, or a waste; and such an allegation

lic; and the bill was considered sufficient.

*Obstructions of Stream.* — It is sufficient to allege that there is danger that the defendant's acts will produce a deflection of the channel of a river, and thus irreparable injury, and it is not necessary to allege positively that the current will be changed. *Cobb v. Illinois, etc., R., etc., Co.*, 68 Ill. 233. See also article WATERS AND WATER-COURSES.<sup>1</sup>

*Official Misconduct.* — A petition asking that the governor of the state be enjoined from designating a certain town to be the county seat of the county, on the ground that the census taker has taken the census fraudulently, should charge that the fraud or illegality has been brought to the attention of the governor, or that he would fail to regard the same if it were brought to his attention. *Martin v. Ingham*, 38 Kan. 641.

*Trespass.* — It is insufficient to allege merely that defendant has broken and entered the plaintiff's close, or that he intends to do so, but it must be charged that the threatened trespass is irreparable, and the nature of the injury itself or the want of responsibility in the party threatening its commission must be shown. It is never sufficient to allege mere matters of aggravation which will enhance the measure of damages. *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520; *Leach v. Day*, 27 Cal. 643; *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Morrison v. Latimer*, 51 Ga. 519; *Bethune v. Wilkins*, 8 Ga. 118; *Anthony v. Sturgis*, 86 Ind. 479; *Council Bluffs v. Stewart*, 51 Iowa 385 [citing 2 Story Eq., § 298; *Cowles v. Shaw*, 2 Iowa 496; *Gibbs v. McFadden*, 39 Iowa 371; *Thomas v. Farley Mfg. Co.*, 76 Iowa 735; *Whalen v. Dalashmutt*, 59 Md. 250; *McMaugh v. Burke*, 12 R. I.

499 [citing *Roman v. Strauss*, 10 Md. 89; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468]; *Fort Clark Horse R. Co. v. Anderson*, 108 Ill. 64 [citing *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497]; *Chicago, etc., R. Co. v. Ft. Howard*, 21 Wis. 45; *Champion v. Sessions*, 1 Nev. 478.

*Waste.* — An allegation that the defendant is committing waste and that the plaintiff will suffer irreparable injury is not sufficient, but the facts must be alleged to show that irreparable injury will be committed. *Green v. Keen*, 4 Md. 98; *Baughner v. Crane*, 27 Md. 36. See further the article WASTE.

1. In *Weiss v. Jackson County*, 9 Oregon 470, it was said: "The court must be satisfied from a statement of the grievances that the injury would be irreparable, and it is enough if the court can discover this from the allegation of facts." See also *Rood v. Mitchell County*, 39 Iowa 444; *Martin v. Jewell*, 37 Md. 530; *White v. Flannigan*, 1 Md. 525; *Lamm v. Burrell*, 69 Md. 272; *Glover v. Silverman*, 6 Misc. Rep. (N. Y. Super. Ct.) 347.

*Qualifying Effect of the Word "Almost."* — Where the facts alleged in the bill show that the acts complained of are of that character that, if insisted upon, irreparable injury will be done, it is immaterial that the word "almost" is used in connection with the charge of irreparable damage. *Davis v. Reed*, 14 Md. 152.

*Unlawfully, Maliciously, and Wantonly.* — The use of the words "unlawfully," "maliciously," and "wantonly" adds no force to the complaint. In considering the complaint and in determining the rights of the parties, the court looks to the nature of the acts alleged, and if such acts are lawful within themselves, such epithets are of no avail. *Per Coffey, J.*, in *Tyner v. People's Gas Co.*, 131 Ind. 408.



is all the more important when the damages are capable of estimation, because if the damages can be assessed by a jury, and the defendant is solvent, the remedy at law is necessarily adequate.<sup>1</sup>

1. *Alabama*. — *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

*California*. — *Gardner v. Stroeve*, 81 Cal. 150; *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Robinson v. Russell*, 24 Cal. 467; *Tomlinson v. Rubio*, 16 Cal. 202; *Burnett v. Whitesides*, 13 Cal. 156.

*Colorado*. — *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554, holding that in a suit to enjoin breach of a contract to furnish water, it must be alleged that the defendant is insolvent, or shown otherwise that the injury will be irreparable.

*Connecticut*. — *Camp v. Bates*, 11 Conn. 51, holding that an allegation of the defendant's insolvency adds great strength to the plaintiff's claim that the injury will be irreparable.

*Florida*. — *Carney v. Hadley*, 32 Fla. 344.

*Georgia*. — *Atlanta Nat. Bank v. Fletcher*, 80 Ga. 327; *Lingo v. Harris*, 74 Ga. 368; *Nethery v. Payne*, 71 Ga. 374; *Berrien v. Thomas*, 65 Ga. 61; *West v. Cobb*, 63 Ga. 341; *Flannegan v. Hardeman*, 53 Ga. 440; *Allen v. Thornton*, 51 Ga. 594; *Morrison v. Latimer*, 51 Ga. 519; *Sharpe v. Kennedy*, 51 Ga. 257; *Walker v. Walker*, 51 Ga. 22; *Smith v. Malcolm*, 48 Ga. 343; *Seymour v. Morgan*, 45 Ga. 201; *Lewis v. Christian*, 40 Ga. 187; *Edmondson v. Jones*, 19 Ga. 19.

*Illinois*. — *Poyer v. Des Plaines*, 123 Ill. 111, citing *Owens v. Crossett*, 105 Ill. 356.

*Indiana*. — *Miller v. Burket*, 132 Ind. 472; *Wimberg v. Schwegeman*, 97 Ind. 528; *McQuarrie v. Hildebrand*, 23 Ind. 122; *Wallace v. McVey*, 6 Ind. 303; *Centreville, etc., Turnpike Co. v. Barnett*, 2 Ind. 536.

*Iowa*. — *Thomas v. Farley Mfg. Co.*, 76 Iowa 735; *Gibbs v. McFadden*, 39 Iowa 371; *Smith v. Short*, 11 Iowa 523; *Cowles v. Shaw*, 2 Iowa 496.

*Kentucky*. — *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346. See also *Musselman v. Marquis*, 1 Bush (Ky.) 463, 89 Am. Dec. 637, which case was cited in *Heaney v. Butte, etc., Commercial Co.*, 10 Mont. 590.

*Missouri*. — *Weigel v. Walsh*, 45 Mo. 560, which case was cited in *Heaney*

*v. Butte, etc., Commercial Co.*, 10 Mont. 590.

*Montana*. — *Lee v. Watson*, 15 Mont. 228; *Atchison v. Peterson*, 1 Mont. 561; *Heaney v. Butte, etc., Commercial Co.*, 10 Mont. 590.

*Nebraska*. — *Tigard v. Moffitt*, 13 Neb. 565; *Connery v. Swift*, 9 Nev. 39.

*New Jersey*. — In *Kerlin v. West*, 4 N. J. Eq. 449, it was declared that an injury may be irreparable either from its nature or the want of responsibility in the person committing it. See also the following cases: *Mullen v. Jennings*, 9 N. J. Eq. 192; *West v. Page*, 9 N. J. Eq. 119; *Butler v. Rogers*, 9 N. J. Eq. 487.

*New Mexico*. — *Waddingham v. Robledo*, 6 N. Mex. 347, citing 10 Am. and Eng. Encyc. of Law, title *Injunctions*, p. 881, note 1.

*New York*. — *Woodruff v. Bunce*, 9 Paige (N. Y.) 443; *Hart v. Albany*, 3 Paige (N. Y.) 213, which case was cited with approval in *Kerlin v. West*, 4 N. J. Eq. 449; *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182; *Rogers v. Marshall*, 38 How. Pr. (N. Y. Supreme Ct.) 43; *Brown v. Metropolitan Gaslight Co.*, 38 How. Pr. (N. Y. C. Pl.) 133.

*North Carolina*. — *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728.

*Ohio*. — *McCoy v. Chillicothe Corp.*, 3 Ohio 371, 17 Am. Dec. 607.

*Oregon*. — *Wellman v. Harker*, 3 Oregon 253.

*Utah*. — *Kahn v. Old Tel. Min. Co.*, 2 Utah 18.

*West Virginia*. — *McMillan v. Ferrell*, 7 W. Va. 223; *Western Min., etc., Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 296: which cases were cited with approval in *Heaney v. Butte, etc., Commercial Co.*, 10 Mont. 590.

*United States*. — *McElroy v. Kansas City*, 21 Fed. Rep. 257.

**The Insolvency of One of Several Wrongdoers** does not lessen the adequacy of remedies at law or relieve the plaintiff from the necessity of resorting to them. *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

**Suit Against Vendor**. — Where an injunction is sought against the collec-

**Insolvency Not Alone Sufficient.** — It is insufficient, however, to allege merely that the defendant is insolvent, where other circumstances of the case are such as to show that irreparable injury will not necessarily ensue.<sup>1</sup>

**When Insolvency Need Not Be Alleged.** — In some cases the plaintiff is entitled to an injunction because of the nature of the apprehended injury, and not because of the defendant's incapacity to respond in damages, and in such cases an allegation of the defendant's insolvency is immaterial and unnecessary.<sup>2</sup>

tion of purchase money on the ground of failure of title, one of the material facts that must be alleged is the insolvency of the vendor. *Wimberg v. Schwegeman*, 97 Ind. 528; *Smith v. Short*, 11 Iowa 523; *Woodruff v. Bunce*, 9 Paige (N. Y.) 443. See also *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346. See further *Mullen v. Jennings*, 9 N. J. Eq. 192, holding that where the plaintiff has exchanged land with the defendant, and there is a failure of title to the land taken by the plaintiff, it is necessary to allege in a bill seeking an injunction against the alienation or incumbrance of the land taken by the defendant that the defendant is insolvent or embarrassed or unable to respond to any amount which the court may decree him to pay, and that plaintiff has not an adequate remedy by an action on the defendant's covenants.

**Trespass.** — In an action to enjoin a trespass, it is insufficient to allege that the land is used by the plaintiff in connection with business which would be interrupted by the threatened trespass, but it must be charged that the defendant is insolvent, or otherwise shown that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 202; *Corney v. Hadley*, 32 Fla. 344; *Poyer v. Des Plaines*, 123 Ill. 111; *Miller v. Burket*, 132 Ind. 472; *Thomas v. Farley Mfg. Co.*, 76 Iowa 735; *Lee v. Watson*, 15 Mont. 228; *Weigel v. Walsh*, 45 Mo. 560; *Tigard v. Moffitt*, 13 Neb. 565; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728; *McCoy v. Chillicothe Corp.*, 3 Ohio 371, 17 Am. Dec. 607. See further, for a more exhaustive citation of authorities and the application of the rule to the different sorts of trespasses, the article TRESPASS.

**Judgment Fraudulently Obtained.** — In *Connery v. Swift*, 9 Nev. 39, it was held that where an injunction is sought against a judgment alleged to have

been fraudulently obtained, it should be charged that the defendant is insolvent.

**Nuisance.** — As to the materiality of an allegation of insolvency in a suit to enjoin a nuisance, see *Butler v. Rogers*, 9 N. J. Eq. 487; and the article NUISANCES.

**Waste.** — As to the necessity to charge insolvency in a suit to enjoin waste, see *Robinson v. Russell*, 24 Cal. 467; *Crescent City Wharf, etc., Co. v. Simpson*, 77 Cal. 286; *Richards v. Dower*, 64 Cal. 63; *West v. Page*, 9 N. J. Eq. 119; and the article WASTE.

1. *Centreville, etc., Turnpike Co. v. Barnett*, 2 Ind. 536; *Thornton v. Roll*, 118 Ill. 351, in which latter case the court cited *Owens v. Crossett*, 105 Ill. 354. See also the title *Injunctions*, Am. and Eng. Encyc. of Law.

2. *Merced Min. Co. v. Fremont*, 7 Cal. 317, in which case an injunction was sought against the destruction of timber and the removal of minerals. See likewise the language of *Pearson, J.*, in *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728; *Poirier v. Fetter*, 20 Kan. 47. See also *Kerlin v. West*, 4 N. J. Eq. 449, wherein it was declared that an injury may be irreparable either from its nature or the want of responsibility in the person committing it. Citing *Smallman v. Onions*, 3 Bro. C. C. 623; *Hart v. Albany*, 3 Paige (N. Y.) 214.

**Damages Incapable of Estimation.** — Where the damages which the plaintiff will suffer will not be capable of estimation, it need not be alleged that the defendant is insolvent. *Sierra Nevada Silver Min. Co. v. Sears*, 10 Nev. 346.

**Multiplicity of Suits.** — Where the facts alleged disclose a determined purpose on the part of the defendant to commit repeated injuries and thus render redress at law obtainable only by a multiplicity of suits, it is not necessary to allege that the defendant is insolvent. *Tantlinger v. Sullivan*, 80

**18. Allegation of Fraud** — *a*. **NECESSITY TO CHARGE FRAUD.** — Fraud cannot be relied upon as the ground for issuing an injunction unless it is charged in the bill.<sup>1</sup>

*b*. **HOW ALLEGED.** — A mere allegation of fraud, without stating the facts upon which the fraud is predicated, is insufficient.<sup>2</sup> It must be charged plainly and distinctly;<sup>3</sup> and there must be particular and specific allegations, and not merely vague and general averments.<sup>4</sup> See also article **FRAUD**, vol. 9, p. 675.

**19. Allegation of Usury.** — It is necessary to plead usury with the same strictness and certainty as is required in an action at law, by stating the sum of money or the value of the goods and chattels loaned or advanced, and the time at which the same was loaned or advanced.<sup>5</sup> See also article **USURY**.

Iowa 218; Ladd *v.* Osborne, 79 Iowa 93; Musselman *v.* Marquis, 1 Bush (Ky.) 463, 89 Am. Dec. 637. See further Council Bluffs *v.* Stewart, 51 Iowa 385; Bolton *v.* McShane, 67 Iowa 207.

**Insolvency, How Alleged.** — As to the method of charging insolvency in a bill for injunction, see *infra*, VIII. 20. *b*. *How Alleged*.

1. Powell *v.* Parker, 38 Ga. 644; People *v.* Lowber, 7 Abb. Pr. (N. Y. Supreme Ct.) 158.

2. Gates *v.* Steele, 58 Conn. 316; Schaefer *v.* Hunnewell, 47 Ga. 660; Montgomery *v.* Walker, 36 Ga. 515; Powell *v.* Quinn, 49 Ga. 523; Street *v.* Rider, 14 Iowa 506; Pomeroy *v.* Hindmarsh, 5 How. Pr. (N. Y. Supreme Ct.) 437. See also Scholze *v.* Steiner, 100 Ala. 148.

**Plaintiff's Ignorance of His Rights.** — It must be stated of what the fraud consists, and a mere allegation that the plaintiff was ignorant and did not know his rights is insufficient. Cobb *v.* Garner, 105 Ala. 467.

3. Powell *v.* Parker, 38 Ga. 644; People *v.* Lowber, 7 Abb. Pr. (N. Y. Supreme Ct.) 158.

4. Elston *v.* Blanchard, 3 Ill. 420; Walker *v.* Gilbert, 7 Smed. & M. (Miss.) 456, holding that fraud in a contract should be alleged with such fulness as to enable the court to set aside the contract for fraud; Jewett *v.* Dringer, 27 N. J. Eq. 271, holding that there must be reasonable distinctness and particularity, and not merely a statement of suspicions; Brooks *v.* O'Hara, 2 McCrary (U. S.) 644.

See also Clark *v.* Dayton, 6 Neb. 192, in which case the plaintiff sought to enjoin county commissioners from paying for a bridge, and it was alleged

that the allowance of the builders' bill by the commissioners was unjust, and that it was audited and allowed through fraudulent and undue means, without charging by what particular means and in what respect they were fraudulent, or by whom they were resorted to. This averment of fraud was considered altogether too general for the admission of proof.

**Intent to Deceive.** — It is necessary to charge an intent to deceive either by an express averment or by such words as necessarily imply such intent. Brooks *v.* O'Hara, 2 McCrary (U. S.) 644. Citing Gray *v.* Earl, 13 Iowa 188; Moss *v.* Riddle, 5 Cranch (U. S.) 351.

**Information and Belief.** — From Jones *v.* Thacher, 48 Ga. 83, it would seem that an allegation of fraud on information and belief is insufficient, especially where the charge is not supported by positive affidavits. See also, *supra*, VIII. 7. *Allegations on Information and Belief*.

**Perjury and Surprise.** — To lay a sufficient ground of relief against perjury and surprise, the bill should name the witnesses, and wherein they swore falsely, and set forth facts tending to show that their testimony was false. On a motion to dissolve on bill and answer, the court may dissolve for want of equity in the bill, without considering the answer. Kersey *v.* Rash, 3 Del. Ch. 321, wherein the object of the bill was to obtain an injunction against an enforcement of the judgment.

5. Neurath *v.* Hecht, 62 Md. 221. See also Johnson *v.* Griffin Banking, etc., Co., 55 Ga. 691, in which case it was objected that the allegations touching usury were not altogether definite; that it was not stated anywhere in the

**20. Allegation of Insolvency — a. NECESSITY TO CHARGE INSOLVENCY.** — In the absence of averments to the contrary it will be assumed that the defendant is solvent and able to respond in damages for the wrongs apprehended by the plaintiff.<sup>1</sup>

**b. HOW ALLEGED.** — It has been held that in the absence of a motion for a more specific allegation, an averment that the defendant will not be able to respond for the damages for which he will be liable is sufficient, and that it is not necessary to aver that he is proof against an execution.<sup>2</sup>

**Vague and Indefinite Allegations,** however, will not be considered sufficient, and it must be shown that the defendant is insolvent at the time of the filing of the bill.<sup>3</sup>

bill what rate of interest was agreed upon or what rate was charged; and that the fact of usury did not appear anywhere, except in so far as it might be suggested by comparing the amount of the loan with the amount of the acceptance.

1. *Kellar v. Bullington*, 101 Ala. 267; *Chambers v. Alabama Iron Co.*, 67 Ala. 353.

**As to the Materiality of an allegation of the defendant's insolvency and the particular instances in which such an allegation is appropriate,** see *Materiality of Allegation*, etc., *supra*, p. 956.

2. *Burroughs v. Saterlee*, 67 Iowa 396; *Long v. Kasebeer*, 28 Kan. 226.

3. **Uncertainty as to Party to Whom the Charge Refers.** — Where the bill is filed against two defendants, an allegation that they "one or both of them are insolvent," and that the plaintiff believes that they are insolvent, is insufficient. *Farland v. Wood*, 35 W. Va. 458.

In *Tigard v. Moffitt*, 13 Neb. 565, an allegation that "the said defendants have already caused the beginning of the removal of said building, and the parties engaged therein are irresponsible and unable to make good any loss that may arise," was not considered a sufficient allegation that the defendants were irresponsible, as, fairly construed, it imported, not that the defendants were engaged personally in the work of removal, but simply that they were causing other persons to do the work for them, and that such other persons were irresponsible.

**Property Beyond Reach of Process.** — An allegation that the property of the defendant is beyond the reach of legal process is as effective as an allegation of insolvency. *Conolly v. Riley*, 25 Md. 402.

**Threats to Dispose of Property.** — Alle-

gations that the defendant is insolvent, as the plaintiff is advised and believes, at least, that the defendant has declared that he will be so, and that he has threatened that no part of the plaintiff's claim shall ever be paid, are too vague and are insufficient, especially when it appears from the face of the bill that the defendant is owner of certain land on which he lives. *McLendon v. Hooks*, 15 Ga. 533.

**Disposal of "Most" of His Property.** — An allegation that the defendant has parted with "most" of the property which is subject to levy and sale, except his residence, is insufficient, because this may be true and he still be abundantly solvent. *Powell v. Parker*, 38 Ga. 644.

**Defendant's Slender Circumstances.** — An allegation that the defendant "is in very slender circumstances, and is unable to pay and satisfy the recovery were he [the plaintiff] compelled to resort to" covenants contained in a deed made by the defendant, sufficiently charges the defendant's insolvency. *Graham v. Tankersley*, 15 Ala. 634.

**No Visible Property.** — An averment that the defendant has "no visible property exempt from execution" is not sufficient. *Connery v. Swift*, 9 Nev. 39.

**Numerous Defendants.** — In *Hicks v. Compton*, 18 Cal. 206, there were numerous defendants, and it was alleged that the larger portion of them were utterly insolvent, that the plaintiff had recovered a judgment against a larger portion of them and had been unable to make half such sum, that the defendants against whom such judgments had been recovered swore before a referee that they had no property subject to execution, that many of the other defendants were equally

**21. The Prayer — a. IN GENERAL.** — The character of the bill depends upon the prayer, which defines its object and points out the defendants and the remedies and redress sought.<sup>1</sup>

**b. PRAYER FOR PROCESS.** — As in other bills in equity, an injunction bill should contain a prayer for process.<sup>2</sup>

**c. PRAYER FOR INJUNCTION.** — (1) *Necessity for Specific Prayer.* — As a general rule a remedial writ of injunction, *i. e.*, one which operates as a restraint upon the party, will not be granted unless it is specially prayed for.<sup>3</sup>

insolvent, and that although a few of them had a small amount of property it was all movable and could be readily run beyond the reach of process. Although absolute insolvency was not charged, this averment was deemed sufficient to satisfy the court that a judgment for damages would be utterly worthless.

**As of What Time.** — In *Brough v. Schanzenbach*, 59 Ill. App. 407, the allegation of insolvency was not considered sufficient because it was only an affirmation that the plaintiff at one time had been informed that the defendant was insolvent, and believed at the time of filing of the bill that he was insolvent, without any intimation that his information, belief, or representations at that time were true.

**Insolvency of Officer's Sureties.** — Where the defendant is an officer who has given a bond with sureties, it is not sufficient to allege that he is insolvent in a suit to enjoin him from performing his official duties, but it must be alleged that his sureties are insolvent. *Wells v. Dayton*, 11 Nev. 161.

1. *Per Hand, J.*, in *Clark v. Judson*, 2 Barb. (N. Y.) 90.

In *Adams v. Lamar*, 8 Ga. 83, *Nisbet, J.*, said: "To determine its character we are to look to the bill itself — to its allegations and its prayer. \* \* \* The prayer alone cannot characterize a bill; for that derives its character from the allegations in the bill. It must be consistent with the bill or it is nugatory. It may fall short of the case made, or it may exceed it. In the latter event its excess amounts to nothing."

**Complaint in Two Counts.** — Where the complaint consists of two counts, a prayer for an injunction contained in one count is a prayer for equitable relief upon the count to which the prayer is appended, without reference to the other count or to any relief to which

the plaintiff may be entitled on the other count. *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282.

2. *Binney's Case*, 2 Bland (Md.) 99, in which case Chancellor Bland said that merely naming a party in a bill as defendant does not make him a party unless process is prayed against him. See further the article *BILLS IN EQUITY*, vol. 3, p. 351.

**Necessity to Name Defendants in Prayer.**

— Where the defendants are named in the bill, it is sufficient to state in the prayer that the plaintiff prays process against the parties named, without again repeating their names. *U. S. v. Agler*, 62 Fed. Rep. 824.

3. *Wood v. Beadell*, 3 Sim. 273; *Wright v. Atkyns*, 1 Ves. & B. 314, which case was cited in a note to *Savory v. Dyer*, Ambl. 70; *Gaines v. Hale*, 26 Ark. 168; *Thompson v. Maxwell*, 16 Fla. 773; *Jefferson v. Hamilton*, 69 Ga. 401; *Berrien v. Thomas*, 65 Ga. 61; *Willett v. Woodhams*, 1 Ill. App. 411; *Lefforge v. West*, 2 Ind. 514; *Lewiston Falls Mfg. Co. v. Franklin Co.*, 54 Me. 402; *Binney's Case*, 2 Bland (Md.) 99; *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 16 N. J. Eq. 321; *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Jackson v. Bunnell*, 113 N. Y. 216; *Chicago, etc., R. Co. v. Macomb*, 2 Fed. Rep. 18. See likewise 1 Hoffm. Ch. Pr. 77; 1 Dan. Ch. Pr. 388; *Story Eq. Pl.*, § 41.

**Insufficiency of General Prayer.** — In *Wright v. Atkyns*, 1 Ves. & B. 314, Lord Eldon said: "The plaintiff cannot move for an injunction under the prayer for general relief." Cited in a note to *Savory v. Dyer*, Ambl. 70. See also, to the same effect, the following cases: *Lefforge v. West*, 2 Ind. 514; *Lewiston Falls Mfg. Co. v. Franklin Co.*, 54 Me. 402; *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Chicago, etc., R. Co. v. Macomb*, 2 Fed. Rep. 18, in which last-mentioned case it was

The Reason that has been assigned for requiring an injunction to be specially prayed is that if it be specially prayed, the defendant may make a different case by his answer from what he otherwise would.<sup>1</sup>

**Perpetual Injunction Incidental to Main Relief.**—On the final hearing the court may decree a perpetual injunction, if it is necessary for the purpose of complete justice, although not prayed for in the bill.<sup>2</sup>

(2) *Prayer for Preliminary Injunction.*—A preliminary injunction should not be granted unless there is a prayer therefor in the bill.<sup>3</sup>

**An Exception to the General Rule** that a preliminary injunction will not be granted unless there is a prayer therefor, exists in some cases as to which there are statutory provisions that the court may, during the pendency of the action, make and enforce proper orders.<sup>4</sup>

(3) *Mandatory Injunction.*—A judicial writ of injunction, *i. e.*, one commanding an act to be done, may be granted on the final

said that a prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill.

**In Florida** it has been provided by statute that no injunction shall be granted to restrain an action at law unless it is prayed for. *Thompson v. Maxwell*, 16 Fla. 773.

1. *Gaines v. Hale*, 26 Ark. 168.

2. *Sanderlin v. Baxter*, 76 Va. 299, citing *Kerr Inj.*, p. 637, c. 29, § 4. See also *Hovey v. M'Crea*, 4 How. Pr. (N. Y.) 31, wherein Hand, J., said: "Where the court, having full cognizance of the matter, has, by its own decree taken it into its own hands, it will interfere by its injunction to prevent injury to the property, either by the parties litigant or others, although there is no injunction prayed by the bill." Citing *Wood v. Beadell*, 3 Sim. 273; *Matter of Hemiup*, 2 Paige (N. Y.) 319; *Clark v. Judson*, 2 Barb. (N. Y.) 90; *Dan. Ch. Pr.* 1834; 1 Barb. Ch. Pr. 619; 1 *Hoffman Ch. Pr.* 77.

3. In *Burnham v. Kempton*, 44 N. H. 78, the court said: "We have not been asked in terms to grant any temporary injunction, so that the specific relief prayed for cannot now be granted." See also, in support of the proposition stated in the text, the following cases: *Wood v. Beadell*, 3 Sim. 273, in which case, although an injunction was asked for in the general prayer, a preliminary injunction was refused because it was not asked for in

the prayer for process; *Savory v. Dyer*, Ambl. 70; *Davile v. Peacock*, Barnard 27, which two last-mentioned cases are cited in a note to *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165; *College Corner, etc., Gravel Road Co. v. Moss*, 77 Ind. 139; *Vermilyea v. Vermilyea*, 14 How. Pr. (N. Y. Supreme Ct.) 470, *per Johnson, J.*; *Clark v. Judson*, 2 Barb. (N. Y.) 90, *per Hand, J.*; *Uhl v. Irwin*, 3 Okla. 388, *per Bierer, J.* See further *Eden Inj.* 37, and *Story Eq. Pl.* § 41, which authorities were cited in *Clark v. Judson*, 2 Barb. (N. Y.) 90.

4. *Uhl v. Irwin*, 3 Okla. 388, which case was decided under a statute (Stat. Okla. 1893, § 4548) providing that pending a petition for divorce "the court, or a judge thereof in vacation, may make and enforce by attachment such order to restrain the disposition of the property of the parties, or of either of them, \* \* \* or for the control of the children and support of the wife during the pendency of the action, as may be right and proper." Said the court: "It very often occurs that no necessity for such an order is made to appear at the time the complaint \* \* \* is filed. \* \* \* It certainly would be unreasonable to hold that under such a statute as this it would become necessary for a party to amend his or her petition in order to entitle him or her to this auxiliary relief." Citing *College Corner, etc., Gravel Road Co. v. Moss*, 77 Ind. 139.

hearing under the general prayer for relief, and need not be specially prayed.<sup>1</sup>

(4) *Prayer for Injunction in the Prayer for Process.* — The prayer for an injunction must be not alone in the prayer for relief, but in the prayer for process.<sup>2</sup>

*d. AMENDMENT AS RESPECTS THE PRAYER.* — The omission of a special prayer for injunction is a formal matter, and will not be permitted to defeat justice, and an amendment will be allowed.<sup>3</sup>

**22. Verification of the Bill** — *a. NECESSITY TO VERIFY BILL.* — When the court is asked to grant a restraining order or preliminary injunction during the pendency of the action, and before final hearing, the bill should be sworn to.<sup>4</sup>

1. *Gaines v. Hale*, 26 Ark. 168.

2. *Wood v. Beadell*, 3 Sim. 273; *Lewiston Falls Mfg. Co. v. Franklin Co.*, 54 Me. 402; *Union Bank v. Kerr*, 2 Md. Ch. 460; *Clark v. Judson*, 2 Barb. (N. Y.) 90, *per Hand, J.*; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Willett v. Woodhams*, 1 Ill. App. 411.

But see *Webb v. Ridgely*, 38 Md. 364, wherein it was held that the prayer for the writ of injunction need not necessarily be included in the prayer for process, and that it is unimportant whether it is made in a separate prayer or is united with the ordinary prayer for subpoena; and reference is made to this case for the form of a prayer.

**Definiteness.** — Where the bill charges that the defendants, the mayor and common council of the city, assessed the plaintiff's land for state, city, and county taxes, a prayer that the defendants may be enjoined against assessing any tax upon the land in question is sufficiently definite and embraces the three kinds of tax. *Paterson, etc., R. Co. v. Jersey City*, 9 N. J. Eq. 434.

**Abatement of Nuisance.** — In an action to abate a nuisance, a prayer "that said nuisance be abated" is sufficient. *Sullivan v. Royer*, 72 Cal. 248.

**Until Further Order of the Court.** — In *Steiner v. Scholze*, 105 Ala. 607, the plaintiff prayed for an injunction to be continued "until the further orders of the court—at least until the determination of the claim suit in the Circuit Court of Jefferson county," and it was held that an interlocutory or preliminary injunction was prayed for.

3. *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 16 N. J. Eq. 379. See also *Hinckley v.*

*Haines*, 69 Me. 76, in which case it was held that a bill to remove a cloud on title may be amended by adding a prayer for injunction. See, further, *Camden Horse R. Co. v. Citizens Coach Co.*, 31 N. J. Eq. 525, holding that the prayer may be amended if necessary. See also *Beckham v. Newton*, 21 Ga. 187, to the effect that the prayer may be amended.

**Prayer for Preliminary Injunction.** — Where there is no prayer for a preliminary injunction, the bill may be amended in this respect, and the plaintiff will be permitted to renew his application upon the amended bill. *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Savory v. Dyer*, Ambl. 70.

4. *Alabama.* — *Thorington v. Gould*, 59 Ala. 461; *Bolling v. Tate*, 65 Ala. 417.

*Florida.* — *Ballard v. Eckman*, 20 Fla. 661.

*Georgia.* — In *Boykin v. Epstein*, 87 Ga. 25, it was held that a statute providing that "no petition needs to be verified unless it seeks an extraordinary equitable relief or remedy, in which case it must be," imperatively requires that a petition for an injunction shall be verified. See also *Alspaugh v. Adams*, 80 Ga. 345; *Brunswick v. Finney*, 54 Ga. 317; *Mathews v. Cody*, 60 Ga. 355; *Hone v. Moody*, 59 Ga. 731; *Landes v. Globe Planter Mfg. Co.*, 73 Ga. 176; *Hemphill v. Ruckersville Bank*, 3 Ga. 435; *Martin v. Burgwyn*, 88 Ga. 78.

*Illinois.* — *Hawkins v. Hunt*, 74 Ill. 42.

*Indiana.* — It is required by statute that the complaints shall be verified in order to entitle the plaintiff to a preliminary injunction. *Rich v. Dessar*, 50 Ind. 309; *Sand Creek Turnpike Co.*

**Amended Bill.** — Where an amendment is offered, there should be an affidavit of the verity of the allegations of the amended bill

*v. Robbins*, 41 Ind. 79; *Ross v. Crews*, 33 Ind. 120; *McQuarrie v. Hildebrand*, 23 Ind. 122.

*Iowa*. — *Stump v. Buzick*, 3 Greene (Iowa) 245, following *Porter v. Moffett*, 1 Morr. (Iowa) 108.

*Maryland*. — *Salmon v. Clagett*, 3 Bland (Md.) 125; *Laupheimer v. Rosenbaum*, 25 Md. 219; *Jones v. Magill*, 1 Bland (Md.) 177; *Negro Charles v. Sheriff*, 12 Md. 274; *Binney's Case*, 2 Bland (Md.) 100.

*Michigan*. — *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189.

*Nebraska*. — Civ. Code Neb., § 113; *Johnson v. Jones*, 2 Neb. 126.

*New Jersey*. — *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Youngblood v. Schanp*, 15 N. J. Eq. 42; *Perkins v. Collins*, 3 N. J. Eq. 482.

*New York*. — *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224; *Campbell v. Morrison*, 7 Paige (N. Y.) 157; *Orleans Bank v. Skinner*, 9 Paige (N. Y.) 305; *Bogert v. Haight*, 9 Paige (N. Y.) 297; *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193.

Under Code Civil Procedure, §§ 604 and 607, which latter section applies to section 603, as a general rule an injunction will be granted in an action only upon a complaint and affidavit showing sufficient grounds therefor, and not on a verified complaint alone; but where the allegations of the complaint are positive, and not on information and belief, and the allegations are sworn to be true, the complaint will be treated as an affidavit. *Hecker v. New York*, 28 How. Pr. (N. Y. Supreme Ct.) 211, 18 Abb. Pr. (N. Y. Supreme Ct.) 369, in which case *Ingraham, J.*, said that "it is only where the verification of the complaint is positive that it will suffice as the affidavit." See also *Woodruff v. Fisher*, 17 Barb. (N. Y.) 224, wherein it was said: "The positive verification of a complaint is tantamount to an affidavit; and it would be merely supererogatory to repeat the same matter in the form of an affidavit. \* \* \* If the motion for an injunction is for causes existing at the commencement of the suit, and those are fully set out in the complaint, under positive allegations, and an injunction demanded therein, the ordinary verification of the complaint is sufficient. If the cause for an injunction arise during litigation, then,

as a general rule, there must be an affidavit. *Citing Whitt. Pr.* 680, 681. See likewise *Smith v. Reno*, 6 How. Pr. (N. Y. Supreme Ct.) 124, *per Harris, J.*; *Leffingwell v. Chave*, 19 How. Pr. (N. Y. Super. Ct.) 54; *Roome v. Webb*, 1 Code Rep. (N. Y.) 114, 3 How. Pr. (N. Y. Supreme Ct.) 327; *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193; *Cushing v. Ruslander*, 49 Hun (N. Y.) 19, 15 Civ. Pro. Rep. (N. Y.) 106; *Chatterton v. Kreidler*, 2 Abb. N. Cas. (N. Y. Supreme Ct.) 453; *Bostwick v. Elton*, 25 How. Pr. (N. Y. Supreme Ct.) 362; *Penfield v. White*, 8 How. Pr. (N. Y. Supreme Ct.) 87.

But see *Millikin v. Cary*, 5 How. Pr. (N. Y. Supreme Ct.) 272, wherein *Sill, J.*, said: "The proper mode of proceeding is to draw the complaint as in other cases, stating facts only, and omitting evidence and legal conclusions. The additional circumstances and evidence which may be needed to obtain an order of injunction should be presented by affidavit." *Disapproving Roome v. Webb*, 3 How. Pr. (N. Y. Supreme Ct.) 327, and *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225, and declaring that it does not appear that this point was raised by counsel in either case, or particularly examined by the judge. See also, to the same effect, *Jewett v. Allen*, 3 How. Pr. (N. Y. Supreme Ct.) 129, which case was cited in *Hecker v. New York*, 28 How. Pr. (N. Y. Supreme Ct.) 211, 18 Abb. Pr. (N. Y. Supreme Ct.) 369, in support of the proposition that, as a general rule, mere verification of the complaint is insufficient.

*Where the Complaint Is Not Verified*, the plaintiff must rely alone upon the facts stated in the affidavit upon which he seeks to obtain an injunction. *Smith v. Reno*, 6 How. Pr. (N. Y. Supreme Ct.) 124.

*Texas*. — The petition must be sworn to, and this is a statutory requirement. *Taylor v. Gillean*, 23 Tex. 508; *Gaskins v. Peebles*, 44 Tex. 390; *Pullen v. Baker*, 41 Tex. 419; *Eccles v. Daniels*, 16 Tex. 136.

*United States*. — *Read v. Consequa*, 4 Wash. (U. S.) 174; *Daly v. Sheriff*, 1 Woods (U. S.) 175; *U. S. v. Parrott*, 1 McAll. (U. S.) 271; *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618.



and of the causes that make the amendments necessary.<sup>1</sup>

*b. EXCEPTIONS TO THE RULE REQUIRING VERIFICATION.* — What is required as preliminary to the granting of an injunction, other than the sufficiency of the averments of the bill, is that the confidence of the court should be obtained, and it is not in all cases indispensable that the bill should be verified. Although the bill is not verified, an injunction will be allowed where documentary evidence or records are produced which satisfy the conscience of the court.<sup>2</sup>

*England.* — James *v.* Downes, 18 Ves. Jr. 522; Davis *v.* Leo, 6 Ves. Jr. 785.

In Rhode Island a bill for an injunction is not demurrable for want of an affidavit verifying the allegations upon which an injunction is asked, because in that state an injunction is not issued *ex parte* without proof. Harrington *v.* Harrington, 15 R. I. 341.

**Verification of Application.** — In Kansas, when the petition for an injunction is not sworn to, an application for an injunction stating that the relator has filed a petition for an injunction in the District Court, with a copy of the petition attached thereto, which application is verified by the oaths of the relator and another person, each of whom swears that he has read the application and the exhibit thereto attached, and that they are true, is a substantial compliance with Code Civ. Pro. Kan., §§ 238, 239. State *v.* Loomis, 46 Kan. 107.

**Petition of Intervener.** — Where an injunction is asked by an intervener, his petition must be verified. Taylor *v.* Gillean, 23 Tex. 508.

**Waiver of Discovery.** — It is especially necessary that the bill should be verified where discovery is waived. Mathews *v.* Cody, 60 Ga. 355.

**Bill for Discovery and Injunction.** — Although a bill praying merely for discovery need not be sworn to, yet when the party seeks, in addition to the discovery, to stay proceedings in a suit pending at law, he must support the allegations of the bill by an affidavit of their truth. Owsley *v.* Barbour, 4 Ind. 584, citing Appleyard *v.* Seton, 16 Ves. Jr. 223.

**Information Filed by Attorney-General.** — In Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 593, it being objected that an information filed by the attorney-general was not supported by affidavit, the court said: "We hold \* \* \* that an information of the attorney-general *ex officio*, acting under the sanction of his oath of office, is equivalent to a bill in chan-

cery verified on information and belief. Like such a bill, it will call in proper cases for answer under oath. But, as in case of such a bill, an injunction will not usually go upon it, unsupported by positive affidavit, until after the defendant has had the opportunity to contradict it on oath, and has failed to do so." *Following Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133.

1. James *v.* Downes, 18 Ves. Jr. 522; Semmes *v.* Boykin, 27 Ga. 47; Maddox *v.* Rowe, 28 Ga. 61; Walker *v.* Ayres, 1 Iowa 449 [in which last mentioned case the court cited Rodgers *v.* Rodgers, 1 Paige (N. Y.) 424; Whitmarsh *v.* Campbell, 2 Paige (N. Y.) 67; Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81; Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 46]; See also Rhodes *v.* Union Bank, 7 Rob. (La.) 63; Calderwood *v.* Trent, 9 Rob. (La.) 227.

**Supplemental Bill.** — A supplemental bill should be verified by affidavit. Richardson *v.* Dinkgrave, 26 La. Ann. 651.

2. Negro Charles *v.* Sheriff, 12 Md. 274; Salmon *v.* Clagett, 3 Bland (Md.) 125, *per* Chancellor Bland; Jones *v.* Magill, 1 Bland (Md.) 177. See also Thorington *v.* Gould, 59 Ala. 461; Schermerhorn *v.* L'Espenasse, 2 Dall. (U. S.) 360; Hancock *v.* Walsh, 3 Woods (U. S.) 351; Boykin *v.* Epstein, 87 Ga. 25; Morris Canal, etc., Co. *v.* Bartlett, 3 N. J. Eq. 9, which case was decided under a statute requiring the chancellor to be satisfied with the plaintiff's equity, either by affidavit annexed to the bill or other means.

**Admissions in Answer.** — An injunction may be granted on the equity admitted by the answer after it comes in, although the bill has not been sworn to. *Per* Chancellor Bland in Binney's Case, 2 Bland (Md.) 99, citing Wilson *v.* Wilson, 1 Desaus. (S. Car.) 224.

**Motion for Injunction After Defendant's Appearance.** — The matters alleged in

**Injunction on Final Hearing Only.** — It is only necessary to have the bill verified when a restraining order or preliminary injunction is sought, and where the only relief prayed for is an injunction on the final hearing, no verification of the bill is required,<sup>1</sup> inasmuch as a final decree for an injunction cannot be rendered until the facts authorizing it have been established either by the defendant's admissions or by evidence.<sup>2</sup>

**c. AT WHAT TIME THE BILL SHOULD BE VERIFIED.** — In this country the affidavit is ordinarily made before the bill is filed, and is annexed to and filed with the bill, but by the English practice the affidavit is not made until after the bill has been filed.<sup>3</sup>

**d. BY WHOM AFFIDAVIT SHOULD BE MADE.** — The affidavit is usually made by the plaintiff;<sup>4</sup> and where there are more plaintiffs than one, the bill may be verified by the affidavit of one of them.<sup>5</sup> The affidavit, by whomsoever it is made, should be

the bill may be established to the satisfaction of the court on a motion made after appearance and upon notice by any competent evidence without relying upon the oath of the plaintiff. *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362.

**Other Exceptions to the Rule**, viz., those instances in which it is not essential that the plaintiff should swear positively to the bill, will be found *infra*, p. 969.

1. *Hawkins v. Hunt*, 14 Ill. 42; *Rich v. Dessar*, 50 Ind. 309; *Clay County v. Markle*, 46 Ind.\* 96; *Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79; *Champ v. Kendrick*, 130 Ind. 549; *Denny v. Moore*, 13 Ind. 418; *Porter v. Moffett*, 1 Morr. (Iowa) 108, 153; *Claverie v. Gerodias*, 30 La. Ann. 291; *Eccles v. Daniels*, 16 Tex. 136; *Edrington v. Allsbrooks*, 21 Tex. 186; *Pullen v. Baker*, 41 Tex. 419; *Love v. Powell*, 67 Tex. 15, *per Gaines*, J.

In *Georgia*, however, it is provided by statute that a petition seeking an extraordinary equitable relief or remedy must be verified, and it has been held that the statute imperatively requires that a petition for injunction shall be verified, and that the judge may demand that this be done "before taking action or allowing a hearing to be had thereon." *Boykin v. Epstein*, 87 Ga. 25, in which case Lumpkin, J., said: "If, as contended, \* \* \* proof of the allegations at and during the hearing would be sufficient verification, there would have been no need at all for passing the statute cited, because, as no injunction could be properly granted \* \* \* unless facts authorizing such relief are proved to the

judge, it follows that unless the statute means to provide for a verification of the petition in some way previous to action thereon by the judge, it is useless, and serves no practical purpose."

2. *Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79.

3. *Per* Chancellor Green in *Youngblood v. Schamp*, 15 N. J. Eq. 42, *citing* 1 Smith Ch. Pr. 95, and 3 Daniell Ch. Pr. 1890.

**In United States Courts** there is no imperative rule requiring verification of the bill at the time it is signed. *Woodworth v. Edwards*, 3 Woodb. & M. (U. S.) 120; *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618; *Hughes v. Northern Pac. R. Co.*, 18 Fed. Rep. 106.

**Before an Answer Has Been Filed** the defendant has a right to call upon the plaintiff to verify the truth of the allegations of the petition. *Richardson v. Dinkgrave*, 26 La. Ann. 651.

4. *Per* Trippe, J., in *Cook v. Houston County*, 54 Ga. 163; *per* Chancellor Bland in *Salmon v. Clagett*, 3 Bland (Md.) 125.

5. *Hemphill v. Ruckersville Bank*, 3 Ga. 435; *Cook v. Houston County*, 54 Ga. 163, *per* Trippe, J.; *Jones v. Magill*, 1 Bland (Md.) 177, *per* Chancellor Bland; *Salmon v. Clagett*, 3 Bland (Md.) 125, *per* Chancellor Bland.

In *Louisiana* it has been held that where an application for an injunction is made by several plaintiffs representing distinct interests, and an affidavit is made by only one of the plaintiffs, and it does not appear from either the petition or the affidavit that he acted as the agent of the others, the injunction must

made by some one who is acquainted with the facts.<sup>1</sup> Thus it may be made by the plaintiff's counsel where the plaintiff is absent or for any reason his affidavit cannot be procured.<sup>2</sup> Or it may be made by an agent who is acquainted with the facts where the principal is not in a situation to swear to the bill.<sup>3</sup> See also the article VERIFICATION.

*e.* FORM OF AFFIDAVIT. (See also the article VERIFICATION.)

—(1) *In General.*—The verification must extend to all the material facts upon which the right to an injunction rests,<sup>4</sup> and must be

be dissolved as to the parties by whom no affidavit was made. *Robertson v. Travis*, 4 La. Ann. 151.

1. *Mathews v. Cody*, 60 Ga. 355; *Cook v. Houston County*, 54 Ga. 163. *per Trippe*, J. [*citing* 1 Smith Ch. Pr. 596; *Hemphill v. Ruckersville Bank*, 3 Ga. 435.]

In *Georgia*, under the Code of 1882, § 3211, "the affidavit of a competent person" is sufficient. *Cook v. Houston County*, 54 Ga. 163.

2. *Per* Chancellor Green in *Youngblood v. Schamp*, 15 N. J. Eq. 42 [*citing* 1 Smith Ch. Pr. 575; 3 Dan. Ch. Pr. 1890; 1 Hoffman Ch. Pr. 79; 3 Hoffman Ch. Pr. 18]. See also *Alspaugh v. Adams*, 80 Ga. 345; *Sizer v. Miller*, 9 Paige (N. Y.) 605.

In *Texas* it has been held, under a statute (Act Tex. Jan. 11, 1856) giving to an affidavit made by an attorney the same effect as one made by his client, that a petition for an injunction may be verified by the petitioner's attorney. *Edrington v. Aillsbrooks*, 21 Tex. 186.

3. *Woodworth v. Edwards*, 3 Woodb. & M. (U. S.) 120, *citing* 1 Barb. Ch. Pr. 41. See also *Brunswick v. Finney*, 54 Ga. 317; *Binney's Case*, 2 Bland (Md.) 100; *Long v. Kasebeer*, 28 Kan. 226; *Salmon v. Claggett*, 3 Bland (Md.) 125; *Jones v. Magill*, 1 Bland (Md.) 177; *Youngblood v. Schamp*, 15 N. J. Eq. 42; *Dunlop v. Harrison*, 14 Gratt. (Va.) 251.

**Corporation as Plaintiff.**—Where the bill is filed by a corporation an officer thereof or other person who has personal knowledge of the facts should swear to them. *Youngblood v. Schamp*, 15 N. J. Eq. 42; *Orleans Bank v. Skinner*, 9 Paige (N. Y.) 305.

4. *Youngblood v. Schamp*, 15 N. J. Eq. 42.

**Forms of Affidavits.**—In *Georgia* an affidavit "that the facts contained in the foregoing amendment are true, and such statements as are made on information and belief, he believes them

to be true," is sufficient. *Rice v. Dodd*, 94 Ga. 414.

But in *Bailey v. Bailey*, 90 Ga. 435, an affidavit that "the facts contained in the written bill of complaint are true so far as they depend on our own knowledge and belief, and so far as they depend on the knowledge and information of others we believe them to be true," was not upheld.

In *Illinois* it has been repeatedly held that an affidavit that the plaintiff has "read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters stated therein on information and belief, and as to those he believes it to be true," is not sufficient. *Stirlen v. Neustadt*, 50 Ill. App. 378; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; *Northern Electric R. Co. v. Chicago, etc., R. Co.*, 57 Ill. App. 409; *Werner Co. v. Miamisburg First Nat. Bank*, 55 Ill. App. 321.

*Indiana.*—In *Champ v. Kendrick*, 130 Ind. 549, an affidavit that "the matters and things set forth in the foregoing complaint are true, as he is informed and believes," was considered good and as equivalent to an oath that the matters were true. *Citing Thayer v. Burger*, 100 Ind. 262; *Bonsell v. Bonsell*, 41 Ind. 476; *Curry v. Baker*, 31 Ind. 151; *State v. Ellison*, 14 Ind. 380; *McNamara v. Ellis*, 14 Ind. 516; *Archibald v. Lamb*, 9 Ind. 544.

But in *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165, an affidavit "that the bill is true in substance and matter of fact so far as the things therein stated are set forth positively, and that he believes them to be true so far as they are stated upon information and belief," was considered insufficient.

*Iowa.*—Where the petition sets forth the facts upon which the relief is demanded an affidavit of their truth as the affiant believes is sufficient. *Kelley v. Briggs*, 58 Iowa 332.

direct and positive;<sup>1</sup> it must be such as to subject the affiant to the penalty of perjury if the facts sworn to are not true;<sup>2</sup> and it must not be left in doubt what facts the affiant swears to.<sup>3</sup>

*Louisiana.*—In *Klein v. Coon*, 10 La. Ann. 522, it was held that an affidavit "that all the facts and allegations in the foregoing petition are true, and those stated to be derived from the information of others he believes to be true," is sufficient to authorize an injunction. *Following Livingston v. Dick*, 1 La. Ann. 323.

*Maryland.*—In *Triebert v. Burgess*, 11 Md. 452, the allegations of the bill were stated in the usual manner of averring facts as based upon the knowledge of the plaintiff and were sworn to by him as being true "to the best of his knowledge and belief," and the affidavit was considered sufficient. *Citing Coale v. Chase*, 1 Bland (Md.) 137, in which case an answer sworn to in much the same manner was considered sufficient. In the last-mentioned case, however, it was said that regularly the affidavit should assert "that the facts within the defendant's own knowledge are true, and that those facts not within his own knowledge he believes to be true."

*Minnesota.*—Where all of the averments of the bill are in form positive, verification in the usual form satisfies the requirements of the statute. *McRoberts v. Washburne*, 10 Minn. 23.

*New Jersey.*—An oath of the plaintiff that he verily believes that the facts, matters, and things stated in the bill, so far as they relate to the acts and deeds of other persons than himself, are true, is insufficient. *Conover v. Ruckman*, 34 N. J. Eq. 293.

In *Perkins v. Collins*, 3 N. J. Eq. 482, the bill charged the facts without averring that any part of them was charged as of the knowledge of the plaintiff, or that any of them were received from information of others, and an affidavit in the following words was considered sufficient: "State of New Jersey, ss. James Perkins, the complainant in the above bill, being duly sworn according to law, on his oath saith that the matters and things set forth and charged as of his own knowledge are true; and those which are set forth as received from others, and of which the complainant was informed, he believes to be true."

*New York.*—In *Woodruff v. Fisher*, 17

Barb. (N. Y.) 224, the allegations of the bill were made positively, and not on information and belief, and the following affidavit was considered sufficient: "\* \* \* that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters he believes it true."

Where the matters relied upon for an injunction are stated on information and belief, verification in the ordinary form is insufficient. *Hecker v. New York*, 28 How. Pr. (N. Y. Supreme Ct.) 211. *Citing Bostwick v. Elton*, 25 How. Pr. (N. Y. Supreme Ct.) 362.

1. *Perkins v. Collins*, 3 N. J. Eq. 482; *Hebert v. Joly*, 5 La. 52; *Elder v. New Orleans*, 31 La. Ann. 500; *New Orleans Canal, etc., Co. v. Carriel*, 3 La. Ann. 225.

In *Davis v. Leo*, 6 Ves. Jr. 784, Lord Eldon said: "I dare not grant an injunction in this case." The bill states a title sufficiently, if it was duly verified. But the affidavits disclose the case no farther than that it may or may not be true; and I am of opinion the court ought not to grant an injunction unless there is positive evidence of actual title." This case was cited in *Boulo v. New Orleans, etc., R. Co.*, 55 Ala. 480.

2. *Catlett v. McDonald*, 13 La. 44, *citing Reboul v. Behrens*, 5 La. 79.

3. In *Louisiana* it has been repeatedly held that an affidavit that "the facts and allegations contained in the above petition which render an injunction necessary are true and correct," and other similar affidavits, are insufficient. *Hebert v. Joly*, 5 La. 50; *Reboul v. Behrens*, 5 La. 79; *Ricard v. Hiriart*, 5 La. 244; *Sauvinet v. Poupono*, 14 La. 87; *Elder v. New Orleans*, 31 La. Ann. 500.

**Statement that All the Facts Are True.**—An affidavit that the facts and allegations in the petition are true, without stating that they are all true, is sufficient. *Lewis v. Winston*, 26 La. Ann. 707.

**Additional Facts Stated in Affidavit.**—The fact "that the affidavit states more than the complaint does not lessen the

(2) *Information and Belief*. — As a general rule, a bill sworn to upon information and belief, unassisted by affidavits made by those from whom the plaintiff's information and belief are derived, is insufficient.<sup>1</sup>

**There Are Some Exceptions to This Rule**, and it is not essential that the plaintiff should swear positively to the existence of facts which are shown by documents or records which are referred to in the bill;<sup>2</sup> and where the bill charges fraud and prays a discovery,

efficacy of the facts stated in the complaint, or transfer the application made upon the complaint to an application made upon affidavit." *Badger v. Wagstaff*, 11 How. Pr. (N. Y. Supreme Ct.) 562.

**Verification before Plaintiff's Attorney.**

— An affidavit which is intended to be made the basis of an application for an injunction should not be sworn to before the plaintiff's attorney. *Kuh v. Barnett*, 57 N. Y. Super. Ct. 234, wherein it is said that the rule not to allow an affidavit taken before the attorney in the action to be read is an old rule of the King's Bench that has often been followed. *Citing Tidd's Prac.* 451; *Taylor v. Hatch*, 12 Johns. (N. Y.) 340; *Anonymous*, 4 How. Pr. (N. Y. Supreme Ct.) 290; *Bliss v. Molter*, 58 How. Pr. (N. Y. Supreme Ct.) 112; *Murray v. Hefferan*, 2 Month. L. Bul. (N. Y.) 67.

**The Officer's Certificate.** — In *Way v. Lamb*, 15 Iowa 79, it was held under Rev. Stat. Iowa 1860, § 2913, that the officer should certify that the affidavit was not only signed in his presence, but also that it was sworn to before him.

**Authentication of Officer's Official Character.** — Where the affidavit is made in another state, the official character of the person who administered the oath must be authenticated. *Behn v. Young*, 21 Ga. 207.

**Omission of Jurat.** — Where the bill has been actually sworn to, the omission of the master to sign the jurat is not one which affects the interests of the defendant, and is immaterial. *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467, in which case the chancellor declined to dissolve the injunction on this ground.

**Affidavit by Trustee.** — Where a petition for an injunction is presented by a party who describes himself as a trustee, it is unnecessary that his capacity as trustee should be repeated

in the affidavit. *Robertson v. Travis*, 4 La. Ann. 151.

1. *Florida*. — *Ruge v. Apalachicola Oyster Canning, etc., Co.*, 25 Fla. 656; *Ballard v. Eckman*, 20 Fla. 661; *Peck v. Spencer*, 26 Fla. 23.

*Georgia*. — *Landes v. Globe Planter Mfg. Co.*, 73 Ga. 176; *Home v. Moody*, 59 Ga. 731.

*Illinois*. — *Stirlen v. Neustadt*, 50 Ill. App. 378; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; *Northern Electric R. Co. v. Chicago, etc., R. Co.*, 57 Ill. App. 409.

*Indiana*. — *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

*Kansas*. — *Atchison v. Bartholow*, 4 Kan. 124, in which case an affidavit that the matters "are, according to the best of their knowledge, information, and belief, true in substance and in fact," was considered insufficient. See also *Long v. Kasebeer*, 28 Kan. 226.

*Nevada*. — It is sufficient to verify the complaint in the manner required by Prac. Act, § 113 (1 Comp. Laws 1174), which implies that the averments of the complaint may be made upon information and belief. *Sierra Nevada Silver Min. Co. v. Sears*, 10 Nev. 346.

*New Jersey*. — *Conover v. Ruckman*, 34 N. J. Eq. 293; *Perkins v. Collins*, 3 N. J. Eq. 482.

*New York*. — *Kuh v. Barnett*, 57 N. Y. Super. Ct. 234; *Roome v. Webb*, 1 Code Rep. (N. Y.) 114, 3 How. Pr. (N. Y. Supreme Ct.) 327; *Rateau v. Bernard*, 12 How. Pr. (N. Y. Supreme Ct.) 464; *People v. New York*, 32 Barb. (N. Y.) 102; *Hecker v. New York*, 28 How. Pr. (N. Y. Supreme Ct.) 211; *Bostwick v. Elton*, 25 How. Pr. (N. Y. Supreme Ct.) 362; *Champlin v. New York*, 3 Paige (N. Y.) 573; *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

*United States*. — *U. S. v. Parrott*, 1 McAll. (U. S.) 271.

*England*. — *Davis v. Leo*, 6 Ves. Jr. 785.

2. *Hammersley v. Wyckoff*, 8 Paige

from the very nature of things positive proof cannot be expected, and an affidavit founded on information and belief alone is sufficient.<sup>1</sup> And an affidavit made on information and belief may be sufficient as against a defendant who has had an opportunity to deny the allegations if they are unfounded.<sup>2</sup>

**Necessity to Annex Affidavits of Third Persons.** — Where the plaintiff does not personally know the facts constituting his right to equitable relief, he should swear that the facts stated as within his knowledge are true, and that those which he alleges are not stated within his knowledge he believes to be true,<sup>3</sup> and he should annex to the bill affidavits of those from whom his information is derived.<sup>4</sup>

(3) *Form of Affidavit by Third Person.* — Where the injunction is sought upon affidavits of others than the plaintiff, if any material allegation or charge which is necessary to be sworn to positively is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information, swearing that he knows such allegations or charges as are within his knowledge to be true and that the others he believes to be true, in the same manner as if the bill had been sworn to by the plaintiff himself and some of the material facts to sustain the injunction depended upon information derived by the plaintiff from others.<sup>5</sup>

**23. Multifariousness.** (See also article MULTIFARIOUSNESS.) —

*a. IN GENERAL.* — If there be a misjoinder of causes of action

(N. Y.) 72, *citing* Campbell v. Morrison, 7 Paige (N. Y.) 158. See also Youngblood v. Schamp, 15 N. J. Eq. 42; Edrington v. Allsbrooks, 21 Tex. 186.

1. *Per* Chancellor Green in Youngblood v. Schamp, 15 N. J. Eq. 42. *Citing* Atty.-Gen. v. Columbia Bank, 1 Paige (N. Y.) 511, and Campbell v. Morrison, 7 Paige (N. Y.) 157.

2. Walker v. Devereaux, 4 Paige (N. Y.) 229.

**Objection Waived.** — The manner in which the complaint is verified is waived where the injunction is granted on a hearing of all the parties and no objection is made thereto. McRoberts v. Washburne, 10 Minn. 23, *citing* Campbell v. Morrison, 7 Paige (N. Y.) 160.

**Objections Waived by Answer.** — In Hughes v. Feeter, 18 Iowa 142, it was held under Rev. Stat. Iowa, § 2916, that defects in the verification were waived by answering the petition without objecting thereto, and that the defendant could not, therefore, move to dissolve.

3. Reboul v. Behrens, 5 La. 79; Cat-

lett v. McDonald, 13 La. 44; Triebert v. Burgess, 11 Md. 452; Campbell v. Morrison, 7 Paige (N. Y.) 157.

4. Ballard v. Eckman, 20 Fla. 661; Ruge v. Apalachicola Oyster Canning, etc., Co., 25 Fla. 656; Peck v. Spencer, 26 Fla. 23; Hone v. Moody, 59 Ga. 731; Southern Plank Road Co. v. Hixon, 5 Ind. 165; Ramsey v. Erie R<sup>r</sup> Co., 38 How. Pr. (N. Y. Supreme Ct.) 193; Hamersley v. Wyckoff, 8 Paige (N. Y.) 72; Walker v. Devereaux, 4 Paige (N. Y.) 229; Orleans Bank v. Skinner, 9 Paige (N. Y.) 305; Hecker v. New York, 18 Abb. Pr. (N. Y. Supreme Ct.) 369; Campbell v. Morrison, 7 Paige (N. Y.) 157.

5. Orleans Bank v. Skinner, 9 Paige (N. Y.) 305 [*citing* Campbell v. Morrison, 7 Paige (N. Y.) 157; Catlett v. McDonald, 13 La. 44, and 1 Hoffman Pr. 79]. See also Ballard v. Eckman, 20 Fla. 661; Bowes v. Hoeg, 15 Fla. 403; Dunham v. Curtis, 92 Ga. 514; Jordan v. Gauden, 73 Ga. 191; Kuh v. Barnett, 57 N. Y. Super. Ct. 234; Wiggan v. New York, 9 Paige (N. Y.) 16; Pullen v. Baker, 41 Tex. 419.

the bill will be multifarious and therefore demurrable,<sup>1</sup> but the objection of multifariousness is not favored, for the reason that it is to the interest of the parties as well as that of the public that all matters in controversy shall be settled in one suit when it can be done with safety and without great practical inconvenience.<sup>2</sup>

**b. WHAT CONSTITUTES MULTIFARIOUSNESS.** — When the object of the bill is single, to establish and obtain relief for one claim in which all the defendants may be interested, it is not multifarious, although the defendants may have different and separate interests;<sup>3</sup> on the other hand, however, where several acts are charged against different defendants severally, who are

1. *Rose v. Rose*, 11 Paige (N. Y.) 166; *Allegany, etc., R. Co. v. Weidenfeld*, 5 Misc. Rep. (N. Y. Supreme Ct.) 43.

**Bill Without Equity in One Aspect.** — Where the bill seeks relief arising out of two separate equities, and, as respects one ground for relief, the bill is without equity, it is not open to the objection that it is multifarious. *Elliott v. Sibley*, 101 Ala. 344.

**Objection Cured by Answer.** — Where a bill prays an injunction against the performance of separate and distinct acts by the defendant, the objection that it is multifarious, if originally tenable, is obviated by the defendant's answer alleging that he has ceased to do some of the acts complained of. *Whitney v. Union R. Co.*, 11 Gray (Mass.) 359.

2. *Per Hall, J.*, in *Graham v. Dahlonega Gold Min. Co.*, 71 Ga. 296.

3. *Lockwood Co. v. Lawrence*, 77 Me. 297, in which case injunction was sought against a plurality of defendants who were severally contributing to the pollution of a stream. Citing *Bugbee v. Sargent*, 23 Me. 269; *Brinkerhoff v. Brown*, 6 Johns. Ch. (N. Y.) 157; *Campbell v. Mackay*, 1 Myl. & C. 603, and *Gaines v. Chew*, 2 How. (U. S.) 642. See also *Graham v. Dahlonega Gold Min. Co.*, 71 Ga. 296, holding that where the plaintiff claims one general right against a plurality of defendants, and does not join several matters of a distinct and independent nature, the bill is not multifarious.

**Dissolution of Partnership, etc.** — A bill asking the dissolution of a partnership, an account, and an injunction against further interference on the part of the defendant with the partnership affairs, is not multifarious. *Burchard v. Boyce*, 21 Ga. 6.

**Trade-mark and Patent Rights.** — A bill which seeks an injunction against an infringement of trade-mark rights and also of patent rights is not multifarious where the trade-mark rights and patent rights relate to the same subject-matter. *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. Rep. 622.

**Injunction against Two Executions Between Same Parties.** — A bill asking relief against two executions which have been levied by the same officer on the same property, both executions being between the same parties, is not multifarious. *Clary v. Haines*, 61 Ga. 520.

**Ejectment and Injunction.** — In California it is permissible to ask in one complaint a recovery of land as in an original action of ejectment, and also an injunction to restrain the commission of trespass in the nature of waste pending the action. *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 544. See also *McGarrahan v. Maxwell*, 28 Cal. 75, *per Rhodes, J.*

**Form of Complaint.** — In order to prevent confusion and preserve the simplicity and directness requisite in the averments of the complaint in an action at law, the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 544, in which case the court said: "It would be the better practice, in such case, to commence that portion of the complaint which seeks the equitable relief with the form, 'and for equitable relief, pending the above action, the plaintiff further represents;' or, 'and, for a further cause of action, the plaintiff represents.'"

not alleged to have had any connection one with the other, the bill is multifarious.<sup>1</sup>

c. **SUIT FOR INJUNCTION AND DAMAGES.**—It is a general principle of equity jurisdiction to aim at complete and final relief in respect to all matters between the same parties growing out of the same general transaction; and consequently the plaintiff is at liberty, in a suit for injunction, to claim damages for the injuries which he has already sustained by reason of the acts out of which his claim to an injunction arises.<sup>2</sup> The plaintiff may

1. American Refrigerating, etc., Co. v. Linn, 93 Ala. 610.

2. Among the cases in which this doctrine has been announced are the following, but reference is made, for a more particular discussion of the question and a more exhaustive citation of authorities, to concrete titles throughout this work, such as COPYRIGHT; NUISANCES; WASTE, etc.:

*California.*—Jungerman v. Bovee, 19 Cal. 354; More v. Massini, 32 Cal. 590.

*Connecticut.*—Wells v. Bridgeport Hydraulic Co., 30 Conn. 316; Trowbridge v. True, 52 Conn. 190.

*Florida.*—Kahn v. Kahn, 15 Fla. 400.

*Iowa.*—The Code, § 3386, provides that in case of "breach of contract or other injury" the party injured may bring an action by ordinary proceedings, and may in the same cause pray for a writ of injunction. *Berger v. Armstrong*, 41 Iowa 447.

*Nevada.*—Jerrett v. Mahan, 20 Nev. 89.

*New York.*—*Lamming v. Galusha*, 135 N. Y. 239; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Chapman v. Rochester*, 110 N. Y. 276; *Sullivan v. New York El. R. Co.*, (Super. Ct.) 25 N. Y. St. Rep. 903; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 121; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 186; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 428; *Pegram v. New York El. R. Co.*, 147 N. Y. 135; *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191; *Williams v. New York Cent. R. Co.*, 16 N. Y. 111; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 354; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301.

*Oregon.*—*Ewing v. Rourke*, 14 Oregon 514; *Bishop v. Baisley*, 28 Oregon 119, in which latter case the court cited *Fleischner v. Citizens' Invest. Co.*, 25 Oregon 130.

*Utah.*—*Bullion, etc., Min. Co. v. Eurēka Hill Min. Co.*, 5 Utah 3.

*Vermont.*—*Hastings v. Perry*, 20 Vt. 272.

*England.*—*Thomas v. Oakley*, 18 Ves. Jr. 184, which case was cited in *Bishop v. Baisley*, 28 Oregon 119, and in *Bullion, etc., Min. Co. v. Eurēka Hill Min. Co.*, 5 Utah 3. See also *Smith v. Cooke*, 3 Atk. 381; *Lee v. Alston*, 1 Ves. Jr. 78; *Whitfield v. Bewit*, 2 P. Wms. 240; *Garth v. Cotton*, 1 Ves. 528, which cases were cited in *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169.

**Damages as the Principal Ground of Relief.**—A court of equity ought not to be resorted to in order to obtain an award of damages as the principal ground of relief, and it is necessary for the plaintiff to allege facts entitling him to an injunction. *Ewing v. Rourke*, 14 Oregon 514. See also *Bishop v. Baisley*, 28 Oregon 119, wherein it was said that the power to assess damages is incidental and does not exist as an equitable remedy, except in connection with the injunction.

**A Statute Authorizing the Plaintiff** to bring an action for damages and also for an injunction against the repetition of the injury does not entitle him to an injunction as a matter of right, but it is necessary for him to allege facts showing that he is entitled to an injunction. *Berger v. Armstrong*, 41 Iowa 447.

**No Necessity for Separate Counts.**—In *Connecticut* the statute allows both legal and equitable relief upon the same facts, and permits the plaintiff to claim alternative relief on the same facts; and consequently, where an injunction is sought against the commission of threatened injury, and also



claim not only such damages as he has sustained at the time of commencing the action, but also damages up to the time of the trial and disposition of the case.<sup>1</sup>

**Plaintiffs Who Own Property in Severalty** when they join in a suit for injunction should not ask for damages, because their claims for damages are several, and the joinder of such claims will render the bill multifarious.<sup>2</sup>

**Pendency of Action at Law for Damages.** — The plaintiff in a suit for an injunction will not be permitted to claim damages for injuries which he has already sustained when an action at law is pending for such damages, but he should abandon his suit at law and give the court of equity control of his whole case.<sup>3</sup>

**24. Construction of the Bill — Presumptions Against the Plaintiff.** — An injunction bill will be construed against the pleader, or, in other words, it will be assumed that he has stated his grounds of action as strongly as he could, and no presumptions will be indulged in the plaintiff's favor.<sup>4</sup> The court will look at the substance of the bill, and will disregard the name by which the

damages for injuries that have already been done, the complaint may in one count set out all the facts and conclude with a prayer for a judgment for damages and also for an injunction as in a suit in equity. *Trowbridge v. True*, 52 Conn. 190.

1. *Per Foster, J.*, in *Davis v. Lambertson*, 56 Barb. (N. Y.) 480.

2. *Crane v. Winsor*, 2 Utah 248.

3. *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71, in which case it appeared that the plaintiffs had brought one suit at law for damages and had then instituted a second suit at law, and before final judgment had been obtained in either of such suits had filed their bill in equity and asked for a writ of injunction and for damages since the last or second suit at law. Said the court: "We approve of the plaintiffs prosecuting one of these suits at law to final judgment, so that their legal right be fully established, and they have doubtless the right to resort to another suit at law. But when a party brings forth his two suits at law before he appeals to the equitable tribunal, we think the presumption may be fairly entertained that he has elected a favorite remedy and must abide by it, and should not ask for equity while inflicting a multiplicity of suits at law upon his opponents. \* \* \* The plaintiffs, having obtained compensation in one suit at law, and without, however, bringing it to final judgment, and not proposing to abandon their second suit at law,

ask the court for other adequate damages, and for the writ of injunction, and otherwise to prescribe for them full and ample redress for all their grievances, without giving us control of their whole case." *Citing Prothero v. Phelps*, 35 Eng. L. & Eq. 518; *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416; *Story Eq.*, § 746 and note. See further the article *ANOTHER SUIT PENDING*, vol. 1, p. 750.

4. *Garrett v. Lynch*, 45 Ala. 204; *Ex p. Martin*, 13 Ark. 198; *Grimes v. Linscott*, (Cal. 1895) 40 Pac. Rep. 421; *Marriner v. Smith*, 27 Cal. 649; *Allen v. Thornton*, 51 Ga. 594; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Simpson v. Wright*, 21 Ill. App. 67; *Kansas City, etc., R. Co. v. Rich Tp.*, 45 Kan. 275; *Day v. Louisville, etc., R. Co.*, 69 Miss. 589; *Gaillard v. Thomas*, 61 Miss. 166.

**Omission to State Material Fact.** — "Where there is an omission to state a material fact, one necessary to show a cause of action, the presumption against a pleader is that it does not exist." *Burlington, etc., R. Co. v. York County*, 7 Neb. 487, *quoting Burlington, etc., R. Co. v. Lancaster County*, 4 Neb. 307.

**The Code** requires the allegations of a pleading to be liberally construed with a view to substantial justice, and that every error or defect which does not affect the substantial rights of the adverse party be disregarded. *Ayers v. Lawrence*, 59 N. Y. 192, in which

pleader calls it; <sup>1</sup> and will consider the bill in accordance with its general scope and tenor, regardless of isolated averments. <sup>2</sup>

**IX. AMENDMENTS TO THE BILL—1. Right of the Plaintiff to Amend.** — The general principle is that a party is bound to state his whole case in his first bill; but the practice of the court is very liberal as to amendments, and if the plaintiff, after filing his bill, discovers that he has omitted to state any matter, he may supply the defect by amendment. <sup>3</sup> Especially where the matter of the amendment is consistent with the cause made by the bill, and is merely a more direct and specific allegation touching the subject upon which the equity of the original bill rests, the court will be liberal in allowing the plaintiff to amend. <sup>4</sup>

case Code N. Y., §§ 159 and 176, was applied to the complaint in an action for injunction.

1. *McConnel v. Gibson*, 12 Ill. 128.

**Materiality of Prayer.** — The court will frequently look to the prayer when it is doubtful which of two or more actions which the facts stated in the bill will support the pleader's intentment. *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595.

2. *Miller v. Burket*, 132 Ind. 472.

3. *Buckley v. Corse*, 1 N. J. Eq. 504. And see generally article AMENDMENTS, vol. I, p. 466 *et seq.*

In *Holland v. Trotter*, 22 Gratt. (Va.) 136, Christian, J., said: "It is the well-settled practice of courts of equity that where the plaintiff is advised that his original bill does not contain such material facts, or make such parties, as may be necessary to enable the court to do complete justice, he may amend his bill by inserting new matter or adding new parties."

**Defect of Parties.** — As to the right to amend the bill where there is a defect or misjoinder of parties, see *supra*, 895.

4. *Alabama*. — *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396, wherein it is recognized that an injunction bill may be amended.

*Delaware*. — *Jackson v. Philadelphia, etc., R. Co.*, 3 Del. Ch. 512.

*Georgia*. — *Jordan v. Gauden*, 73 Ga. 191; *Semmes v. Columbus*, 19 Ga. 471; *Fields v. Ralston*, 30 Ga. 79; *Beckham v. Newton*, 21 Ga. 187; *Head v. Bridges*, 72 Ga. 30.

*Illinois*. — *Craig v. People*, 47 Ill. 487; *Marble v. Bonhotel*, 35 Ill. 240.

*Iowa*. — *Kriechbaum v. Bridges*, 1 Iowa 14.

*Maryland*. — *Morton v. Grafflin*, 68 Md. 545, holding that the bill may be

amended where it is defective by reason of the plaintiff's failure to attach the original documents thereto.

*New Jersey*. — *Delaware, etc., Canal Co. v. Raritan, etc., R. Co.*, 14 N. J. Eq. 445; *Buckley v. Corse*, 1 N. J. Eq. 504; *Fleischman v. Young*, 9 N. J. Eq. 620.

*New York*. — Under the code the plaintiff has a right to amend his complaint at any time before the expiration of twenty days, and on a motion to continue the injunction, amendments intended as a more distinct statement of matters alleged in the complaint will be regarded as before the court for the purpose of the motion. *Hanlon v. Westchester County*, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 261. See also *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 142, 31 Am. & Eng. R. Cas. 583; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209, *per S. B. Strong, J.*; *Hunt v. Holland*, 3 Paige (N. Y.) 78; *Renwick v. Wilson*, 6 Johns. Ch. (N. Y.) 81; *Ellsworth v. Cook*, 8 Paige (N. Y.) 643; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Ayers v. Lawrence*, 59 N. Y. 192.

*North Carolina*. — *Barnes v. Dickinson*, 1 Dev. Eq. (N. Car.) 330.

*Pennsylvania*. — *Kerr v. Trego*, 47 Pa. St. 292.

*Rhode Island*. — *Lewis v. North Kingsfown*, 16 R. I. 15.

*Texas*. — *McDonald v. Tinnon*, 20 Tex. 245.

*Virginia*. — *Holland v. Trotter*, 22 Gratt. (Va.) 136, wherein Christian, J., said that an amendment may be made by common order before answer or demurrer, and afterwards by leave of court. *Citing Mason v. Nelson*, 11 Leigh (Va.) 234; *Parrill v. McKinley*, 9 Gratt. (Va.) 1; *Stephenson v. Taverners*, 9 Gratt. (Va.) 398; *Smith v. Smith*,

One Consideration which will move the court to be liberal in allowing an amendment is the fact, which fact may be disclosed by affidavit on the motion for leave to amend, that the bill was framed in haste, and that the defendant's conduct rendered it necessary to frame the bill in haste.<sup>1</sup>

**Opposing Affidavit by the Defendant.** — An affidavit by the defendant denying the truth of the matters contained in the proposed amendment will not avail him, and the amendment will be allowed notwithstanding such affidavit.<sup>2</sup>

**After Death of the Plaintiff and Revival.** — Even after the death of the plaintiff and the revival of the suit in the names of his personal representatives, it is permissible to amend the bill by setting up

4 Rand. (Va.) 99; *Boykin v. Smith*, 3 Munf. (Va.) 102; and 1 Dan. Ch. Pr., pp. 401 *et seq.*

*Wisconsin.* — Atty.-Gen. *v. Eau Claire*, 37 Wis. 400, holding that allegations which are admitted by either side made be brought in by an amendment.

*United States.* — *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641.

**In Louisiana**, as a general rule, petitions in suits for injunction are not allowed to be amended. *Howard v. Simmons*, 25 La. Ann. 668. See also *Calderwood v. Trent*, 9 Rob. (La.) 227, wherein it was declared that the propriety of allowing an amendment to a petition for an injunction in any case is very questionable, and that an amendment should not be allowed unless it is manifestly for the furtherance of justice under the peculiar circumstances of the case; and in that case it was said that in no instance should an amendment be allowed where the plaintiff's object appears to be to obtain delay.

**Jurisdictional Amount.** — Where the bill contains no averment that the amount in controversy is sufficient to give the court jurisdiction, but it does not affirmatively appear that the court is without jurisdiction, leave will be given to amend. *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 641.

**Striking Out Portions of Bill.** — In *Renwick v. Wilson*, 6 Johns. Ch. (N. Y.) 81, Chancellor Kent refused to allow any part of the bill to be stricken out without a previous specification of the parts intended to be omitted, remarking: "The whole substance of the existing bill might be expunged, and all the material facts admitted in it might be withdrawn. Such a general power of amendment to an injunction bill, sworn

to, and upon which process of injunction has been obtained, ought not to be granted without further explanation of the way in which the bill is to be amended. If the injunction is to be left to rest upon the merits of the original bill, it implies that none of the charges in that bill are to be expunged."

**Material Allegations.** — In *Carey v. Smith*, 11 Ga. 539, Warner, J., said: "One cogent reason for not allowing a party complainant in a sworn injunction bill to strike out material allegations and averments therein, by way of amendment, is that if he should swear falsely for the purpose of obtaining the injunction, he might, by that means, destroy and obliterate all trace of the evidence of his offense." Citing *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 46, in which case the identical question arose; and *Rodgers v. Rodgers*, 1 Paige (N. Y.) 424.

**Alteration of Original.** — In *New Jersey* the rules forbid an amendment to a sworn bill, especially where an injunction has been granted and served, to be made by altering the original; and it is required that the bill should be engrossed anew, sworn to, annexed to the original bill, and filed. *Layton v. Ivans*, 2 N. J. Eq. 387.

**Dismissal of Original Bill.** — In *Ward v. Whitfield*, 64 Miss. 754, it was held that it was proper to refuse to dismiss the original bill after an amended bill had been filed.

**Amendment of Prayer.** — As to the right to amend the prayer or amend the bill by inserting a prayer for an injunction, see *supra*, p. 963.

1. *Jackson v. Philadelphia, etc.*, R. Co., 3 Del. Ch. 512.

2. *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364.

matters which are not inconsistent with but are merely an addition to what is already set out in the bill.<sup>1</sup>

**2. In What Particulars Amendments Permissible — Materiality of Amendments.** — The amendments made by the plaintiff must be founded on new facts and charges, and they must be material.<sup>2</sup>

**Facts Inconsistent with Original Bill.** — The plaintiff will not be permitted so to amend his bill as to contradict facts which he has sworn in the original bill to be positively true, unless he can clearly show the court that the statements in the original bill were made by mistake.<sup>3</sup> The amended bill should present matters which are in addition to the original bill, and which are not variant from and repugnant to those alleged in the original bill.<sup>4</sup>

**Newly Discovered Matters.** — On an application for leave to amend the bill after answer, pending a motion to dissolve, it is generally a sufficient excuse for the defectiveness of the original bill that the new matter has come to the knowledge of the plaintiff since the bill was filed.<sup>5</sup>

**3. Diligence After Amendment.** — Where an order allowing an amendment contains no limitation as to time, the plaintiff will be required to proceed diligently.<sup>6</sup>

**4. Additional Answer by the Defendant.** — Where the bill is materially amended after the defendant has put in his answer, he is entitled to put in a further answer.<sup>7</sup>

**5. Prejudice to Injunction.** — An amendment relating to the subject-matter as originally charged, which does not make out a new case, but only introduces additional facts to strengthen and support the charges in the bill as originally drawn, may be made by

1. *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364, in which case M'Coun, V. C., said: "The objection that executors cannot be allowed to add to a bill by way of an amendment, because their testator is thereby made to say what he never did say in his lifetime, and that the executors cannot render a sufficient excuse for the testator for not bringing forward those allegations in the bill when first filed, seems to me not of sufficient weight to prevent the order being granted."

2. *Matthiessen, etc., Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 275; *Buckley v. Corse*, 1 N. J. Eq. 504. And see in general article AMENDMENTS, vol. I, p. 468 *et seq.*

3. *Marble v. Bonhotel*, 35 Ill. 240. See also article AMENDMENTS, vol. I, p. 476.

4. *Howell v. Motes*, 54 Ala. 1; *Jackson v. Philadelphia, etc., R. Co.*, 3 Del. Ch. 512; *Rhodes v. Union Bank*, 7 Rob. (La.) 63, holding that the plaintiff will not be permitted to change the object

and nature of his original action; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364.

5. *Jackson v. Philadelphia, etc., R. Co.*, 3 Del. Ch. 512.

**Lord Eldon**, in *Vipan v. Mortlock*, 2 Meriv. 476, in which case the amended bill was filed after the injunction obtained on the original bill had been dissolved, permitted the defendant to show that the matter introduced by way of amendment was within the plaintiff's knowledge at the time when he filed his original bill.

6. *Selden v. Vermilya*, 4 Sandf. Ch. (N. Y.) 573, in which case it was held that the mere fact that the amendment was not filed until after appearance by the defendant, although it had been allowed before, was immaterial, it not appearing that the plaintiff's delay had been unreasonable.

7. *Savory v. Dyer*, Ambl. 70, decided by Lord Hardwicke; *Iglehart v. Lee*, 4 Md. Ch. 514, wherein the bill was amended by bringing in necessary parties.

leave of court without prejudice to an injunction which has been previously awarded, although some of the cases have held that the injunction should be expressly saved by the terms of the order granting the amendment.<sup>1</sup>

**6. Retroactive Effect of Amendment.** — It is firmly established by the cases that an injunction which was issued before the bill was amended must stand or fall upon the original bill and the answer thereto, and that the amendment cannot be used in support of the injunction.<sup>2</sup>

1. *Drewry Inj.* 390; *Eden Inj.* 88; 1 *Hoffman Ch. Pr.* 301; 1 *Dan. Ch. Pr.* 527, 531.

In *Barnes v. Dickinson*, 1 *Dev. Eq. (N. Car.)* 330, *Henderson, C. J.*, said: "I fear that the common idea that an injunction is given up by an amendment is carried too far; it is going sufficiently far to say that an injunction cannot be sustained or propped by an amendment." See also the following cases: *Dipper v. Durant*, 3 *Meriv.* 465; *Davis v. Davis*, 2 *Sim.* 515; *Pickering v. Hanson*, 2 *Sim.* 488; *Mason v. Murray*, *Dick.* 536; *Adney v. Flood*, 1 *Madd.* 447 (which last two cases were cited by Chancellor Kent in *Renwick v. Wilson*, 6 *Johns. Ch. (N. Y.)* 81); *Jackson v. Philadelphia, etc., R. Co.*, 3 *Del. Ch.* 512; *Walker v. Walker*, 3 *Ga.* 302; *Selden v. Vermilya*, 4 *Sandf. Ch. (N. Y.)* 573, *per Sandford, V. C.*; *Delaware, etc., Canal Co. v. Raritan, etc., R. Co.*, 14 *N. J. Eq.* 445, *per* Chancellor Green, *obiter*; *Lanning v. Heath*, 25 *N. J. Eq.* 425; *Buckley v. Corse*, 1 *N. J. Eq.* 504, *per* Chancellor Vroom; *Rogers v. De Forest*, 3 *Edw. Ch. (N. Y.)* 171.

**Necessity for Clause Saving Injunction.**

— Chancellor Kent declared in *Renwick v. Wilson*, 6 *Johns. Ch. (N. Y.)* 81, that the rule as laid down by the vice-chancellor in *Adney v. Flood*, 1 *Madd.* 447, that an amendment will not affect the injunction, even though the order allowing the amendment does not contain the words "without prejudice to the injunction," is best established. But see *contra*, *Bliss v. Boscawen*, 2 *Ves. & B.* 101, *per* Lord Eldon; *Dixon v. Redmond*, 2 *Sch. & Lef.* 513; *Home v. Watson*, 2 *Sim.* 85; *Semmes v. Columbus*, 19 *Ga.* 471. See, further, *Binney's Case*, 2 *Bland (Md.)* 99, in which case an amendment was asked for the purpose of introducing new facts giving a different complexion to the bill, and it was held that an order expressly saving the injunction was necessary.

**The Bringing In of a Co-Plaintiff** has been held to be such an amendment as to terminate an injunction previously issued. *Atty.-Gen. v. Marsh*, 18 *Sim.* 575, which case was cited in *Kerfoot v. People*, 51 *Ill. App.* 409.

**Amendment After Motion to Dissolve.** — An injunction bill may be amended even after motion to dissolve, and if, when so amended, it shows sufficient cause for continuing the injunction, which is not overborne by the defendant, it will be continued, and a motion for dissolution, on the ground of defects in the original bill, will be overruled where those defects have been remedied by means of an amended bill which does not change the cause of action. *Conover v. Ruckman*, 34 *N. J. Eq.* 293. *Citing Crawford v. Paine*, 19 *Iowa* 172, and *Sweatt v. Faville*, 23 *Iowa* 321.

2. *Per* Chancellor Kent in *Renwick v. Wilson*, 6 *Johns. Ch. (N. Y.)* 81 [*citing* *Mayne v. Hochin, Dick.* 235; *Vere v. Glynn, Dick.* 441]. See also *Rhodes v. Union Bank*, 7 *Rob. (La.)* 63; *Barnes v. Dickinson*, 1 *Dev. Eq. (N. Car.)* 330; *Walsh v. Smyth*, 3 *Bland (Md.)* 9. In the last mentioned case the court cited *Vernon v. Vawdry*, 2 *Atk.* 119; *Long v. Burton*, 2 *Atk.* 218; *Vere v. Glynn, Dick.* 441; *McMechen v. Story*, 1 *Bland (Md.)* 181, note.

**Renewal of Application for Injunction After Dissolution.** — The plaintiff, after amending his bill where his injunction has been previously dissolved, must renew his application for an injunction before the proper judicial officer. *Mack v. De Bardeleben Coal, etc., Co.*, 90 *Ala.* 396.

**Time and Method of Making Application.** — In *Anonymous*, 3 *Atk.* 694, Lord Hardwicke said: "When an injunction has been dissolved upon the merits or for want of the plaintiff's showing cause why the injunction should not be dissolved on the defendant's order *nisi*,

**7. At What Time Amendments May Be Made.** — The court in its discretion may allow amendments to an injunction bill at any stage of the cause.<sup>1</sup>

**8. Application for Leave to Amend.** — After the defendant has answered or made a motion to dissolve, if the plaintiff wishes to amend the bill he must apply for leave to amend, and a sufficient excuse must be shown for the defectiveness of the original bill by showing that the matters sought to be incorporated by an amendment were not known to him when the original bill was filed, or, if they were unknown, his failure to incorporate them in the original bill must be satisfactorily accounted for.<sup>2</sup>

he cannot, by amending his bill and the defendant's obtaining a *dedimus* to take his answer to the amended bill, move for an injunction; for, if he could, he might amend his bill *toties quoties*, and by that means keep up the injunction against the defendant *in infinitum*; but if on coming in of the defendant's answer to the amended bill he thinks there are sufficient grounds arising out of the answer to support an injunction, he may move for it upon the merits."

In *Bliss v. Boscawen*, 2 Ves. & B. 101, Lord Eldon said, with reference to the right of the plaintiff to an injunction after an amendment: "I do not say you cannot have an injunction, the only question is how you are to apply for it; and if the case has all these peculiarities, it must be by a special motion founded upon them, and you cannot take the ordinary injunction *nisi*."

**Effect of Answering Amended Bill.** —

Where the bill is amended after a motion to dissolve has been refused, and the defendant answers the bill as amended, the overruling of the motion cannot be assigned as error. *Craig v. People*, 47 Ill. 487.

1. *Craig v. People*, 47 Ill. 487. *Citing* *Jefferson County v. Ferguson*, 13 Ill. 33; and also, in support of the proposition that an amendment may be allowed before an answer has been filed, and in many cases after and before a replication is filed, *Drouillard v. Baxter*, 2 Ill. 101. See also article AMENDMENTS, vol. I, p. 478.

**A Fresh Injunction on Special Motion** may be awarded on special motion where new facts are started on an amended or supplemental bill. *Tucker v. Carpenter*, Hempst. (U. S.) 440, in which case it was said that an injunction is not a matter of course, but depends on the sound discretion of the

court; *citing* *Travers v. Stafford*, 2 Ves. 21.

**Terms Will Be Imposed** to this end if necessary. *Jackson v. Philadelphia*, etc., R. Co., 3 Del. Ch. 512.

2. *Jackson v. Philadelphia*, etc., R. Co., 3 Del. Ch. 512. See also article AMENDMENTS, vol. I, p. 502, *et seq.*

In *Parker v. Grant*, 1 Johns. Ch. (N. Y.) 434, it was held that a rule of court allowing an amendment on a bill of chancery at any time before answer, plea, or demurrer filed, did not apply to an injunction bill, Chancellor Kent remarking: "It would be like a party meddling with and altering his own affidavit on file, without leave; and it would become difficult, and perhaps impossible, afterwards to know to what part of the bill the oath was to be applied." See also, to the same effect, *Rodgers v. Rodgers*, 1 Paige (N. Y.) 424; *Beekman v. Waters*, 3 Johns. Ch. (N. Y.) 410; *Whitmarsh v. Campbell*, 2 Paige (N. Y.) 67; *Walsh v. Smyth*, 3 Bland (Md.) 9; *Norris v. Kennedy*, 11 Ves. Jr. 565; *Sharp v. Ashton*, 3 Ves. & B. 144; *Mair v. Thellusson*, *cited* in a note to *Sharp v. Ashton*, 3 Ves. & B. 145.

**Refusal to Strike Out Tantamount to Leave.** — Where an amended bill is filed without leave, the chancellor's refusal to strike it out is tantamount to leave to file it, and cures the irregularity of filing it without leave. *Ward v. Whitfield*, 64 Miss. 754.

**Accompanying Affidavit.** — In *New Jersey* it has been said that where a second amendment of the bill is desired the plaintiff must apply for it, and must accompany his application with an affidavit that he had not "a knowledge of the facts so as to enable him to bring that case upon the record sooner." *Per* Chancellor Vroom in *Buckley v. Corse*, 1 N. J. Eq. 504, *citing* *Sharp v.*

**X. SUPPLEMENTAL BILL — Right to File.** — The plaintiff may, upon leave of court, file a supplemental bill, adding new charges based on facts which have occurred since the original bill was filed and on facts existing at that time which were then not known to him.<sup>1</sup>

**Original Bill Without Equity.** — Where the original bill, or the original bill as amended, is without equity, the plaintiff should not be allowed to file a supplemental bill, and the proper course is to file a new bill.<sup>2</sup>

**Leave of Court.** — As a general rule, when the plaintiff desires to file a supplemental bill he should obtain leave of court, and his application should advise the court of the grounds upon which

Ashton, 3 Ves. & B. 144. In the first mentioned case, however, Chancellor Vroom said: "I am not aware that such strictness of practice has obtained upon first amendments. They are frequently allowed on the coming in of the answer, without special affidavits, upon such terms as are reasonable. My opinion is \* \* \* that an affidavit disclosing the facts was not necessary."

**Necessity to State Facts.** — Where an injunction is dissolved and the bill dismissed on the plaintiff's motion, with a view to amending it so as to make it contain equity, no reliance is to be placed upon the plaintiff's affidavit attached to the amended bill that the informalities in the former bill are to be remedied in the amended bill, as the plaintiff is not the proper judge whether his amended bill conforms to the opinion of the court before expressed upon the merits of the case. *Honor v. Leeds*, 10 N. J. Eq. 86.

**Right to Re-amend the Bill.** — The court will very rarely allow a re-amendment of an amended bill, and if it does so it will act with great circumspection. *Sharp v. Ashton*, 3 Ves. & B. 144; *Renwick v. Wilson*, 6 Johns. Ch. (N. Y.) 81.

1. *Howard v. Simmons*, 25 La. Ann. 668, in which case it is said: "Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another." See also *Whitley v. Dunham Lumber Co.*, 89 Ala. 493, in which case the court cited 10 Am. and Eng. Encyc. of Law, 908, 909; *Rogers v. Solomons*, 17 Ga. 598; *College Corner, etc., Gravel Road Co. v. Moss*, 77 Ind. 139; *Barnes*

*v. Dickinson*, 1 Dev. Eq. (N. Car.) 330, in which case the court declared that where the plaintiff desires to obviate the abandonment of an injunction by amending his bill, he should file a supplemental bill; *Parkhurst v. Kinsman*, 2 Blatchf. (U. S.) 72, 78. And see, in general, article SUPPLEMENTAL PLEADINGS.

**Trial and Verdict at Law Pending Suit.** — The fact that there has been a trial and verdict at law since the filing of the original bill may be set forth by supplemental bill. *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362.

**Pending Appeal from Order of Dissolution.** — In *Balkum v. Harper*, 50 Ala. 372, it was held that where an injunction restraining the enforcement of an execution at law against the plaintiff's property is dissolved, and the plaintiff appeals, and during the pendency of the appeal the defendant sues out another execution in violation of the injunction, which has been restored for the purposes of the appeal, the plaintiff may file a supplemental bill to enjoin such second execution.

2. *Tallassee Mfg. Co. v. Spigener*, 49 Ala. 262, in which case the court cited *Land v. Cowan*, 19 Ala. 297; *Fahs v. Roberts*, 54 Ill. 192.

In *Candler v. Pettit*, 1 Paige (N. Y.) 168, Chancellor Walworth said: "If the complainant had no ground for the proceedings originally, he should file a new bill, showing a case which will then entitle him to equitable relief. But if his original bill was sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out such new matter in the form of a supplemental bill."

the relief sought by the supplemental bill is applied for and the reasons for filing the supplemental bill.<sup>1</sup>

**The Matters That May Be Introduced.** — A supplemental bill should contain no matters which are not germane to the case made by the original bill.<sup>2</sup>

**Effect of Supplemental Bill upon Injunction.** — The filing of a supplemental bill does not put an end to an injunction which has been previously issued on the original bill.<sup>3</sup>

**A New Injunction May Be Awarded** upon new facts incorporated in a supplemental bill, even though an injunction previously issued has been dissolved.<sup>4</sup>

**XI. THE DEMURRER** — 1. **In General.** — Upon demurrer to an injunction bill, the general rules of equity as to the office and effect of a demurrer obtain, and the court's inquiries are limited to the question whether upon the case made by the bill the plaintiff is entitled to relief.<sup>5</sup> The chancellor's decision on an

1. *Parkhurst v. Kinsman*, 2 Blatchf. (U. S.) 72; *Livingston v. Gibbons*, 4 Johns. Ch. (N. Y.) 571, *per* Chancellor Kent.

In *Eager v. Price*, 2 Paige (N. Y.) 333, Chancellor Walworth said: "The usual practice is to serve a copy of the supplemental bill on the defendant who has appeared in the cause, together with a notice that the court will be applied to upon such bill for an order that an injunction issue according to the prayer thereof. If the injunction is allowed, the leave to file the bill is always implied in the order, if it is not stated in express terms. Although a party may not file a supplemental bill without permission of the court, leave is usually granted on an *ex parte* application."

2. *Fahs v. Roberts*, 54 Ill. 192.

**Parties to Supplemental Bill.** — Where there has been no change of parties, all of the parties to the original bill must be made parties to the supplemental bill. *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362.

**Matters Previously Within the Plaintiff's Knowledge** will not be allowed to be incorporated in a supplemental bill where there is no sufficient excuse given by the plaintiff for his failure to bring forward such matters in his original bill. *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456.

3. *Conover v. Ruckman*, 34 N. J. Eq. 293. *Citing D'Arcy v. Sumner*, 2 Moll. 359; and *Joyce Inj.* 298.

4. *Fanning v. Dunham*, 4 Johns. Ch. (N. Y.) 35, in which case Chancellor

Kent cited *Lingham v. Toule*, 1 Anstr. 189, and *Travers v. Stafford*, 2 Ves. 19, Ambl. 104.

5. *Harper v. Hill*, 35 Miss. 63; *Schall v. Nusbaum*, 56 Md. 512; *Wangelin v. Goe*, 50 Ill. 459, to which last mentioned case particular reference is made, as it contains a lucid statement as to the office of a demurrer. See further, in connection with the statements contained in this article as to a demurrer to an injunction bill, the articles DEMURRERS, vol. 6, p. 292, and DEMURRERS IN CHANCERY, vol. 6, p. 391.

**Want of Equity.** — When the bill is without equity, demurrer should be sustained. *Knabe v. Rice*, 106 Ala. 516.

**Remedy at Law.** — There is no more frequent or better settled ground of demurrer to an injunction bill than that the plaintiff has a complete remedy at law. *Bowyer v. Creigh*, 3 Rand. (Va.) 25. See also *Boston Water Power Co. v. Boston, etc., R. Corp.*, 16 Pick. (Mass.) 512. See further the cases cited *supra*, p. 953, as to the necessity for the bill to show that the plaintiff is without an adequate remedy at law.

In *Georgia* it has been held that the objection that the plaintiff has an adequate remedy at law cannot be made by a general demurrer for want of equity, but must be made by special demurrer. *Powell v. Cheshire*, 70 Ga. 357, in which case, however, the demurrer was made at a late stage, and there was an agreement to try the demurrer for want of equity in general.

In *Iowa*, under Code, § 2515, it is not a ground for demurrer that the plaintiff



application for a preliminary injunction or on a motion to dissolve a preliminary injunction is not *res judicata*, and does not so operate as to prevent a demurrer from being subsequently made and entertained.<sup>1</sup>

**Demurrer to the Whole Bill.** — Where an injunction bill is demurred to, the court will apply the general rule that a demurrer to the whole bill will not be allowed unless the court is satisfied that no discovery or proof called for by the bill or founded upon its allegations can make the cause set forth a proper subject of equitable cognizance.<sup>2</sup>

has a plain, speedy, and adequate remedy at law, because it is provided that an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change of the proceedings and a transfer to the proper docket. *Gibbs v. McFadden*, 39 Iowa 371. *Citing Conyngham v. Smith*, 16 Iowa 471; *Byres v. Rodabaugh*, 17 Iowa 53; and *Brown v. Mallory*, 26 Iowa 469.

**Defect of Parties.** — The absence of a necessary party is a ground for demurrer. *Larkin v. Mason*, 71 Ala. 227; *Jamison v. May*, 13 Ark. 600; *Hays v. Hill*, 17 Kan. 360; *Hardy v. Newton First Nat. Bank*, 46 Kan. 88.

**Misjoinder of Parties.** — In *Arkansas* a misjoinder of defendants is no ground of demurrer; the proper course being to make a motion to strike out the names of such as are improperly joined or sued. *Oliphint v. Mansfield*, 36 Ark. 191.

**Want or Defect of Verification.** — The want of an affidavit to the bill or defects in the affidavit cannot be objected to by demurrer. *Hancock v. Walsh*, 3 Woods (U. S.) 351; *Woodworth v. Edwards*, 3 Woodb. & M. (U. S.) 120, wherein it is suggested that the objection should be taken at the hearing on the merits by protesting against further proceedings until the bill is verified; *Champ v. Kendrick*, 130 Ind. 549, wherein it is declared that there should be a motion to reject the bill for want of verification.

**Effect of Answer.** — Double pleading in a court of equity is not allowable, and a general answer has the effect of overruling the demurrer. *U. S. v. Parrott*, 1 McAll. (U. S.) 271, *citing Taylor v. Luther*, 2 Sumn. (U. S.) 230.

**Surplus Matter.** — The fact that the complaint contains surplus matter will not render it vulnerable on demurrer. *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595.

**Assignment of Errors Ore Tenus.** — Where a bill is demurred to for want of equity, the defendant can *ore tenus* assign as error any defect in substance. *Hastings v. Belden*, 55 Vt. 273.

**Amendment of Bill After Demurrer.** — Where the bill has been demurred to, and after material changes have been made therein by amendment, the original demurrer does not cover both the bill and the amendment. *Powell v. Cheshire*, 70 Ga. 357.

**Amendment of Demurrer.** — The court may, in its discretion, before the decree, give leave to amend the demurrer. *Metler v. Metler*, 18 N. J. Eq. 270 *citing* 1 Dan. Ch. Pr. 609.

1. In *National Bank v. Printup*, 63 Ga. 570, the court said: "The purpose of an interlocutory injunction is wholly provisional; it is preliminary and preparatory; it looks to a future and final hearing more deliberate, solemn, and complete than any which has been had, and while contemplating what the result of that hearing may be, it by no means forestalls it or settles what it shall be." See also *Mechanics*, etc., *Bank v. Harrison*, 68 Ga. 463.

**After Affirmance of an Order Made on a Motion to Dissolve**, upon appeal to the Supreme Court from such order, the lower court may, notwithstanding the order previously made and its affirmance, entertain a demurrer. *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201, in which case the court said: "Although the judge, on the motion to dissolve the injunction, must necessarily have considered that there was equity in the bill, as appeared from the order he made, \* \* \* yet that judgment, although it was affirmed by this court, upon exceptions taken to it, will not preclude the defendant from insisting upon his demurrer in term, and does not estop the court from passing on it."

2. *George v. Central R., etc., Co.*,

Volume X.

**Special Demurrers** to an injunction bill, like special demurrers to other bills in equity, should point out clearly the defective features of the bill.<sup>1</sup>

**Admissions by the Demurrer.** — A demurrer to an injunction bill of course admits the facts alleged in the bill which are well pleaded.<sup>2</sup> Matters of law or fact which are repugnant to each other are not admitted,<sup>3</sup> nor are facts which are not well pleaded admitted.<sup>4</sup>

101 Ala. 608; *Kelly v. Martin*, 107 Ala. 479; *Stout v. Curry*, 110 Ind. 514; *Conant v. Warren*, 6 Gray (Mass.) 562; *Boston Water Power Co. v. Boston*, etc., R. Corp., 16 Pick. (Mass.) 512; *Sprague v. Rhodes*, 4 R. I. 307; *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39.

**Injunction and Other Relief.** — A demurrer on the ground that "the facts stated in the petition do not entitle plaintiff to the relief demanded," where an injunction is not the only relief sought, raises the question whether the plaintiff is entitled to any relief whatever and not merely whether he is entitled to an injunction. *Thomas v. Farley Mfg. Co.*, 76 Iowa 735.

**Discovery and Injunction.** — Where the bill asks discovery and an injunction, if the plaintiff is entitled to an injunction, a demurrer to the whole bill is improper. *Metler v. Metler*, 19 N. J. Eq. 457.

**Cancellation of Contract and Injunction.** — In *Metler v. Metler*, 18 N. J. Eq. 270, injunction was sought against proceedings at law on a note, also the cancellation of the note, and the plaintiff was entitled upon the case made in the bill to the cancellation, and the demurrer was overruled regardless of the insufficiency of the bill as an injunction bill.

1. *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 39, in which case the bill was long and involved, and a demurrer to "so much of the bill as seeks," etc., without pointing out clearly the portions of the bill which were claimed to be defective, was considered too obscure and indefinite.

**Demurrer to Separate Specifications of Complaint.** — In *Indiana*, where an injunction is sought to restrain the collection of illegal taxes, and the complaint contains various specifications of the grounds for an injunction, a separate demurrer may be filed to each specification. *Ricketts v. Spraker*, 77 Ind. 371.

2. In the following cases this familiar rule of pleading was applied to injunction bills:

*California.* — *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

*Georgia.* — *Anderson v. Walton*, 35 Ga. 202.

*Illinois.* — *Wierich v. De Zoya*, 7 Ill. 385.

*Kansas.* — *Graham v. Horton*, 6 Kan. 343.

*Maryland.* — *Maddox v. White*, 4 Md. 72; *Duckett v. Duckett*, 71 Md. 357.

*Montana.* — *Boley v. Griswold*, 2 Mont. 447.

*New Mexico.* — *Armijo v. Baca*, 3 N. Mex. 294.

*New Jersey.* — *Paterson, etc., R. Co. v. Jersey City*, 9 N. J. Eq. 434.

*New York.* — *Wilcken v. West Brooklyn R. Co.*, (Supreme Ct.) 1 N. Y. Supp. 791.

*Oregon.* — *Longshore Printing Co. v. Howell*, 26 Oregon 527.

*Utah.* — *Crane v. Winsor*, 2 Utah 248.

*Virginia.* — *Meade v. Grigsby*, 26 Gratt. (Va.) 612.

*United States.* — *Foote v. Linck*, 5 McLean (U. S.) 616.

And see, in general, the article DEMURRERS IN CHANCERY, vol. 6, p. 396.

3. *Boley v. Griswold*, 2 Mont. 447. Citing 1 Dan. Ch. Pr. 567, and Story Eq. Pl., § 656.

4. *Ulman v. Charles St. Ave. Co.*, 83 Md. 130; *Morton v. Graffin*, 68 Md. 546.

**Admission of Legal Conclusions.** — For applications of the general rule that the demurrer does not admit the pleader's arguments or legal conclusions to demurrers to injunction bills, reference is made to the following cases: *Johnson v. Roberts*, 102 Ill. 655; *Boley v. Griswold*, 2 Mont. 447; *Longshore Printing Co. v. Howell*, 26 Oregon 527. See also article DEMURRERS IN CHANCERY, vol. 6, p. 397.

**Speaking Demurrers.** — On demurrer to an injunction bill the court applies the rule that the bill alone is to be looked to, and that no examination is to be made of the answer. *Tommey v. Ellis*, 41 Ga. 260. See also *Treanor v. Sheldon Bank*, 90 Iowa 575; *Goddard v.*

**2. Order in Which Motion for Injunction and Demurrer Should Be Heard.** — Where a demurrer and an application for injunction are both pending, the demurrer should be first heard and disposed of.<sup>1</sup>

**3. Effect of Sustaining Demurrer.** — Nothing remains to support an injunction after a demurrer to the entire bill has been sustained, and if the plaintiff refuses to amend, it is proper to dissolve the injunction,<sup>2</sup> and, it would seem, to dismiss the bill;<sup>3</sup> but the injunction does not inevitably fall, for in some cases the court will give leave to amend without prejudice to the injunction.<sup>4</sup>

**XII. PRELIMINARY INJUNCTIONS — 1. Discretion of Court — a. IN GENERAL.** — The issuance of a preliminary injunction which will put restraints upon the defendant before the rights of the parties have been fully investigated and tried, rests solely in the discretion of the chancellor, and as a general rule his action in ordering or denying a preliminary injunction will not be reviewed on appeal or otherwise controlled.<sup>5</sup> In *Georgia* this question has

Providence, 18 R. I. 536; Walker v. Armstrong, 2 Kan. 198.

1. Woodworth v. Edwards, 3 Woodb. & M. (U. S.) 120, in which case it was said: "In the natural order of things such an objection by demurrer, which may turn out to be one of form merely, ought to be considered before the merits of the application."

2. Clark v. Noblesville, 44 Ind. 83; Fox v. Hudson, 20 Kan. 246, in which case it was intimated that a formal order of dissolution is perhaps unnecessary; Phillips v. Sioux Falls, 5 S. Dak. 524. See also Titus v. Mabee, 25 Ill. 257.

3. Jones v. Coker, 53 Miss. 195. See also article DEMURRERS IN CHANCERY, vol. 6, p. 426.

**Dismissal Ordinarily Premature.** — Ordinarily, it is considered premature upon a general demurrer wholly to dismiss the bill unless the plaintiff's case is, from his own showing, radically such that no discovery or proof properly called for or founded upon the allegations in the bill can make it a proper subject of equitable jurisdiction. Meade v. Grigsby, 26 Gratt. (Va.) 612. Citing Pryor v. Adams, 1 Call (Va.) 382; Le Roy v. Veeder, 1 Johns. Cas. (N. Y.) 417; and 2 Rob. Pr. 302.

4. Per Beasley, C. J., in Morgan v. Rose, 22 N. J. Eq. 583, citing Kerr Inj., pp. 208, 635. See also *supra*, IX. *Amendments to the Bill*; and *infra*, XII. *d. Dismissal of Bill upon Denial of*

*Injunction.* See likewise the articles AMENDMENTS, vol. 1, p. 458; DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823.

5. Travers v. Stafford, 2 Ves. 19; Hilton v. Granville, 1 Craig & Ph. 292, which latter case was cited in Richards's Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; Adams Eq. 641, which was cited in Allen v. Hawley, 6 Fla. 142; Hilliard Inj., c. 1, § 39, which was cited in Eastman v. Amoskeag Mfg. Co., 47 N. H. 71.

Among the multitude of American cases in which the doctrine stated in the text finds support, are the following:

*Alabama.* — Davis v. Sowell, 77 Ala. 262; Barnard v. Davis, 54 Ala. 565; Reid v. Moulton, 51 Ala. 255; *Ex p.* Montgomery, 24 Ala. 98.

*Arkansas.* — Miller v. O'Bryan, 36 Ark. 200; *Ex p.* Conway, 4 Ark. 302.

*California.* — Porter v. Jennings, 89 Cal. 440; Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242; White v. Nunan, 60 Cal. 406; De Godey v. Godey, 39 Cal. 167; McCreery v. Brown, 42 Cal. 462; Patterson v. Santa Cruz County, 50 Cal. 345; Efford v. South Pac. Coast R. Co., 52 Cal. 277; Coolot v. Central Pac. R. Co., 52 Cal. 65; Payne v. McKinley, 54 Cal. 532; Parrott v. Floyd, 54 Cal. 534; Goldstein v. Kelly, 51 Cal. 301; Kohler v. Los Angeles, 39 Cal. 510; Hicks v. Compton, 18 Cal. 209; Slade v. Sullivan, 17 Cal. 102; Hicks v. Michael, 15 Cal. 112; Burnett v. Whitesides, 13 Cal. 156.

arisen in a great number of cases, and the Supreme Court has adhered steadfastly to the rule that the court's exercise of its dis-

*Connecticut.* — Roath *v.* Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Gallup *v.* Manning, 48 Conn. 25; Goodwin *v.* New York, etc., R. Co., 43 Conn. 494; Hawley *v.* Beardsley, 47 Conn. 571; Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 50; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Hine *v.* Stephens, 33 Conn. 497; Bigelow *v.* Hartford Bridge Co., 14 Conn. 565; Kennedy *v.* Scovil, 12 Conn. 317.

*Dakota.* — Wood *v.* Bangs, 1 Dakota 172.

*District of Columbia.* — Fayolle *v.* Texas, etc., R. Co. (D. C.), 3 Am. & Eng. R. Cas. 533.

*Florida.* — Apalachicola *v.* Curtis, 9 Fla. 340, 79 Am. Dec. 284; Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387; McKinne *v.* Dickenson, 24 Fla. 366; Allen *v.* Hawley, 6 Fla. 142.

*Illinois.* — Baxter *v.* Board of Trade, 83 Ill. 146; Hanford *v.* Blessing, 80 Ill. 188; Scott *v.* Whitlow, 20 Ill. 310; Marble *v.* Bonhotel, 35 Ill. 240; Poyer *v.* Des Plaines, 20 Ill. App. 30.

*Indiana.* — Logansport *v.* Uhl, 99 Ind. 531, 50 Am. Rep. 109.

*Iowa.* — District Tp. *v.* Barrett, 47 Iowa 110; Lamb *v.* Burlington, etc., R. Co., 39 Iowa 333; Reno *v.* Teagarden, 24 Iowa 144; Rice *v.* Smith, 9 Iowa 570.

*Kansas.* — Van Fleet *v.* Stout, 44 Kan. 523; Mead *v.* Anderson, 40 Kan. 203; Davis *v.* Stark, 30 Kan. 565; Conley *v.* Fleming, 14 Kan. 381; Olmstead *v.* Koester, 14 Kan. 463; Stoddart *v.* Vanlaningham, 14 Kan. 18; Long *v.* Kasebeer, 28 Kan. 226.

*Louisiana.* — Cameron *v.* Godchaux, 48 La. Ann. 1345; Beebe *v.* Guinault, 29 La. Ann. 795; State *v.* Judge, 28 La. Ann. 905; State *v.* Judge, 23 La. Ann. 51; State *v.* Judge, 16 La. Ann. 233. In the foregoing cases it was determined that under Code Prac., art. 303, providing that an injunction may be granted in certain cases, the issuance of an injunction is not mandatory, but rests in the discretion of the court. Code Prac. La., art. 298, provides that in certain enumerated cases an injunction must be granted. Johnson *v.* Rightor, 40 La. Ann. 852, *per* Watkins, J.

*Maine.* — Morse *v.* Machias Water Power, etc., Co., 42 Me. 119.

*Maryland.* — Frostburg Bldg. Assoc.

*v.* Stark, 47 Md. 338; Spencer *v.* Falls Turnpike Road, 70 Md. 136; Welde *v.* Scotten, 59 Md. 72; Shoemaker *v.* National Mechanics' Bank, 31 Md. 396; Nusbaum *v.* Stein, 12 Md. 315; Union Bank *v.* Poultney, 8 Gill & J. (Md. 332.

*Massachusetts.* — Carleton *v.* Rugg, 149 Mass. 550.

*Michigan.* — Atty.-Gen. *v.* Oakland County Bank, Walk. (Mich.) 90.

*Minnesota.* — Pineo *v.* Heffelfinger, 29 Minn. 183.

*Mississippi.* — Jones *v.* Commercial Bank, 5 How. (Miss.) 43; Brown *v.* Speight, 30 Miss. 45.

*Montana.* — Red Mountain Consol. Min. Co. *v.* Esler, 18 Mont. 174; Anaconda Copper Min. Co. *v.* Butte, etc., Min. Co., 17 Mont. 519; Cotter *v.* Cotter, 16 Mont. 63; Fabian *v.* Collins, 2 Mont. 510; Klein *v.* Davis, 11 Mont. 155; Blue Bird Min. Co. *v.* Murray, 9 Mont. 475; Nelson *v.* O'Neal, 1 Mont. 284; Atchison *v.* Peterson, 1 Mont. 561; Power *v.* Klein, 11 Mont. 159.

*Nevada.* — Sierra Nevada Silver Min. Co. *v.* Sears, 10 Nev. 346; Hobart *v.* Ford, 6 Nev. 77.

*New Hampshire.* — Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71.

*New Jersey.* — Citizens' Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Jones *v.* Newark, 11 N. J. Eq. 452; Thompson *v.* Paterson, 9 N. J. Eq. 624; Cornelius *v.* Post, 9 N. J. Eq. 196; Van Horn *v.* Talmage, 8 N. J. Eq. 108; Cammack *v.* Johnson, 2 N. J. Eq. 163; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Society, etc., *v.* Morris Canal, etc., Co., 1 N. J. Eq. 157.

*New Mexico.* — Matter of Sloan, 5 N. Mex. 590.

*New York.* — Pond *v.* Harwood, 139 N. Y. 111; Hart *v.* Ogdensburg, etc., R. Co., (Supreme Ct.) 20 N. Y. Supp. 918; Hudson River Telephone Co. *v.* Watervliet Turnpike, etc., Co., 121 N. Y. 397; Hatch *v.* Western Union Tel. Co., 93 N. Y. 640; Castoirano *v.* Dupe, 145 N. Y. 250; Hughes *v.* Bingham, 135 N. Y. 347; Strasser *v.* Moonelis, 108 N. Y. 611; Selchow *v.* Baker, 93 N. Y. 59; Paul *v.* Munger, 47 N. Y. 469; Calkin *v.* Manhattan Oil Co., 65 N. Y. 557; Osterhoudt *v.* Rigney, 98 N. Y. 222; Brown *v.* Keeney Settlement Cheese Assoc., 59;

cretion in granting or withholding an injunction, especially where there are conflicting affidavits or evidence, will not be interfered with. In the forceful language of one of the judges, "nothing short of the long arm of the legislature can pull it up and cast it

N. Y. 242; *Pfohl v. Sampson*, 59 N. Y. 174; *People v. Schoonmaker*, 50 N. Y. 499; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277; *Steele v. Pittsburgh, etc., R. Co.*, (Supreme Ct.) 36 N. Y. St. Rep. 198; *Van Dewater v. Kelsey*, 1 N. Y. 533; *Gentil v. Arnand*, 38 How. Pr. (N. Y. Super. Ct.) 94; *Brown v. Metropolitan Gaslight Co.*, 38 How. Pr. (N. Y. C. Pl.) 133; *Grill v. Wiswall*, 82 Hun (N. Y.) 281; *Woodward v. Harris*, 2 Barb. (N. Y.) 439; *Davis v. Lamberton*, 56 Barb. (N. Y.) 480; *Howe v. Rochester Iron Mfg. Co.*, 66 Barb. (N. Y.) 592; *Allison Bros. Co. v. Allison*, (Supreme Ct.) 7 N. Y. Supp. 268; *M'Intyre v. Mancius*, 3 Johns. Ch. (N. Y.) 45; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Middletown v. Rondout, etc., R. Co.*, 43 How. Pr. (N. Y. Supreme Ct.) 481; *Van Nest Land, etc., Co. v. New York, etc., Water Co.*, 7 N. Y. App. Div. 295; *Androvette v. Bowne*, 4 Abb. Pr. (N. Y. Supreme Ct.) 440; *New York, etc., Printing, etc., Establishment v. Fitch*, 1 Paige (N. Y.) 97; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160; *Hessler v. Schafer*, 82 Hun (N. Y.) 199.

*Oklahoma*. — *Couch v. Orne*, 3 Okla. 508; *Reaves v. Oliver*, 3 Okla. 62.

*Oregon*. — *Longshore Printing Co. v. Howell*, 26 Oregon 527; *Burton v. Moffitt*, 3 Oregon 29.

*Pennsylvania*. — *Richards's Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202; *Grey v. Ohio, etc., R. Co.*, 1 Grant's Cas. (Pa.) 412.

*South Carolina*. — *Pelzer v. Hughes*, 27 S. Car. 408; *Jugnot v. Hale*, 1 Hill Eq. (S. Car.) 430.

*Tennessee*. — *Flippin v. Knaffle*, 2 Tenn. Ch. 238, which case was cited in *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952.

*Utah*. — *Leitham v. Cusick*, 1 Utah 242.

*Vermont*. — *Griffith v. Hilliard*, 64 Vt. 643; *Stetson v. Stevens*, 64 Vt. 649.

*Virginia*. — *Tate v. Vance*, 27 Gratt. (Va.) 571; *Manchester Cotton Mills v. Manchester*, 25 Gratt. (Va.) 825.

*Wisconsin*. — *Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443; *Sheldon v. Rockwell*, 9 Wis. 166.

*United States*. — *Poor v. Carleton*, 3

Sumn. (U. S.) 70; *Clark v. Wooster*, 119 U. S. 322; *Buffington v. Harvey*, 95 U. S. 99; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Bonaparte v. Camden, etc., R. Co.*, 1 Baldw. (U. S.) 205; *New York Grape Sugar Co. v. American Grape Sugar Co.*, 20 Blatchf. (U. S.) 386; *Andrae v. Redfield*, 12 Blatchf. (U. S.) 407; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Ayling v. Hull*, 2 Cliff. (U. S.) 494; *Clum v. Brewer*, 2 Curt. (U. S.) 506; *Wells v. Gill*, 6 Fisher Pat. Cas. 89; *Singer Mfg. Co. v. Union Button-Hole, etc., Co.*, 6 Fisher Pat. Cas. 480; *Earth Closet Co. v. Fenner*, 5 Fisher Pat. Cas. 15; *Irwin v. Dane*, 4 Fisher Pat. Cas. 359; *Parker v. Sears*, 1 Fisher Pat. Cas. 93; *Tucker v. Carpenter, Hempst.* (U. S.) 440; *Lawrence v. Bowman*, 1 McAll. (U. S.) 419; *Sullivan v. Redfield*, 1 Paine (U. S.) 441; *Batten v. Silliman*, 3 Wall. Jr. (C. C.) 124; *Goodyear v. Day*, 2 Wall. Jr. (C. C.) 283; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13; *Edison Electric Light Co. v. Buckeye Electric Co.*, 64 Fed. Rep. 225; *Shinkle, etc., Co. v. Louisville, etc., R. Co.*, 62 Fed. Rep. 690; *Norton v. Hood*, 12 Fed. Rep. 763.

**Statutory Authority to Issue Injunctions.** — Where jurisdiction to issue injunctions is conferred by statute, the power conferred "is obviously discretionary, and the exercise of it will depend upon the circumstances of each particular case." *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Carleton v. Rugg*, 149 Mass. 550. See also as to the construction which was put upon provisions contained in the statutes of *Louisiana, supra*, p. 881.

**Under the Code** a more liberal discretion has been conferred upon the court or officer than the chancellor previously had, as the word "irreparable" is not used in describing injuries which may be enjoined. *Per* Roosevelt, J., in *Shaw v. Dwight*, 16 Barb. (N. Y.) 536. See also *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371; *Ciancimino v. Man*, 1 Misc. Rep. (N. Y. C. Pl.) 121. In the latter case the court cited *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 121 N. Y. 397, and *MacLaury v. Hart*, 121 N. Y. 636.

out." Indeed, it is provided by statute that the granting and continuing of an injunction must always rest in the sound discretion of the judge according to the circumstances of each case.<sup>1</sup>

1. 2 Code Ga. 1895, § 4920; Driskill v. Cobb, 66 Ga. 649, *per* Jackson, C. J., whose language is quoted in the text. See also the following cases: Buck v. Beach, 99 Ga. 183, 25 S. E. Rep. 206; Hudson v. Williams, 99 Ga. 183, 25 S. E. Rep. 182; Terrell v. Marietta Paper Mfg. Co., 99 Ga. 206, 24 S. E. Rep. 861; Warren v. Monnish, 97 Ga. 399; Walker v. Maddox-Rucker Banking Co., 97 Ga. 386; Herren v. Harralson, 97 Ga. 374; Williams v. Cheatham, 97 Ga. 341; Davis v. Jones, 97 Ga. 340; Ross v. Cornell, 97 Ga. 340; Glaze v. Bogle, 97 Ga. 340; Eady v. Blanton, 96 Ga. 768; Maddox v. Tidwell, 96 Ga. 783; Clark v. Flannery, 96 Ga. 782; Sheffield v. Parker, 96 Ga. 774; Duncan v. Bluthenthal, 96 Ga. 760; O'Bryan v. Hardwick, 94 Ga. 729; Epstein v. Williamson, 94 Ga. 728; Conyers v. Smith, 94 Ga. 728; Siesel v. Wells, 94 Ga. 728; Whigham v. Davis, 92 Ga. 574; Mitchell v. Mitchell, 92 Ga. 572; Jones v. Rountree, 92 Ga. 571; Harrell v. Griffin, 92 Ga. 571; Thrasher v. Holmes, 92 Ga. 571; Comer v. Comer, 92 Ga. 569; Thigpen v. Aldridge, 92 Ga. 563; Southern Medical College v. Thompson, 92 Ga. 564; Rome St. R. Co. v. Van Dyke, 92 Ga. 570; Harrell v. Americus Refrigerating Co., 92 Ga. 443; White v. Williamson, 92 Ga. 443; Barfield v. Putzel, 92 Ga. 442; Wood v. Haynes, 92 Ga. 180; Anthony v. Price, 92 Ga. 170; Rice v. Dodd, 94 Ga. 414; Hoke v. Georgia R., etc., Co., 89 Ga. 215; Einstein v. Lee, 89 Ga. 130; Metropolitan Rubber Co. v. Atlanta Rubber Co., 89 Ga. 28; Kiser v. Dannenberg Co., 88 Ga. 541; Board of Education v. McRee, 88 Ga. 214; Brunswick, etc., R. Co. v. Waycross, 88 Ga. 68; Weed v. Savannah, 87 Ga. 513; State Bank v. Porter, 87 Ga. 511; Swift Specific Co. v. Jacobs, 87 Ga. 507; Bryant v. Jones, 87 Ga. 451; Electric R. Co. v. Savannah, etc., R. Co., 87 Ga. 261; Savannah, etc., R. Co. v. Woodruff, 86 Ga. 94; Bentley v. Crenshaw, 85 Ga. 871; East Tennessee, etc., R. Co. v. Sellers, 85 Ga. 853; Gibson v. Cohen, 85 Ga. 850; Pendleton v. Johnson, 85 Ga. 840; Macon, etc., R. Co. v. Gibson, 85 Ga. 1; Rubsam v. Cobb, 84 Ga. 552; Allen v. Etheredge, 84 Ga. 550; Yarborough v. Miller, 84 Ga. 546; Mathews v. Williams, 84 Ga. 536; Ivey v. Georgia Southern, etc., R. Co., 84 Ga. 536; Georgia Southern, etc., R. Co. v. Ray, 84 Ga. 376; Hughes v. McIntosh, 83 Ga. 431; Frank v. Stapler, 83 Ga. 429; Oliver v. Union Point, etc., R. Co., 83 Ga. 257; Frobel v. Covington, etc., R. Co., 82 Ga. 673; Kendy v. Beatty, 82 Ga. 669; Cohen v. State Bank, 81 Ga. 723; Powell v. Hammond, 81 Ga. 567; East Rome Town Co. v. Cothran, 81 Ga. 359; Baker v. Mills, 81 Ga. 342; McMekin v. Richards, 81 Ga. 192; Doolittle v. East Tennessee, etc., R. Co., 80 Ga. 658; Alspaugh v. Adams, 80 Ga. 345; Couch v. Williams, 79 Ga. 211; Wheelan v. Clarke, 79 Ga. 181; Hammett v. Tanner, 78 Ga. 355; Brinson v. Hadden, 77 Ga. 499; Empire Loan, etc., Assoc. v. Atlanta, 77 Ga. 496; Mason v. Kirkpatrick, 77 Ga. 492; McPhee v. Veal, 76 Ga. 656; Lamar v. Lanier House Co., 76 Ga. 640; Georgia Pac. R. Co. v. Douglasville, 75 Ga. 828; Knight v. Knight, 75 Ga. 386; Howard v. Lowell Mach. Co., 75 Ga. 325; Frick v. Davis, 74 Ga. 839; Leary v. McDonough, 74 Ga. 838; Shackelford v. Twigg, 74 Ga. 828; Oliver v. Victor, 74 Ga. 543; Adcock v. Watts, 74 Ga. 402; Carson v. Sheldon, 74 Ga. 400; Jordan v. Gaulden, 73 Ga. 191; Barnesville Sav. Bank v. Respass, 73 Ga. 103; Daniels v. Edwards, 72 Ga. 196; Mayo v. McPhaul, 71 Ga. 758; Moore v. Atlanta, 70 Ga. 611; Strickland v. Griffin, 70 Ga. 541; Holmes v. Harris, 70 Ga. 309; Shelton v. Ellis, 70 Ga. 297; Brown v. Boynton, 69 Ga. 754; Anderson v. Savannah, 69 Ga. 472; Wood v. Macon, etc., R. Co., 68 Ga. 539; Dunson v. Pitts, 67 Ga. 767; Perry v. Cockran, 67 Ga. 770; McArthur v. Matthewson, 67 Ga. 134; Poole v. Sims, 67 Ga. 36; Carter v. Monroe, 66 Ga. 755; Taylor v. Dyches, 66 Ga. 712; Thaxton v. Roberts, 66 Ga. 704; Nisbet v. Sawyer, 66 Ga. 256; Saddler v. Lee, 66 Ga. 45; Gammage v. Georgia Southern R. Co., 65 Ga. 614; Bell v. Singer Mfg. Co., 65 Ga. 452; Thomas v. Wilkinson, 65 Ga. 405; Whitaker v. Hudson, 65 Ga. 43; Brumby v. Bell, 65 Ga. 116; De Give v. Seltzer, 64 Ga. 423; West v. Cobb, 63 Ga. 347; Hays v. Urquhart, 63 Ga. 323; Hooks v. Brady, 63 Ga. 226; Citizens'

**A Delicate Power.** — As has been said by one of the chancellors and frequently reiterated: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or [which is] more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear; the injury impending or threatened, so as to be averted only by the protecting, preventive process of injunction."<sup>1</sup>

**Restraining Orders.** — The issuance of a restraining order, like the issuance of an ordinary preliminary injunction, is not a matter of course, and rests in the discretion of the court.<sup>2</sup>

**Upon Amended or Supplemental Bill.** — An application made, after the plaintiff has amended his bill or filed a supplemental bill for a

Bank *v.* Cook, 63 Ga. 159; Richardson *v.* Nacoochee Gold Min. Co., 60 Ga. 596; Conner *v.* Cherry, 60 Ga. 596; Mitchell *v.* Word, 60 Ga. 525; Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 344; Jones *v.* Johnson, 60 Ga. 260; Morris *v.* Barnwell, 60 Ga. 147; Smith *v.* McLaren, 59 Ga. 879; Harris *v.* Western, etc., R. Co., 59 Ga. 830; Nevin *v.* Printrup, 59 Ga. 281; Jones *v.* Jones, 58 Ga. 184; Wachtel *v.* Wilde, 58 Ga. 50; Poullain *v.* English, 57 Ga. 492; Summerville Macadamized, etc., Road Co. *v.* Augusta Land Co., 56 Ga. 527; Girardey *v.* Moore, 56 Ga. 526; Wayne *v.* Savannah, 56 Ga. 448; Gunby *v.* Thompson, 56 Ga. 316; Tufts *v.* Little, 56 Ga. 139; Savannah *v.* Dehoney, 55 Ga. 33; Cozart *v.* Georgia R., etc., Co., 54 Ga. 379; Byne *v.* Byne, 54 Ga. 258; Barnett *v.* People's Bank, 54 Ga. 239; Goldsmith *v.* Elsas, 53 Ga. 186; Biggam *v.* Gorham, 52 Ga. 329; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Dumas *v.* Neal, 51 Ga. 563; Central R., etc., Co. *v.* Burr, 51 Ga. 553; Hill *v.* Sledge, 51 Ga. 539; Morrison *v.* Latimer, 51 Ga. 519; Sharpe *v.* Kennedy, 51 Ga. 257; Walker *v.* Walker, 51 Ga. 22; Parker *v.* Green, 49 Ga. 624; Collier *v.* Sapp, 49 Ga. 93; Seago *v.* Bass, 49 Ga. 9; Smith *v.* Malcolm, 48 Ga. 343; Jones *v.* Thacher, 48 Ga. 83; Phillips *v.* Walker, 48 Ga. 55; Decatur County *v.* Humphrey, 47 Ga. 565; Oberholser *v.* Greenfield, 47 Ga. 530; Lowry *v.* Williams, 47 Ga. 387; Davis *v.* Weaver, 46 Ga. 626; Cook *v.* North, etc., R. Co., 46 Ga. 618; Kendall *v.* Dow, 46 Ga. 607; Isam *v.* Hooks, 46 Ga. 309; Anthony *v.* Stephens, 46 Ga. 241; Thomas *v.* Stokes, 44 Ga. 631; Rowland *v.* Ran-

some, 43 Ga. 390; McDonald *v.* Davis, 43 Ga. 356; Bridwell *v.* McNair, 43 Ga. 176; Moses *v.* Flewellen, 42 Ga. 386; Cubbedge *v.* Adams, 42 Ga. 124; Gardner *v.* Kersey, 39 Ga. 664, 99 Am. Dec. 484; Crawford *v.* Ross, 39 Ga. 44; Powell *v.* Parker, 38 Ga. 644; Louis *v.* Bamberger, 36 Ga. 589; Montgomery *v.* Walker, 36 Ga. 515; Buchanan *v.* Ford, 29 Ga. 490; Loyless *v.* Howell, 15 Ga. 554; Swift *v.* Swift, 13 Ga. 145; Dent *v.* Summerlin, 12 Ga. 5; Holt *v.* Augusta Bank, 9 Ga. 552; Hemphill *v.* Ruckersville Bank, 3 Ga. 445; Read *v.* Dews, R. M. Charlt. (Ga.) 358; Shellman *v.* Scott, R. M. Charlt. (Ga.) 380.

1. Bonaparte *v.* Camden, etc., R. Co., 1 Baldw. (U. S.) 205; Truly *v.* Wanzer, 5 How. (U. S.) 141; Cross *v.* Morristown, 18 N. J. Eq. 305; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419; Longshore Printing Co. *v.* Howell, 20 Oregon 527.

2. Androvette *v.* Bowne, 4 Abb. Pr. (N. Y. Supreme Ct.) 440, 15 How. Pr. (N. Y.) 75.

As was said by Brewer, J., in *Olmstead v. Koester*, 14 Kan. 463, "There are oftentimes considerations which, upon the same testimony, will forbid a temporary restraining order, when upon final hearing they will require a permanent injunction. \* \* \* We have in several cases of late referred to the fact that often a court is justified in refusing a temporary restraining order, and requiring the plaintiff to wait until the final disposition of the case, even where the preponderance of the evidence on the application is in favor of the right to a restraining order."

new injunction in the first instance, is addressed to the sound discretion of the court.<sup>1</sup>

**b. RULES GOVERNING THE CHANCELLOR'S EXERCISE OF DISCRETION** — (1) *Miscellaneous Considerations*. — A preliminary injunction is not a matter of strict right which is to be issued *ex debito justitiæ*, and an application for an injunction *in limine* is an appeal to the favor or conscience of the chancellor.<sup>2</sup> It usually includes a higher degree of discretion than the issue of other writs.<sup>3</sup>

The Facts and Circumstances of each particular case are to be considered,<sup>4</sup> and the court's power should be exercised in furtherance of justice.<sup>5</sup>

1. *Tucker v. Carpenter, Hempst.* (U. S.) 440.

2. *English v. Progress Electric Light, etc., Co.*, 95 Ala. 259; *Johnson v. Wilson County*, 34 Kan. 670; *Kemper v. Campbell*, 45 Kan. 529; *State v. Jarrett*, 17 Md. 309; *Reddall v. Bryan*, 14 Md. 444; *Galusha v. Flour City Nat. Bank*, 1 Hun (N. Y.) 573; *Adams v. Grey*, 11 Misc. Rep. (N. Y. City Ct.) 446; *Pelzer v. Hughes*, 27 S. Car. 408.

**Mandamus**. — As to the right to a writ of mandamus to compel the chancellor to issue an injunction, see *infra*, p. 994.

3. *Ex p. Conway*, 4 Ark. 302.

**Injunction Distinguished from Attachment**. — A preliminary injunction "is not like an order of attachment, which goes upon the filing of a statutory affidavit and bond." *Olmstead v. Koester*, 14 Kan. 463.

4. *Camp v. Bates*, 11 Conn. 51; *Can-ton Co. v. Northern Cent. R. Co.*, 21 Md. 383; *McCreery v. Sutherland*, 23 Md. 471; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *Matter of Sloan*, 5 N. Mex. 590; *Wormser v. Brown*, 149 N. Y. 163; *Hygeia Water Ice Co. v. New York Hygeia Ice Co.*, 140 N. Y. 94; *Calhoun v. Millard*, 121 N. Y. 69; *Tate v. Vance*, 27 Gratt. (Va.) 571.

**The Criterion** by which the issue of the writ is to be allowed or refused is to be found in the question: Does the position of the parties, the status of the matters involved at this present moment, justify the exercise of the power? Writs of injunction are not to be scattered loosely by the court for a tentative purpose only, but there must appear an impending injury, which demands instant preventive action to justify their allowance. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. Rep. 351.

5. *Per Harris, J.*, in *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371. See also, to the same effect, *Decker v. Decker*, 52 How. Pr. (N. Y. Supreme Ct.) 218. The circumstance that the object of the action may be defeated by refusing a preliminary injunction is not of itself sufficient to deprive the court of all discretion and power. *Young v. Campbell*, 75 N. Y. 525.

**Technical Objections** to the issuance of a preliminary injunction are to be weighed and examined, but they are to be treated with no particular indulgence. *Woodworth v. Hall*, 1 Woodb. & M. (U. S.) 248, wherein Woodbury, J., said: "In all inquiries in equity, the leaning in doubtful points must certainly be rather against than in favor of them; and more especially must it be so in preliminary injunctions, where the decision is only temporary, and may be dissolved on motion at any time, on showing fuller proof as to anything affecting the merits of the controversy."

**A Stronger Case** must be made to justify the reversal of an order granting an injunction than would be required to justify the reversal of an order refusing one. *Lamb v. Burlington, etc., R. Co.*, 39 Iowa 333.

**Particular Precedents**. — Although the writ of injunction will not be awarded in doubtful or new cases not coming within well-established principles of equity, the court is not confined to particular precedents. *Hardesty v. Taft*, 23 Md. 512; *Bonaparte v. Camden, etc., R. Co.*, 1 Baldw. (U. S.) 218. See also, in support of the proposition that a preliminary injunction ought not to be granted in a case which does not come within well-established principles of equity, *Woodward*



**Person Pursuing Lawful Business.** — The chancellor should be particular in granting a preliminary injunction against persons in the pursuit of their lawful business and rights.<sup>1</sup>

**Laches and Insolvency.** — The court will consider whether or not the plaintiff has been guilty of laches,<sup>2</sup> and also whether or not the defendant is solvent.<sup>3</sup>

**Where the Sovereign or State Sues** for an injunction and is not under the necessity of giving bond, the court will be more chary in awarding an injunction than if a bond could be required.<sup>4</sup>

**Anticipation of Final Decree.** — The court should be slow to grant an injunction in advance of the trial, which will practically give the plaintiff all the relief which he could obtain by means of a perpetual injunction, especially where any possible injury to the plaintiff will be slight and readily capable of compensation.<sup>5</sup>

(2) *The Balance of Respective Inconveniences.* — Where one or the other of the parties is to suffer by the granting or withholding of an injunction, the inconvenience likely to be incurred by the respective parties by the granting or withholding of a preliminary injunction should be balanced, and the court should grant or withhold the injunction accordingly.<sup>6</sup> Where the inconvenience to

*v. Harris*, 2 Barb. (N. Y.) 439; *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419.

In *Hamilton v. Whitridge*, 11 Md. 128, it was declared that when a new case arises in which rights can be asserted or wrongs prevented or redressed consistently with established principles, the court should not deny relief merely because no decision can be found in which the jurisdiction has been invoked and exercised.

"For precedents in any recognized sense of that word it is \* \* \* idle to search. By one judge, an injunction may be granted to-day, under a given state of facts, and by another be refused to-morrow upon identically the same state of facts, and yet neither functionary be chargeable with even error in judgment." *Per Knowles, J.*, in *Earth Closet Co. v. Fenner*, 5 Fisher Pat. Cas. 15.

1. *Cohen v. State Bank*, 81 Ga. 723.

2. *Sprague v. Rhodes*, 4 R. I. 301; *Sheldon v. Rockwell*, 9 Wis. 166; *Cobb v. Smith*, 16 Wis. 661.

3. *Swett v. Troy*, 62 Barb. (N. Y.) 630, 12 Abb. Pr. N. S. (N. Y.) 100; *Morris v. Lowell Mfg. Co.*, 3 Fisher Pat. Cas. 67, in which latter case it was declared that the solvency of the defendant is a material circumstance especially in patent cases. *Citing*

*Newall v. Wilson*, 2 De G. M. & G. 282, and *Day v. Boston Belting Co.*, 16 Law Rep. 330.

**Averment of Defendant's Insolvency.** — As to the materiality of an averment that the defendant is insolvent, see *supra*, p. 956; and as to the method of pleading insolvency, *supra*, p. 960.

4. *U. S. v. Jellico Mountain Coke, etc., Co.*, 43 Fed. Rep. 898.

5. *Steele v. Pittsburgh, etc., R. Co.*, (Supreme Ct.) 36 N. Y. St. Rep. 198; *Seymour v. Mutual Reserve Fund L. Assoc.*, 14 Misc. Rep. (N. Y. Supreme Ct.) 151; *Goodyear v. Dunbar*, 3 Wall. Jr. (C. C.) 310.

**Where Fraud Is the Gravamen of the Bill**, it is the duty of the chancellor to be more careful in refusing an injunction than in other cases, because fraud is so subtle and difficult of detection. *Shaefer v. Hunnewell*, 47 Ga. 660; *Isam v. Hooks*, 46 Ga. 309.

6. *Hilliard Inj.*, c. 1, § 39, cited in *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

**The Court Looks to the Particular Circumstances** to see what degree of inconvenience will be occasioned to one party or the other by granting or withholding the injunction. *Sargent v. Seagrave*, 2 Curt. (U. S.) 553; *Union Paper Bag Mach. Co. v. Binney*, 5 Fisher Pat. Cas. 166; *Swift v. Jenks*, 19 Fed. Rep. 641. In the last mentioned

result is equally divided, or the preponderance is in favor of the defendant, an injunction will be refused.<sup>1</sup>

(3) *Exercise of Caution.* — The power to grant an injunction should be exercised with great caution, and an injunction should not be issued except in a case of urgent necessity. The process of injunction "is the strong arm of the court, and to render its operation benign and useful it must be exercised with great discretion and when necessity requires it."<sup>2</sup> Especially should

case it was declared that where an injunction will work great injury to one party without corresponding benefit to the other, it should not ordinarily be issued, especially where judicial protection can be had without it.

In *Carleton v. Rugg*, 149 Mass. 550, it was declared that the court should look to the interests of the plaintiff, and should, at the same time, remember that without good reason a defendant is not to be dealt with *ex parte* before the case is ripe for hearing. See also the following cases: *Olmstead v. Koester*, 14 Kan. 463; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21; *Jones v. Newark*, 11 N. J. Eq. 452; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Seymour v. Mutual Reserve Fund L. Assoc.*, 14 Misc. Rep. (N. Y. Supreme Ct.) 151; *Abraham v. Meyers*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 384; *Cornell v. Utica, etc., R. Co.*, 61 How. Pr. (N. Y.) 184; *Flippin v. Knaffle*, 2 Tenn. Ch. 238; *Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674; *Irwin v. Dane*, 4 Fisher Pat. Cas. 359; *Morris v. Lowell Mfg. Co.*, 3 Fisher Pat. Cas. 67; *Potter v. Whitney*, 1 Lowell (U. S.) 87; *Thomas v. Nantahala Marble, etc., Co.*, 8 U. S. App. 429; *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952.

**Respective Rights of Appeal.** — Where the court is clearly of the opinion that the plaintiff is not entitled to an injunction, it will not be influenced to allow an injunction by the consideration that the defendant can appeal from an order allowing one, and that the plaintiff cannot appeal from an order refusing an injunction. *Edison Electric Light Co. v. Buckeye Electric Co.*, 64 Fed. Rep. 225.

**Preliminary Injunction for Defendant's Benefit.** — A consideration that presses very strongly upon the court in deter-

mining whether or not to issue an injunction against the erection of a bridge which is claimed to be a nuisance, is the heavy expenditure of the defendant in its erection and the loss which he may suffer in the event that the injunction is granted on the final hearing. *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74, *citing* *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518, wherein the court expressed regret that the judge before whom the application for the injunction was first made had not enjoined any further proceedings until the great questions involved had been finally disposed of.

**Liability for Costs.** — In *Georgia Southern, etc., R. Co. v. Ray*, 84 Ga. 376, the court said: "The question of cost merely is not one upon which the grant or refusal of a temporary injunction ought to be brought to this court, since the losing party by acquiescing in the interlocutory decision will part with no right of contesting liability for costs when it comes to the final trial."

1. *Per Lurton, J.*, in *Shinkle, etc., Co. v. Louisville, etc., R. Co.*, 62 Fed. Rep. 690. *Citing* *Flippin v. Knaffle*, 2 Tenn. Ch. 238, and *Owen v. Brien*, 2 Tenn. Ch. 295.

The discretion should always be exercised in favor of the party most liable to be injured: *Hicks v. Comp-ton*, 18 Cal. 209.

2. *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 378, *per* Chancellor Kent; *Suit v. Creswell*, 45 Md. 529; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Woodward v. Harris*, 2 Barb. (N. Y.) 439 [in which last mentioned case the court *cited* *Brown v. Newall*, 2 Myl. & C. 570; and 2 Story Equity Pleadings, § 959b]. See also *Purdy v. Manhattan El. R. Co.* (C. Pl.) 36 N. Y. St. Rep. 43, in which case the court quoted from 10 Am. and Eng. Encyc. of Law 780. See likewise the following cases:

*Alabama.* — *McBryde v. Sayre*, 86 Ala. 458; *Vaughan v. Marable*, 64 Ala. 60.

the court exercise great caution in granting a preliminary injunction on an *ex parte* application, because experience has shown

*Arkansas.* — *Ex p. Martin*, 13 Ark. 198.

*Connecticut.* — In *Goodwin v. New York, etc.*, R. Co., 43 Conn. 500, the court said: "Restraining the action of an individual or a corporation by injunction is an extraordinary power, always to be exercised with caution, never without the most satisfactory reasons." See also *Rowland v. Weston First School Dist.*, 42 Conn. 30; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165, *per* Butler, J.; *Roath v. Driscoll*, 20 Conn. 533.

*Dakota.* — *Wood v. Bangs*, 1 Dakota 172.

*Georgia.* — *Gunn v. Woolfolk*, 66 Ga. 682; *Empire Loan, etc., Assoc. v. Atlanta*, 77 Ga. 496.

*Illinois.* — *Baxter v. Board of Trade*, 83 Ill. 146, in which case the court cited *Brown v. Newall*, 2 Myl. & C. 568.

*Indiana.* — *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109.

*Kansas.* — *State v. Anderson*, 5 Kan. 90, in which case the court cited *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 378.

*Louisiana.* — *Koehl v. Judge*, 45 La. Ann. 1488.

*Maine.* — *Morse v. Machias Water Power, etc., Co.*, 42 Me. 119, in which case the court cited *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 378.

*Maryland.* — *Garrett County v. Franklin Coal Co.*, 45 Md. 470; *Hefebower v. Buck*, 64 Md. 15.

*Massachusetts.* — Latterly more caution has been observed than under the early practice of the courts, in granting an *ex parte* injunction "on consideration that if such an injunction is not necessary to prevent irreparable injury, or render the purpose of the suit unavailing, it may operate injuriously to interrupt an important enterprise, and because after subpoena served the respondent has notice of the suit, and proceeds at the peril of all the consequences which may ensue." *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

*Nebraska.* — *Calvert v. State*, 34 Neb. 616.

*New Jersey.* — *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557; *West Jersey R. Co. v. Cape May, etc.*, R. Co., 34 N. J. Eq. 164; *Citizens'*

*Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Morris, etc.*, R. Co. v. Prudden, 20 N. J. Eq. 530; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Cross v. Morristown*, 18 N. J. Eq. 305; *Cornelius v. Post*, 9 N. J. Eq. 196; *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35.

*New York.* — *Murray v. Knapp*, 42 How. Pr. (N. Y. Supreme Ct.) 462, wherein the court commented on the dangerous frequency with which preliminary injunction had been granted; *Gentil v. Arnand*, 38 How. Pr. (N. Y. Super. Ct.) 94, *per* McCunn, J.; *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y.) Supreme Ct.) 193; *Androvette v. Bowne*, 4 Abb. Pr. (N. Y. Supreme Ct.) 440; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Woodward v. Harris*, 2 Barb. (N. Y.) 440; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497; *Akrill v. Selden*, 1 Barb. (N. Y.) 316; *Troy, etc.*, R. Co. v. Boston, etc., R. Co., 86 N. Y. 107; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

*Pennsylvania.* — *Com. v. Rush*, 14 Pa. St. 186.

*Oregon.* — *Longshore Printing Co. v. Howell*, 26 Oregon 527; *Mendenhall v. Harrisburg Water Co.*, 27 Oregon 38; *Smith v. Gardner*, 12 Oregon 221, 53 Am. Rep. 342.

*United States.* — *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Morris v. Lowell Mfg. Co.*, 3 Fisher Pat. Cas. 67; *Potter v. Schenck*, 1 Biss. (U. S.) 515; *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248; *U. S. v. Jellicoe Mountain Coke, etc., Co.*, 43 Fed. Rep. 898.

**Rights of the Public.** — Especially will the court exercise great caution where an injunction is sought against an undertaking of great magnitude in which the rights of the public are involved. *Creanor v. Nelson*, 23 Cal. 464; *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Cross v. Morristown*, 18 N. J. Eq. 305; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Avery v. Fox*, 1 Abb. (U. S.) 246.

that *ex parte* statements seldom present the full truth,<sup>1</sup> and the court should not be influenced to grant an injunction in an improper case by the consideration that it may not do any harm to the defendant.<sup>2</sup>

(4) *Doubtful and Difficult Cases.* — A preliminary injunction will not be granted unless it clearly appears that such a remedy is necessary to protect the rights of the party applying therefor pending the litigation; and where the case is not free from doubt, and it does not appear that the denial of the preliminary injunction will deprive the court of its power to afford the plaintiff relief on the final hearing, the plaintiff's application should be denied.<sup>3</sup>

1. *Murray v. Knapp*, 42 How. Pr. (N. Y. Supreme Ct.) 462.

2. *Mullen v. Jennings*, 9 N. J. Eq. 192.

3. *McHugh v. Boston, etc.*, R. Co., 66 Barb. (N. Y.) 612; *Hemsley v. Bew*, 53 N. J. Eq. 241. See also *Mogul Steamship Co. v. M'Gregor*, 15 Q. B. Div. 476, which case was cited in *Hagerty v. Lee*, 45 N. J. Eq. 255. See likewise the following cases in which the doctrine stated in the text finds support.

*Alabama.* — *Boulo v. New Orleans, etc.*, R. Co., 55 Ala. 480.

*California.* — *Hicks v. Compton*, 18 Cal. 209.

*Colorado.* — *Guebelle v. Epley*, 1 Colo. App. 199.

*Connecticut.* — *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

*Delaware.* — *Hulley v. Security Trust, etc.*, Deposit Co., 5 Del. Ch. 578.

*Georgia.* — *Hone v. Moody*, 59 Ga. 731; *Saddler v. Lee*, 66 Ga. 45.

*Mississippi.* — *McCutchen v. Blanton*, 59 Miss. 116; *Green v. Lake*, 54 Miss. 540.

*New Hampshire.* — *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Burnham v. Kempton*, 44 N. H. 78.

*New Jersey.* — *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; *Society, etc., v. Holsman*, 5 N. J. Eq. 126; *Butler v. Rogers*, 9 N. J. Eq. 487. See also *Atty.-Gen. v. Delaware, etc.*, R. Co., 27 N. J. Eq. 9 [in which case the court cited *Story's Eq. Jurisprudence* 924a; and *Rochester v. Curtiss, Clarke Ch. (N. Y.)* 343, wherein it was declared that the court will consider the relative convenience and inconvenience which the parties will sustain from the granting or withholding of relief]; *Lomax v. Picot*, 2 Rand. (Va.) 247; *Atty.-Gen. v. Chicago, etc.*,

R. Co., 35 Wis. 425; *Meyers v. Block*, 120 U. S. 206.

*New York.* — *Morgan v. Binghamton*, 102 N. Y. 500; *Richardson v. Barstow Stove Co.*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 150; *Wynkoop v. Van Beuren*, (Supreme Ct.) 11 N. Y. Supp. 379; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. (N. Y. Super. Ct.) 233; *O'Connor v. National Park Bank*, 8 Misc. Rep. (N. Y. C. Pl.) 288; *Woodward v. Harris*, 2 Barb. (N. Y.) 439; *Steinberg v. O'Conner*, 42 How. Pr. (N. Y. C. Pl.) 52; *Gould v. Thompson*, 39 How. Pr. (N. Y. Supreme Ct.) 5.

*Pennsylvania.* — *Com. v. Rush*, 14 Pa. St. 186; *Bunnell's Appeal*, 69 Pa. St. 59.

*Washington.* — *Rockford Watch Co. v. Rumpf*, 12 Wash. 647.

*United States.* — *Bonaparte v. Camden, etc.*, R. Co., 1 Baldw. (U. S.) 218, which case was cited in *Woodward v. Harris*, 2 Barb. (N. Y.) 439, and in *Hulley v. Security Trust, etc.*, Deposit Co., 5 Del. Ch. 578; *Turner v. People's Ferry Co.*, 22 Blatchf. (U. S.) 272; *Ormerod v. New York, etc.*, R. Co., 21 Blatchf. (U. S.) 106; *Sargent v. Seagrave*, 2 Curt. (U. S.) 553; *Day v. Candee*, 3 Fisher Pat. Cas. 9; *Bliss v. Brooklyn*, 4 Fisher Pat. Cas. 596; *Union Paper Bag Mach. Co. v. Binney*, 5 Fisher Pat. Cas. 166; *Jones v. Hodges*, 1 Holmes (U. S.) 37; *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 642; *Edison Electric Light Co. v. Buckeye Electric Co.*, 59 Fed. Rep. 691.

**Violation of Constitution.** — A preliminary injunction will not be granted on doubtful points of constitutional law. *Greenville Tp. v. Seymour*, 22 N. J. Eq. 458; *Black v. Delaware, etc.*, Canal Co., 22 N. J. Eq. 130.

**Doubt as to the Plaintiff's Title.** — As to the issuance of an injunction when

One Reason, it is said, why a preliminary injunction should be denied in a doubtful case is that if the defendant be not permitted to proceed with the acts complained of, the court will never be able by experience to judge whether the acts are such as will actually injure the plaintiff.<sup>1</sup>

c. ARBITRARY DISCRETION. — The discretion which the chancellor is called upon to exercise when a motion for a preliminary injunction is addressed to him is a judicial discretion, not wilful choice; and it should not be exercised arbitrarily or capriciously, but in accordance with well-established rules of practice.<sup>2</sup>

Errors of Law. — Where errors of law are committed by the chancellor, *e. g.*, where it plainly appears on the face of the bill that the plaintiff is entitled to an injunction and the chancellor refuses a preliminary injunction, or when it is patent that he is not entitled to relief but the chancellor awards an injunction, such errors may be reviewed by the appellate court.<sup>3</sup>

d. PRELIMINARY AND FINAL INJUNCTIONS DISTINGUISHED. — Whether or not a preliminary injunction should be issued, rests

the plaintiff's title is in doubt, see *supra*, VI. *Establishment of Plaintiff's Right at Law*.

1. *Per* Chancellor Zabriskie, in *Duncan v. Hayes*, 22 N. J. Eq. 25.

2. In *Rowley v. Van Benthuyssen*, 16 Wend. (N. Y.) 373, it was said that the question whether or not an injunction should be allowed "certainly is not addressed to the arbitrary or unlimited discretion of the chancellor, but depends in general upon settled and well-defined principles — principles which have been established by a long course of adjudication in courts of equity; and the chancellor, in awarding or dissolving an injunction, is no more at liberty to depart from approved precedents than is the judge who presides on the final decision in a court of law." *Quoted in* *Thompson v. Paterson*, 9 N. J. Eq. 624. See also the following cases to the effect that the chancellor will not be allowed to abuse his discretion: *English v. Progress Electric Light, etc., Co.*, 95 Ala. 259, *per* Clifton, J.; *Richards v. Dower*, 64 Cal. 62; *Gower v. Andrew*, 59 Cal. 119; *Kennedy v. Scovil*, 12 Conn. 317; *Citizens' Bank v. Cook*, 63 Ga. 159, *per* Warner, C. J.; *Beebe v. Guinault*, 29 La. Ann. 795; *Steigerwald v. Winans*, 17 Md. 62; *Thorn v. Sweeney*, 12 Nev. 251; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, *per* Earl, J.; *Strasser v. Moonelis*, 108 N. Y. 611; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *McHenry v. Jewett*, 90 N. Y. 60; *Gen-*

*til v. Arnand*, 38 How. Pr. (N. Y. Super. Ct.) 94; *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425; *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. Rep. 337.

3. *Camp v. Bates*, 11 Conn. 57; *Poole v. Sims*, 67 Ga. 36; *Lee v. Montgomery, Walk.* (Miss.) 109, *per* Ellis, J.; *Hatch v. Western Union Tel. Co.*, 93 N. Y. 640; *Selchow v. Baker*, 93 N. Y. 59; *White v. Inebriates' Home*, 141 N. Y. 123; *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477.

As it was expressed in *State v. Crawford*, 28 Kan. 726, a petition for an injunction which is ascertained, "after a careful examination of all its elements, to be founded in reason and justice, and to come within the acknowledged principles of long-established equity jurisprudence, should not be dismissed unceremoniously, or denied a respectful hearing, simply because of its unquestioned and admitted novelty."

The Principle Which Should Govern Judges on applications for preliminary injunctions is that, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. *U. S. v. Duluth*, 1 Dill. (U. S.) 469, in which case no answer had been filed, but counter affidavits had been read.

in the discretion of the court or officer to whom the application is made, to a much larger extent than is the case after the cause has been tried and the rights of the parties have been judicially ascertained, and there are many cases in which it has been held that a perpetual injunction after a hearing has been had is a matter of strict right.<sup>1</sup>

*e. MANDAMUS.* — The granting or refusing of an injunction is the exercise of a mere ministerial discretion, and consequently, if an injunction is improperly refused, the Supreme Court will not, according to the weight of authority, award a writ of mandamus to compel the issuance of an injunction.<sup>2</sup>

**2. Notice** — *a. WHETHER INJUNCTION WILL BE GRANTED EX PARTE* — (1) *In the Absence of Statute.* — Where the circumstances sworn to in the bill show that the case is one in which the giving of notice will in all probability "accelerate the mischief," and there is no statutory provision requiring notice to be given, the court may award a preliminary injunction without notice to the defendant;<sup>3</sup> but the power of the chancellor to grant an

1. In *Akin v. Davis*, 14 Kan. 143, it was said that a preliminary injunction "may sometimes be properly refused upon the same facts which would entitle the party of right to an injunction on final hearing." See also, in support of the proposition stated in the text, *Richards v. Dower*, 64 Cal. 62; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160; *New York Printing, etc., Establishment v. Fitch*, 1 Paige (N. Y.) 97; *Murray v. Knapp*, 42 How. Pr. (N. Y. Supreme Ct.) 462; *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Pond v. Harwood*, 139 N. Y. 111.

**Conflicting Evidence.** — Where the plaintiff fails to make out a case sufficiently strong to move the court to exercise its extraordinary equity powers, and the evidence is conflicting, the granting or refusing of a permanent injunction is a discretionary matter. *Reynolds v. Everett*, 144 N. Y. 189.

2. *McMillen v. Smith*, 26 Ark. 613; *Ex p. Hays*, 26 Ark. 510; *Ex p. Batesville, etc., R. Co.*, 39 Ark. 82; *Ex p. Conway*, 4 Ark. 302; *State v. Judge*, 28 La. Ann. 905; *State v. Judge*, 23 La. Ann. 51; *State v. Police Jury*, 39 La. Ann. 765; *State v. Judge*, 36 La. Ann. 394; *State v. Judge*, 37 La. Ann. 400. But see *State v. Lazarus*, 36 La. Ann. 578; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, in which case the bill upon which an injunction was granted was devoid of substance, and it was held that a writ of mandamus

should be issued to vacate the injunction; *Ex p. Hodges*, 24 Ark. 197; *Ex p. Pile*, 9 Ark. 336, in which two last mentioned cases writs of mandamus were issued without any question as to the propriety of issuing them. See further the article MANDAMUS.

**In Louisiana** it has been declared that the Supreme Court will not exercise the authority conferred upon it by the constitution to compel the issuance of an execution except when "urgent considerations of public policy" demand such interference. *State v. Judge*, 32 La. Ann. 549.

**Mandamus to Compel Dissolution.** — As to the propriety of mandamus to compel dissolution of an injunction, see *infra*, XV. 5. d. *Mandamus and Prohibition*.

3. *Adams Equity*, 639, whose expression is quoted in the text, cited in *Allen v. Hawley*, 6 Fla. 142.

In *England* the rule is that a *special* injunction cannot be granted on an *ex parte* application. *Morasco v. Boiton*, 2 Ves. 112, in which case the motion was made after appearance; *Wyatt Prac. Reg.* 238; 1 *Newl.* 219; which authorities were cited by Chancellor Vroom in *Buckley v. Corse*, 1 N. J. Eq. 504. See also *James v. Downes*, 18 Ves. Jr. 522; *Edwards v. Edwards*, 2 Dick. 755; *Robinson v. Cathcart*, 2 Cranch (C. C.) 590, in which last mentioned case the English rule is stated. See also the following cases decided in the United States, in which the doctrine stated in the text finds support:

injunction should be exercised with great caution, and upon consideration of all the circumstances of the case; it is only in cases of great urgency or where irreparable mischief will ensue, that an injunction will be granted *ex parte*;<sup>1</sup> and it is much the better practice for the chancellor to refuse to grant an injunction *ex parte* whenever notice can be safely given.<sup>2</sup> As has been said by an able chancellor, whether notice shall be given depends upon no settled rule of practice, but on the nature of the case.<sup>3</sup>

*Alabama.* — *Bolling v. Tate*, 65 Ala. 477; *Collier v. Falk*, 61 Ala. 105.

*Arkansas.* — *Exp. Martin*, 13 Ark. 198.

*California.* — *Eureka Lake, etc., Canal Co. v. Superior Ct.*, 66 Cal. 311; *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187.

*Delaware.* — *Davis v. Browne*, 2 Del. Ch. 188.

*Florida.* — *Lewton v. Hower*, 18 Fla. 872, in which case the plaintiff presented an affidavit stating that he was unable to find the defendant and that he feared the injury might in part be effected before notice could be served. See also *Allen v. Hawley*, 6 Fla. 142.

*Georgia.* — In *Semmes v. Columbus*, 19 Ga. 471, it was said: "The chancellor may order an injunction instantly, on the *ex parte* showing of the complainant; and the exigency of the case frequently requires that he should do it." See also *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Burchard v. Boyce*, 21 Ga. 6.

*Iowa.* — *Death v. Pittsburg Bank*, 1 Iowa 382.

*Maryland.* — *Binney's Case*, 2 Bland (Md.) 99, *per* Chancellor Bland; *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63.

*New Jersey.* — In *Ross v. Elizabeth-Town, etc.*, R. Co., 2 N. J. Eq. 422, Chancellor Pennington said: "If the doctrine so strongly urged, that notice upon every application for an injunction must be given, is to prevail, it would be better to go farther, and put an end to the whole power of the court in granting them at all. It is admitted to be a delicate power, which calls for great firmness and discretion in its exercise; but it is at the same time, as all must agree, an indispensable power to reside somewhere." See also *Perkins v. Collins*, 3 N. J. Eq. 482; *Tichenor v. Morris Canal, etc., Co.* [cited in *Perkins v. Collins*, 3 N. J. Eq. 484]; *Buckley v. Corse*, 1 N. J. Eq. 504; *Wyckoff v. Cochran*, 4 N. J. Eq. 420.

*New York.* — *Murray v. Knapp*, 42

*How. Pr. (N. Y. Supreme Ct.)* 462, 62 Barb. (N. Y.) 566, *per* Learned, J. See also *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160, which case, it would seem, recognizes that when there is a pressing necessity the injunction may be granted without giving the defendant an opportunity to answer.

*Rhode Island.* — *Harrington v. Harrington*, 15 R. I. 341, wherein it is recognized that an injunction will be granted *ex parte* where the bill is accompanied by an affidavit or proof, and a proper case is made showing an emergency.

**Knowledge of Injunction.** — As to the knowledge of an injunction which is sufficient to bind the defendant to obedience to the injunction, see *infra*, XX, 4, *Knowledge of Injunction*.

1. *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 161; *Androvette v. Bowne*, 4 Abb. Pr. (N. Y. Supreme Ct.) 440, 15 *How. Pr. (N. Y.)* 75.

2. In *Phelps v. Foster*, 18 Ill. 309, Caton, J., said: "This writ should very rarely, if ever, be awarded without giving the opposite party a chance to be heard and to file affidavits in answer to the bill, whenever that is practicable." See also *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Thomas Iron Co. v. Allentown Min. Co.*, 28 N. J. Eq. 77.

3. *Buckley v. Corse*, 1 N. J. Eq. 504, *per* Chancellor Vroom, who said also that if the case be one of difficulty and importance the court will generally require notice to be given. See also, to the effect that in the absence of any rule or statute on the subject it is in the discretion of the court to require notice to be given or not, as the circumstances demand, *Tatem v. Gilpin*, 1 Del. Ch. 13; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Perkins v. Collins*, 3 N. J. Eq. 482.

**Mandatory Injunction.** — Where an application is made for a mandatory injunction (as to the power to issue which preliminarily there is grave doubt) notice should be given to the defendant.<sup>1</sup>

(2) *Statutory Provisions.* — In many states statutes have been enacted with reference to the notice that should be given before the granting of an injunction, and likewise by an Act of Congress it has been provided that the United States courts shall require notice to be given. These acts should be consulted by the practitioner.<sup>2</sup>

**After Appearance of the Defendant.** — In *Buckley v. Corse*, 1 N. J. Eq. 504. Chancellor Vroom said: "I do not consider it necessary, in cases where an injunction is applied for after filing the bill, and after the defendant has appeared, that notice of the application should be given, merely because there has been an appearance. The application may be made without notice, and, if it be a case that requires it, notice will be ordered. Where the application is made after answer filed, notice is necessary, according to the thirtieth rule of practice, but even then it may be dispensed with by the chancellor."

**Where the Decision of the Main Question Involved** will be the result of granting an injunction, the defendant should be given notice. *Martin v. Broadus, Freem. (Miss.) 35*, in which case an injunction was sought not only restraining the defendant from making sale of property mentioned in a deed of trust, but also requiring him to deliver it unconditionally into the possession of the plaintiff; *citing Deklyn v. Davis, Hopk. (N. Y.) 135*.

**Allegations in Bill on Information.** — In *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167, it was apparent from the bill that the plaintiff did not know and could not state as a fact within his knowledge the matters upon which he relied for an injunction, and it was held that a notice of the application for an injunction should have been given so as to afford the defendant an opportunity to be heard; *citing Campbell v. Morrison*, 7 Paige (N. Y.) 157.

**Public Interests Involved.** — It is not usual to grant an injunction *ex parte* where the undertaking is of a public nature or where the operation of large companies, in which the public is supposed to be in some degree interested, will be suddenly stopped. *Ex p. Martin*, 13 Ark. 198; *Perkins v. Collins*, 3 N. J. Eq. 482; *Delaware, etc., Canal Co. v. Raritan, etc., R. Co.*, 14 N. J. Eq. 445;

*Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; *Society, etc., v. Butler*, 12 N. J. Eq. 498. See also *Crowder v. Tinkler*, 19 Ves. Jr. 622, which case was cited by *Watkins, C. J.*, in *Ex p. Martin*, 13 Ark. 198. See further *Morgan v. New York, etc., R. Co.*, 10 Paige (N. Y.) 290.

1. *Smith v. People*, 2 Colo. App. 99, holding that a statute requiring notice to be given is merely affirmatory of well established principles of equity.

**Before an Order to Pull Down or Destroy** will be made, the defendant should be heard. *Ewell v. Greenwood*, 26 Iowa 377 [*citing Van Bergen v. Van Bergen*, 2 Johns. Ch. (N. Y.) 273; *Gardner v. Newburgh & Johns. Ch. (N. Y.) 162*].

2. **California** — *Suspension of Business of Corporation.* — Code Civ. Pro. Cal., § 531, provides that an injunction "to suspend the general and ordinary business of a corporation" shall not be granted "without due notice of the application therefor to the proper officers or managing agent of the corporation." *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187; *Fischer v. Superior Ct.*, 110 Cal. 129.

**Injunction Against Unlawful Acts.** — Notwithstanding the statute, notice need not be given where an injunction is sought to restrain a corporation from committing unlawful acts injurious to the plaintiff. *Hobbs v. Amador, etc., Canal Co.*, 66 Cal. 161, 8 Am. & Eng. Corp. Cas. 249.

**Colorado.** — Under provisions of the statutes a mandatory injunction cannot be issued without notice, but these provisions are merely affirmatory of established principles of equity. *Smith v. People*, 2 Colo. App. 99.

**Florida** — *Proceedings at Law.* — It is provided by statute that no writ of injunction to stay proceedings at law shall be issued without notice; but it has been held that the statute does not apply where an injunction is sought to



**Cases of Emergency.** — Where it is provided by statute that no injunction shall be granted without notice, "except in cases of

stay the sale of property wrongfully levied upon under an execution. *Lewton v. Hower*, 18 Fla. 872.

**Georgia.** — Code, § 3211, provides that an injunction shall not be ordered without notice unless it is manifest from sworn allegations in the bill or the affidavit of a competent person that the injury apprehended will be done if an immediate remedy is not afforded. *Strickland v. Griffin*, 70 Ga. 541.

**Illinois.** — It is required by statute that notice shall be given unless it appears that the plaintiff will be unduly prejudiced if an injunction be not issued without notice. *Brough v. Schanzenbach*, 59 Ill. App. 407. See also *Carpenter v. White*, 43 Ill. App. 448; *Evans v. Schriver Laundry Co.*, 57 Ill. App. 150.

**Indiana.** — It is required by statute that no injunction shall be issued without notice except in cases of emergency to be shown in the complaint. *Wallace v. McVey*, 6 Ind. 303; *Cincinnati, etc., R. Co. v. Huncheon*, 16 Ind. 436; *Flagg v. Sloan*, 16 Ind. 432; *Indiana Cent. R. Co. v. State*, 3 Ind. 421; *Vance v. Workman*, 8 Blackf. (Ind.) 306.

**Iowa.** — Code 1897, § 4358 (2 McClell. Anno. Code, § 4626, Code 1873, § 3390), provides that an injunction shall not be granted against a defendant who has answered unless he has had notice of the application. See also *Curtis v. Crane*, 38 Iowa 459, in which case the court cited Rev. Stat., § 3781, in support of the proposition that before granting an injunction the judge may allow the defendant to show cause why the order should not be granted.

**Business of Corporation.** — Code 1897, § 4359 (Code 1873, § 3391), provides that an injunction to stop the general and ordinary business of a corporation or the operation of a railway or of a municipal corporation can only be granted upon reasonable notice. *District Tp. v. District Tp.*, 54 Iowa 115, in which case it was held that this provision does not apply where an injunction is sought against the removal of schoolhouses taken by one district township from the possession of another, and the assumption of territory, as this was not the general and ordinary business of the township; *Johnston v. Chicago, etc., R. Co.*, 58 Iowa 537, in which case it was held that the

words "operation of a railway" referred to the operations of a constructed railway, and not to the operations of a railway company in constructing a railroad.

**Nuisance.** — Code 1897, § 4359 (Code 1873, § 3391), likewise requires notice to be given before the issuance of an injunction to restrain a nuisance. *District Tp. v. Barrett*, 47 Iowa 170.

**Nebraska.** — Code Civ. Pro., § 254, provides that "an injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction." *State v. Greene*, 48 Neb. 327.

**New York.** — Code Civ. Pro. N. Y., § 609 (Code Pro., § 223), provides that the order for an injunction "may be granted upon or without notice, in the discretion of the court or judge, unless the defendant has answered, in which case it can be granted only upon notice or an order to show cause." See *Methodist Churches v. Barker*, 18 N. Y. 463, wherein it was said that the court, instead of granting an injunction unqualifiedly, may make an order to show cause, restraining the defendant in the meantime. See also *Murray v. Knapp*, 42 How. Pr. (N. Y. Supreme Ct.) 462, 62 Barb. (N. Y.) 566, *per* Learned, J.

**Injunction Not an "Ordinary Proceeding."** — In *Becker v. Hager*, 8 How. Pr. (N. Y. Supreme Ct.) 68, it was held that where the defendant has appeared, but not answered, he is not entitled to notice of an application for an injunction, as it is not an "ordinary proceeding" within the meaning of Code Pro. N. Y., § 414, Code Civ. Pro. N. Y., § 799.

**South Carolina.** — Under Code, § 247, an application for a temporary order for an injunction may be heard without notice to the defendant. *Watson v. Citizens' Sav. Bank*, 5 S. Car. 159.

**Washington.** — Code Pro. 1893, § 291, provides that no injunction shall be granted without notice except in cases of emergency to be shown in the complaint. *Rockford Watch Co. v. Rumpf*, 12 Wash. 647. *Citing Coleman v. Columbia, etc., R. Co.*, 8 Wash. 227; *State v. Lichtenberg*, 4 Wash. 407. See also *Larsen v. Winder*, 14 Wash. 109.

**Restraining Order.** — Under Code

emergency," what constitutes a case of emergency is left to the determination of the court or judge in each particular instance.<sup>1</sup>

(3) *Upon Amended and Supplemental Bills.* — Lord Hardwicke, in an early case, declared that when an injunction is dissolved on the merits, and after that the plaintiff amends his bill or brings a supplemental bill for the same matter, he cannot of course move for an injunction till answer, but it must be moved specially, with notice, that the whole circumstances of the case may be laid before the court, otherwise it would tend to delay and vexation.<sup>2</sup>

Pro., § 270, a restraining order may be granted without notice in cases of emergency to be shown by the complaint. *Cherry v. Western Washington Industrial Exposition Co.*, 11 Wash. 586; *State v. Lichtenberg*, 4 Wash. 407, in which case it was held that the only power conferred upon the court is to grant an order to remain in force long enough to give the defendant an opportunity to be heard, and that should the court without notice grant an order to continue for a longer time, its action in so doing would be irregular.

**United States.** — Rev. Stat. U. S., § 718 (Act Cong. June 1, 1872, c. 275, § 7), provides that whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge may, if there appears to be danger of irreparable injury from delay, grant an order restraining the acts sought to be enjoined until the decision upon the motion; under which provision a preliminary injunction, as distinguished from a mere restraining order, may be granted against a defendant who has not been served with notice, and who has not appeared. *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. Rep. 481. *Citing Payne v. Kansas, etc., R. Co.*, 46 Fed. Rep. 546; *Central Trust Co. v. Wabash, etc., R. Co.*, 25 Fed. Rep. 1.

*A Prior Act of Congress* (Act Cong. March 2, 1793, § 5) prohibited the issuance of injunctions by United States courts without notice to the defendant. *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78; *New York v. Connecticut*, 4 Dall. (U. S.) 1; *Wilson v. Stolley*, 4 McLean (U. S.) 272; *Wynn v. Wilson, Hempst.* (U. S.) 698; *Brooks v. Bicknell*, 3 McLean (U. S.) 250; *Perry v. Parker*, 1 Woodb. & M. (U. S.) 280. See also *Lawrence v. Bowman*, 1 McAll. (U. S.) 419; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525; *Sickels v. Borden*, 4 Blatchf. (U. S.) 14.

*No Special Injunction* under these provisions can be granted by a United States court except on due notice. *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78. See also the cases cited in the next preceding paragraph of this note.

*The Supreme Court of the United States* is bound by the prohibitions contained in the Acts of Congress that writs of injunction shall not be granted without reasonable notice. *New York v. Connecticut*, 4 Dall. (U. S.) 1; *Wynn v. Wilson, Hempst.* (U. S.) 698, *per Daniel, J.*

1. *Indiana Cent. R. Co. v. State*, 3 Ind. 421, in which case it was held that the plaintiff must show, in addition to the fact that an injury is about to be inflicted, that it could not reasonably have been anticipated in time to give the requisite notice. *Following Vance v. Workman*, 8 Blackf. (Ind.) 306.

**Necessity to Show Facts.** — A mere statement in an affidavit annexed to the bill that the rights of the plaintiff will be unduly prejudiced if an injunction be not issued according to the prayer and without notice is insufficient, as the facts from which the conclusion is drawn that the plaintiff will be prejudiced must be stated. *Brough v. Schanzbenbach*, 59 Ill. App. 407; *Werner Co. v. Miamisburg First Nat. Bank*, 55 Ill. App. 321. See also *Carpenter v. White*, 43 Ill. App. 448; *Evans v. Schriver Laundry Co.*, 57 Ill. App. 150.

2. *Travers v. Stafford*, Ambl. 104, 2 Ves. 19. See also *Home v. Watson*, 2 Sim. 85, and *Mason v. Murray*, Dick. 536.

In *Bloomfield v. Snowden*, 2 Paige (N. Y.) 355, Chancellor Walworth said: "If there is no necessity for the immediate interference of the court, the complainant should serve a copy of his supplemental bill, or petition for an injunction, with a regular notice of the application, upon the solicitor of the

*b.* ORDER TO SHOW CAUSE. — Upon the presentation of the bill to the chancellor, he may grant a rule to show cause why a preliminary injunction should not be awarded,<sup>1</sup> and an order to show cause is equivalent to a notice.<sup>2</sup>

*c.* WAIVER OF NOTICE. — Although notice of an application for an injunction be required by statute, it may be waived by the defendant by voluntarily appearing.<sup>3</sup>

*d.* REQUISITES AND SUFFICIENCY OF NOTICE. — When due notice or reasonable notice is required, the sufficiency of the notice given must be determined by the court in the exercise of its discretion, in view of the particular circumstances.<sup>4</sup>

parties who have appeared in the cause, and who are to be affected by the injunction. If a temporary injunction is necessary in the meantime to prevent serious loss or injury to the complainant, and a sufficient ground is laid therefor, the court directs the petition or supplemental bill to be filed, and grants an order for the defendant to show cause at the next motion day or other convenient time why the injunction as prayed for should not be granted; and in the meantime a temporary injunction is issued to prevent the anticipated injury." See also *Eager v. Price*, 2 Paige (N. Y.) 333; *Snediker v. Pearson*, 2 Barb. Ch. (N. Y.) 107.

*Chancellor Williamson*, in *Hornor v. Leeds*, 10 N. J. Eq. 86, said: "I lay down the rule, that where an injunction has been dissolved for want of equity in the bill, this court ought not to grant an *ex parte* injunction upon an amended bill, or upon a new bill, supplying that equity. If a complainant is willing to swear to a case fitting the opinion of the court, the rights of a defendant should not be interfered with upon such a bill, without affording the defendant an opportunity of being first heard. Any other practice would be oppressive and would place the interest and rights of a party too much in the power of his adversary." See also *Kehler v. G. W. Jack Mfg. Co.*, 55 Ga. 639.

*In a Case of Imminent Danger* of injury to the plaintiff, the court may, after appearance, allow a temporary injunction to issue upon proposed amendments to the bill, granting at the same time an order to show cause why the bill should not be so amended and the injunction continued. *Hayes v. Heyer*, 4 Sandf. Ch. (N. Y.) 485. See also *Buckley v. Corse*, 1 N. J. Eq. 504,

holding that where a bill has been amended after an injunction has been dissolved, notice is not indispensable before making an application for a second injunction.

1. *Hulley v. Security Trust, etc.*, Deposit Co., 5 Del. Ch. 578.

2. *Per Potter, J.*, in *Middletown v. Rondout, etc.*, R. Co., 43 How. Pr. (N. Y. Supreme Ct.) 481.

*The Object of an Order to Show Cause* is to enable the parties to present the case on its merits. *Per Cope, J.*, in *Hicks v. Michael*, 15 Cal. 115.

3. *Marsh v. Bennett*, 5 McLean (U. S.) 117; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, holding that a defendant whose affidavit is used to oppose the motion is precluded from setting up a want of sufficient notice; *Patterson v. Stair*, 26 Ind. 137, holding that error in granting a restraining order without notice cannot be taken advantage of when the defendant has appeared and moved to dissolve the restraining order and has filed affidavits in resistance of the motion to continue the order.

*Informality in the Service of the notice* is waived by filing an answer. *Brammer v. Jones*, 2 Bond (U. S.) 100.

4. *Lawrence v. Bowman*, 1 McAll. (U. S.) 419.

*Four Hours' notice* has been deemed insufficient under Cal. Practice Act, § 517. *Johnson v. Wide West Min. Co.*, 22 Cal. 479, in which case the defendant did not appear to the motion, and an order granting an injunction was considered as having been made without notice.

*Reasonable Notice* is required to be given where the application for an injunction is addressed to a United States court. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525; *Brooks v. Bicknell*, 3 McLean (U. S.) 250; *Wil-*

**3. Consideration of the Answer** — *a.* THE GENERAL RULE AS TO THE EFFECT OF THE ANSWER. — The defendant may put in his answer as soon as he chooses to do so, even before the application for a preliminary injunction has been heard;<sup>1</sup> and where an answer under oath denies the equities of the bill, a preliminary injunction will, as a general rule, be denied.<sup>2</sup>

*son v. Stolley*, 4 McLean (U. S.) 272; *Mowrey v. Indianapolis, etc.*, R. Co., 4 Biss. (U. S.) 78; *Lawrence v. Bowman*, 1 McAll. (U. S.) 419.

**Unreasonable Length of Notice.** — It is not competent for the plaintiff to fix a time for the hearing of an application for an injunction so far ahead as to embarrass the defendant, and it is the right of the defendant to come in and have the matter disposed of in a reasonable time. *Walworth v. Cook County*, 5 Biss. (U. S.) 133.

1. *Krone v. Krone*, 27 Md. 77; *Hall v. McPherson*, 3 Bland (Md.) 529, in which latter case the defendant anticipated the filing of the bill, and lodged his answer with the chancellor before the bill had been filed; *Bell v. Purvis*, 15 Md. 22; *Sullivan v. Moreno*, 19 Fla. 200.

2. *Magnay v. Mines Royal Co.*, 3 Drew. 130; *Woodman v. Robinson*, 2 Sim. N. S. 204; *Fooks v. Wilts, etc.*, R. Co., 5 Hare 109; *Hanson v. Gardiner*, 7 Ves. Jr. 305. See also *Adams Equity* 356. The foregoing authorities were cited in *Lynn v. Mount Savage Iron Co.*, 34 Md. 603, and *Whalen v. Dalashmutt*, 59 Md. 250.

The doctrine finds support in the following cases also:

*California.* — *Kohler v. Los Angeles*, 39 Cal. 510; *Gagliardo v. Crippen*, 22 Cal. 362, in which case it was held that the application should be denied where the allegations of the complaint are fully and specifically controverted by the defendant's affidavit.

*Florida.* — *Sullivan v. Moreno*, 19 Fla. 200; *Fuller v. Cason*, 26 Fla. 476.

*Georgia.* — Where the equity of the bill is sworn off by the answer, and the denials of the answer are not overcome by proof, injunction should be refused. *Flash v. Long*, 67 Ga. 767; *Spence v. Steadman*, 49 Ga. 133; *Kenan v. Johnson*, 48 Ga. 28. See also *McPhee v. Veal*, 76 Ga. 656; *Georgia Pac. R. Co. v. Douglasville*, 75 Ga. 828; *Burchard v. Boyce*, 21 Ga. 6, *per* McDonald, J., *obiter*; *Powers v. Heery*, R. M. Charlt. (Ga.) 523.

*Iowa.* — *Jones v. Jones*, 13 Iowa 276. *Kansas.* — *McCrea v. Leavenworth*, 46 Kan. 767.

*Maryland.* — *Chappell v. Stewart*, 82 Md. 323; *Heflebower v. Buck*, 64 Md. 15; *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363; *State v. Jarrett*, 17 Md. 309; *Steigerwald v. Winans*, 17 Md. 62; *Krone v. Krone*, 27 Md. 77; *Baltimore, etc.*, R. Co. *v. Strauss*, 37 Md. 237; *Bell v. Purvis*, 15 Md. 22; *Dougherty v. Piet*, 52 Md. 425; *Hall v. McPherson*, 3 Bland (Md.) 532.

*Nevada.* — *Lady Bryan Gold, etc.*, Min. Co. *v. Lady Bryan Min. Co.*, 4 Nev. 414, *citing* *Gardner v. Perkins*, 9 Cal. 553. The question in the latter case, however, was as to the dissolution of an injunction.

*New Jersey.* — *Connelly Mfg. Co. v. Wattles*, 49 N. J. Eq. 92; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *Rigg v. Hancock*, 36 N. J. Eq. 42, in which case a mandatory injunction was sought; *Elkins v. Camden, etc.*, R. Co., 36 N. J. Eq. 233, 9 Am. & Eng. R. Cas. 639; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *McKinley v. Chosen Freeholders*, 29 N. J. Eq. 164; *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422; *Van Houten v. McKelway*, 17 N. J. Eq. 126; *Rogers v. Danforth*, 9 N. J. Eq. 289; *Hardenburgh v. Farmers, etc.*, Bank, 3 N. J. Eq. 68, in which case it was held that where no bill has been filed, the defendant may put in his answer, and, on the argument of the rule to show cause, read it not as an answer but as an affidavit; *Delaware, etc.*, Canal Co. *v. Camden, etc.*, R. Co., 15 N. J. Eq. 13.

*New York.* — In *Decker v. Decker*, 52 How. Pr. (N. Y. Supreme Ct.) 218, it was said: "It is an elementary principle that where the whole equity of the complaint is denied, an injunction will not be granted." *Citing* *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402; and *Finnegan v. Lee*, 18 How. Pr. (N. Y. Supreme Ct.) 187. See also *Rogers v. Michigan Southern, etc.*, R. Co., 28 Barb. (N. Y.) 539; *Lane v.*

**Analogy to Motion to Dissolve.** — In considering the defendant's answer and in determining the sufficiency of it to ward off the issuance of a preliminary injunction, the defendant stands upon the same ground and with the same rights as he would upon a motion to dissolve based upon the denials of the answer.<sup>1</sup>

**b. EXCEPTIONS TO THE RULE.** — The rule that an injunction will be denied after an answer has come in denying the equities of the bill, like the rule that an injunction will be dissolved upon the coming in of the answer, is subject to exceptions.<sup>2</sup>

Clark, Clarke Ch. (N. Y.) 309; Benedict v. Seventh Ward R. Co. (Supreme Ct.) 6 N. Y. St. Rep. 548; Hessler v. Schafer, 82 Hun (N. Y.) 199; Knox v. McDonald, 25 Hun (N. Y.) 268; Decker v. Decker, 52 How. Pr. (N. Y. Supreme Ct.) 218; Grill v. Wiswall, 82 Hun (N. Y.) 281.

An application under the Code for an injunction *pendente lite* should be denied where the defendant denies under oath the facts upon which the plaintiff relies in his affidavit. Perkins v. Warren, 6 How. Pr. (N. Y. Supreme Ct.) 341.

Code Civil Procedure, N. Y., § 630, provides that "upon the hearing of a contested application for an injunction order, \* \* \* a verified answer has the effect only of an affidavit." "This provision," said Lawrence, J., in McEncroe v. Decker, 58 How. Pr. (N. Y. Supreme Ct.) 250, is stated "to have been designed to settle, in accordance with the weight of the authorities, the questions which have arisen in regard to the effect of an answer denying the equity of the complaint. Under this section the court has the power, in my opinion, to determine the weight to be given to the denials contained in the answer, in the same manner and to the same extent as it has to determine other questions arising upon conflicting affidavits."

**Oregon.** — Wellman v. Harker, 3 Oregon 253.

**Pennsylvania.** — McCartney v. Cassidy, 141 Pa. St. 453, in which case it was held that the court should not have awarded a special injunction because the equities of the bill were fully met by the defendant's affidavits.

**United States.** — A mere denial of the equity of the bill does not prevent the court from looking into the law and the facts of the case, where a special injunction is moved for, and granting or refusing it according to its discretion. Clum v. Brewer, 2 Curt. (U. S.) 506, citing Poor v. Carleton, 3

Sumn. (U. S.) 70. As a general rule, however, where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse a preliminary injunction. Shoemaker v. National Mechanics' Bank, 2 Abb. (U. S.) 416; Leo v. Union Pac. R. Co., 17 Fed. Rep. 273; Flint v. Russell, 5 Dill. (U. S.) 151; Batten v. Silliman, 3 Wall. Jr. (C. C.) 124; Good-year v. Day, 2 Wall. Jr. (C. C.) 283.

**Waiver of Answer Under Oath.** — In the United States courts, "before the adoption of the amendment to the forty-first rule in equity, it was a rule in chancery practice that where the answer was under oath and denied all the equities of the bill the injunction should be refused;" but where an answer under oath is served under that rule the answer can be used on the hearing of an application for a preliminary injunction with the probative force of an affidavit alone, and no longer has necessarily the effect of defeating the defendant's application. U. S. v. Workmen's Amalgamated Council, 54 Fed. Rep. 994.

**Answer to Bill for Discovery.** — In ordinary cases where the plaintiff files a bill for discovery and an injunction to stay proceedings at law, no injunction will be allowed after the defendant has put in an answer unless a ground for it appears upon the answer. Per Butler, J., in Isaac v. Humpage, 1 Ves. Jr. 427.

**Denial of Apprehended Danger.** — Where the answer denies that the plaintiff's apprehensions of injury are well founded, the court will, as a general rule, give to the defendant the full benefit of such denial and refuse an injunction. Rogers v. Danforth, 9 N. J. Eq. 289.

1. Yonge v. McCormack, 6 Fla. 368, per Baltzell, C. J.; Society, etc. v. Low, 17 N. J. Eq. 19. See also Bell v. Purvis, 15 Md. 22; Dougherty v. Piet, 52 Md. 425; Fuller v. Cason, 26 Fla. 476.

2. Per Lewis, C. J., in Lady Bryan

**c. REQUISITES AND SUFFICIENCY OF ANSWER.** — The defendant's answer, for the purpose of preventing the issue of an injunction, must meet fairly and fully the charges of the bill in precisely the same manner as it should were it relied upon on a motion to dissolve.<sup>1</sup>

**Information and Belief.** — The denials in the answer must be upon the defendant's knowledge, and not upon his belief or opinion.<sup>2</sup>

**New Matter.** — Where an answer comes in before an injunction has been allowed, new matter set up in the answer by way of avoidance will not avail to prevent the granting of an injunction.<sup>3</sup>

**Averments in the Bill Which Are Not Denied** in the answer are, for the purpose of the motion for a preliminary injunction, assumed to be true.<sup>4</sup>

**Failure of Some of the Defendants to Answer.** — The court may in its discretion refuse to allow an injunction against any one of the defendants upon the answer of some of them, although others have failed to answer.<sup>5</sup>

Gold, etc., *Min. Co. v. Lady Bryan* Min. Co., 4 Nev. 414.

**Issuance of an Injunction to Prevent Irreparable Injury.** — Notwithstanding the denials in the answer, the court will grant a preliminary injunction where to deny it would be in effect to leave the plaintiff without relief and to decide the case on its merits. *McKinne v. Dickenson*, 24 Fla. 366; *Stan-ton Mfg. Co. v. McFarland*, 52 N. J. Eq. 86; *Connelly Mfg. Co. v. Wattles*, 40 N. J. Eq. 92; *Africa v. Knoxville*, 70 Fed. Rep. 729 [in which last case the court cited *Speak v. Ransom*, 2 Tenn. Ch. 210; *Flippin v. Knaffle*, 2 Tenn. Ch. 238; and *Tyne v. Dougherty*, 3 Tenn. Ch. 52].

**Fraud.** — The court may in its discretion grant a preliminary injunction where the bill contains charges of fraud, notwithstanding the denials in the answer. *Bigham v. Gorham*, 52 Ga. 329.

**Construction of Written Instrument.** — Where the right to an injunction depends upon the interpretation to be put by the court upon a written instrument, the court will refuse to consider decisive an answer denying the equity of the bill. *Clum v. Brewer*, 2 Curt. (U. S.) 506, in which case Curtis, J., said: "In general, I apprehend that if the title to a temporary injunction depends on the construction of a deed, the court will construe it and act accordingly, whatever view of that question the answer may have presented."

1. *Bigham v. Gorham*, 52 Ga. 329;

*Pullan v. Cincinnati, etc., Air Line R. Co.*, 4 Biss. (U. S.) 35; *Poppenhuisen v. New York Gutta Percha Comb Co.*, 4 Blatchf. (U. S.) 184, in which last mentioned case it was considered insufficient to assert merely that the defendant had done nothing in violation of the plaintiff's rights, without meeting the allegations of the bill as to the defendant's intention to violate the plaintiff's rights in the future; *U. S. v. Parrott*, 1 McAll. (U. S.) 271.

2. *Meigs v. Lister*, 23 N. J. Eq. 199; *Society, etc., v. Low*, 17 N. J. Eq. 19; *U. S. v. Parrott*, 1 McAll. (U. S.) 271, in which last mentioned case the court cited *Perry v. Parker*, 1 Woodb. & M. (U. S.) 281.

3. *Yonge v. McCormack*, 6 Fla. 368; *McKinne v. Dickenson*, 24 Fla. 366; *Ruge v. Apalachicola Oyster Canning, etc., Co.*, 25 Fla. 656; *Baltimore v. Keyser*, 72 Md. 106; *Dougherty v. Piet*, 52 Md. 425; *Society, etc., v. Low*, 17 N. J. Eq. 19.

In *U. S. v. Parrott*, 1 McAll. (U. S.) 271, it was declared that matters in the answer by way of avoidance are to be received as affidavits, and are not entitled to the consideration that is given to direct and responsive denials.

4. *Baltimore v. Keyser*, 72 Md. 106; *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Meigs v. Lister*, 23 N. J. Eq. 199; *Stuyvesant v. Pearsall*, 15 Barb. (N. Y.) 244.

5. *Cobb v. Hogue*, 87 Ga. 450.

On a motion for an injunction the answer of one defendant will be received

**Verification of Answer.** — The answer will not be sufficient to justify the refusal of an injunction unless it is sworn to, and the answer of a corporation under its seal must be accompanied by affidavits.<sup>1</sup>

**4. Evidence** — *a.* WHERE NO ANSWER HAS BEEN FILED. — Where there is no answer, as a general rule, no evidence need be adduced by the plaintiff, and the allegations of the bill are to be taken as true.<sup>2</sup>

*b.* AFTER COMING IN OF ANSWER. — It is provided by 15 and 16 Vict., c. 86, § 59, that the answer of the defendant shall, for the purpose of evidence, be regarded merely as an affidavit, and that affidavits may be received and read in opposition thereto; but before the enactment of this statute the rule was, and in the United States, according to some cases, is, save in few and exceptional cases, to treat the answer of the defendant as true, and no affidavits can be read to contradict it.<sup>3</sup> But the prevail-

and heard, at all events, as an affidavit. *Shreve v. Black*, 4 N. J. Eq. 177.

**Answer of One Defendant Not Evidence Against Others.** — The answer of one defendant cannot be read in evidence against his codefendants when there is no privity of interest between them, or fraud, collusion, or combination. *Jones v. Jones*, 13 Iowa 276.

**Answer by Defendant in Contempt.** — Where the defendant is in contempt because of the nonpayment of a fine and costs imposed upon him, pursuant to statute, upon the withdrawal of his demurrer without leave of court, he has no right to file an answer till he has purged himself of such contempt. *Gilbert v. Arnold*, 30 Md. 29.

1. *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422.

**On a Motion to Quash** and dismiss the order to show cause, the allegations of the complaint are to be taken as true. *Sierra Nevada Silver Min. Co. v. Sears*, 10 Nev. 346.

2. *Mariner v. Mackey*, 25 Kan. 669; *Myers v. Amey*, 21 Md. 302; *Young v. Lippman*, 9 Blatchf. (U. S.) 277, in which last-mentioned case the court cited *Sullivan v. Redfield*, 1 Paine (U. S.) 441.

**In Kansas** it has been provided by statute (Code, § 248) that a temporary injunction may be ordered where it appears satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto; but under this provision it has been held that the petition, if properly verified, may be used as an affidavit,

*i. e.*, it may be read as testimony. *Atchison v. Bartholow*, 4 Kan. 104.

**In South Carolina** it has been declared that upon an application for an injunction the merits may be entered into without answer filed, but the adverse solicitor is, in his opposition, to confine himself to the allegations in the bill, and cannot produce any extraneous or foreign matter in proof until the answer be brought in. *Rose v. Hamilton*, 1 Desaus. (S. Car.) 137. See also, to the effect that the plaintiff may read affidavits before the coming in of the answer, *Kensler v. Clark*, 1 Rich. (S. Car.) 620, cited in *U. S. v. Parrott*, 1 McAll. (U. S.) 271.

**Admissions in the Answer.** — The plaintiff is under no obligation to substantiate by *aliunde* evidence what is alleged in the bill and admitted in the answer. *Marshall v. Johnson*, 33 Ga. 500.

3. *Per Paxon, J.*, in *Gillis v. Hall*, 2 Brews. (Pa.) 342, in which case it was declared that the rules of equity practice in United States courts have been modeled upon the present improved practice of the High Court of Chancery, and that the plaintiff should be allowed to produce affidavits in contradiction of affidavits read by the defendant. See also, in support of the proposition that in the absence of a statute or rule of court allowing affidavits to be read, the application should be heard on the bill and answer alone, *U. S. v. Parrott*, 1 McAll. (U. S.) 271 [in which case the court cited *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Norway v. Rowe*, 19 Ves. Jr. 157; and *Morphett v. Jones*, 19 Ves. Jr. 350]; *Heyniger v. Hoffnung*,

ing practice in the United States is to permit both parties to read affidavits where an order has been made to show cause, or the defendant has been served with notice.<sup>1</sup>

c. THE FORM AND CONTENTS OF AFFIDAVITS. — The court may refuse to hear affidavits in which the affiants depose to nothing upon their own knowledge;<sup>2</sup> but the rules of evidence are

29 La. Ann. 57. See further *Poor v. Carleton*, 3 Sumn. (U. S.) 70, wherein Story, J., intimated his doubts as to the existence of a good reason for the rule which denies the right of a plaintiff to read affidavits as to his title in a case of irreparable mischief.

1. *Hicks v. Michael*, 15 Cal. 112; *Tatem v. Gilpin*, 1 Del. Ch. 13 [in which the court cited *Robinson v. Byron*, 1 Bro. C. C. 588]; *Falkinburg v. Lucy*, 35 Cal. 52; *Delger v. Johnson*, 44 Cal. 182; *Spicer v. Hoop*, 51 Ind. 365; *Stoddart v. Vanlaningham*, 14 Kan. 18; *Fabian v. Collins*, 2 Mont. 510; *Kean v. Colt*, 5 N. J. Eq. 365, in which case the plaintiff insisted upon a hearing without awaiting an answer, and it was held that the defendant was entitled to read affidavits; *Bagg v. Robinson*, 12 N. Y. Misc. Rep. (Buffalo Super. Ct.) 299; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 45; *Seneca Falls v. Matthews*, 9 Paige (N. Y.) 504; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 362; *Kahn v. Old Tel. Min. Co.*, 2 Utah 13; *Sullivan v. Redfield*, 1 Paine (U. S.) 441; *Potter v. Whitney*, 1 Lowell (U. S.) 87; *Wilson v. Stolley*, 4 McLean (U. S.) 272; *Baker v. Taylor*, 2 Blatchf. (U. S.) 82; *Parker v. Sears*, 1 Fisher Pat. Cas. 93. See further *American Diamond Rock Boring Co. v. Sullivan Mach. Co.*, 14 Blatchf. (U. S.) 119.

**Waste.** — The rule excluding *ex parte* affidavits does not avail where the application is to enjoin waste. *Henry v. Watson*, 109 Ala. 335, citing *Long v. Brown*, 4 Ala. 622. See also, to the same effect, *Hicks v. Michael*, 15 Cal. 117.

**Affidavits Filed Subsequently to the Answer.** — In *New Jersey and South Carolina* it has been held that the plaintiff may read affidavits filed before the coming in of the answer, but that no affidavits filed subsequently to the filing of the answer can be read. *Brundred v. Paterson Mach. Co.*, 4 N. J. Eq. 294; *Kinsler v. Clarke*, 2 Hill Eq. (S. Car.) 617; *Kensler v. Clark*, 1 Rich. (S. Car.) 620.

**Affidavits Filed by the Defendant Without Answer.** — In *Walton v. Crowley*, 3

Blatchf. (U. S.) 440, it was held that an affidavit denying the equity of the bill has not the weight and effect of an answer, and is not sufficient to defeat a motion for an injunction, especially where the allegations of the bill are positive, are supported by the oath of the plaintiff, and are corroborated by facts set up in an additional affidavit which has not been denied by the defendant.

2. *Early v. Oliver*, 63 Ga. 11; *Young v. Lippman*, 9 Blatchf. (U. S.) 277, holding that the defendant should not depose merely to what he is informed of and believes, but should disclose the facts upon which his information and belief are grounded. But see *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135, in which case it was held that the court might consider affidavits which contained hearsay evidence, citing *Buck v. Hermance*, 1 Blatchf. (U. S.) 322, and *Matthews v. Iron Clad Mfg. Co.*, 19 Fed. Rep. 321.

**Discretion of Court.** — It rests somewhat in the discretion of the court whether or not it shall be required absolutely that all means of discovering primary evidence shall be exhausted before the production of secondary evidence. *Davis v. Covington, etc., R. Co.*, 77 Ga. 322.

**Title of Affidavits.** — It has been held that where affidavits have been submitted to the counsel of the adverse party, it is immaterial that by some clerical error or omission they are not entitled as of the cause in which they are sought to be read. *Shook v. Rankin*, 6 Biss. (U. S.) 477. But see *Warren v. Monnish*, 97 Ga. 399, in which case it was held that there was no abuse of discretion in refusing to allow the plaintiff to read an affidavit which had no caption and which was not identified otherwise than by a memorandum on the back of it, and did not state the court, term, name of the case, and the name of the affidavit, there being nothing to show when or by whom such indorsement was made. And see generally article AFFIDAVITS, vol. 1, p. 309.



applied less strictly upon a motion for a preliminary injunction than they are upon the final hearing of the cause.<sup>1</sup> The court will not permit affidavits to be read to enlarge the scope of the bill;<sup>2</sup> nor will the defendant be permitted to controvert allegations which he has admitted in his answer;<sup>3</sup> and the defendant will be held to admit everything which he does not deny in his affidavit.<sup>4</sup>

**5. The Interlocutory Order or Fiat** — *a.* NATURE AND FRAME OF ORDER. — An injunction is a writ or order of an extraor-

1. *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135.

**Objection to Affidavits.** — An objection that the facts stated in the affidavits are illegal and irrelevant is too general, and cannot avail if any of the facts are legal and relevant evidence. *Davis v. Covington, etc.*, R. Co., 77 Ga. 322.

**Production of Articles in Court.** — It is within the power of a party charged with infringement of a patent right to bring into court the article that he uses, so that the court may inspect it; and he should do so when possible instead of putting in affidavits as to the nature of the article. *Ely v. Monson, etc.*, Mfg. Co., 4 Fisher Pat. Cas. 64.

**Examination of Contumacious Witness.** — Where either party, on motion for a preliminary injunction, desires to take the testimony of an unwilling witness, application should be made to the court, and notice given to the other side. The motion should be in writing, and should set forth the name or names of the witnesses, and, briefly, the purpose for which they are called. The court should then, if the application is a proper one, appoint an examiner to take such testimony, due notice to be given to the other side, who should have the right of cross-examination. *Hammerschlag Mfg. Co. v. Judd*, 26 Fed. Rep. 292, in which case the defendant's motion for a subpoena and for an attachment was denied.

2. *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273.

3. *Marshall v. Johnson*, 33 Ga. 500.

**In New Jersey**, in almost every case in which the court has directed notice to be given, or where notice has been given without expressed direction, it has been usual for both parties to produce affidavits. *Hardenburgh v. Farmers'*, Bank, 3 N. J. Eq. 68, in which case the court cited *Weston v. Camden, etc.*, R. Co., 14 N. J. L. 74,

and *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694.

4. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525.

**Preponderance of Evidence.** — Where the parties come before the court with affidavits, the court will refuse a preliminary injunction unless the plaintiff makes out a very clear case by his bill and affidavits. *Rogers v. Danforth*, 9 N. J. Eq. 289.

**Conflicting Affidavits.** — Where the affidavits presented on the interlocutory application are conflicting, and it is impossible to determine therefrom whether or not the plaintiff's rights are being invaded, no preliminary injunction should be granted. *Richardson v. Barstow Stove Co.*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 150.

**In Kansas** it has been held that where the affidavits read by the defendant preponderate, an injunction should not be allowed. *Atchison, etc.*, R. Co. v. *Troy*, 10 Kan. 513.

**Issue to the Jury.** — In *Jollie v. Jaques*, 1 Blatchf. (U. S.) 618, an injunction was sought against the violation of a copyright, and the evidence upon the question whether the plaintiff's composition was subject to copyright being conflicting and not sufficiently full, the court directed an issue at law and required the defendant in the meantime to keep an account of his sales and report monthly to the clerk under oath.

**Newly Discovered Evidence.** — It is discretionary with the judge at chambers to reopen the case and hear newly discovered testimony after the argument. *Electric R. Co. v. Savannah, etc.*, R. Co., 87 Ga. 261, in which case the court cited *Warren v. Bunch*, 80 Ga. 124, and declared that *Huff v. Markham*, 70 Ga. 284, and *Boyce v. Burchard*, 21 Ga. 74, were not in conflict with its decision.

dinary nature, and it never issues without a special direction from the court or judge.<sup>1</sup>

**Frame of the Order.** — The order for an injunction should not be doubtful in its language, but should be definite and certain.<sup>2</sup> It is usual to grant an injunction until answer and the further order of the court.<sup>3</sup>

**A Temporary Restraining Order** must necessarily be in writing, and be so clear and explicit in its terms that all persons to be affected by

1. *Governor v. Wiley*, 14 Ala. 172, in which case it was held that a mandate of the register in chancery, without anything to show that it was issued under competent authority, is a nugatory act, to which obedience cannot be coerced. See also *Hicks v. Michael*, 15 Cal. 112, *per* Field, C. J.; *Phelps v. Foster*, 18 Ill. 309; *State v. Judge*, 16 La. Ann. 233.

In Iowa it is provided by statute (Code, § 3394) that if an order for an injunction be made in vacation "the judge must indorse the order upon the petition;" but this provision has been regarded as simply directory, and failure to indorse the order does not render the writ of injunction invalid. *Jordan v. Circuit Ct.*, 69 Iowa 177.

**Refusal to Dissolve Tantamount to Order Allowing.** — An order refusing to dissolve a restraining order is of itself a grant in effect of a temporary interlocutory injunction, and, likewise, an order that the restraining order shall be continued in full force until the further order of the court is nothing more or less than the granting of an interlocutory injunction. *Jones v. Warnock*, 67 Ga. 484.

2. *Hutchinson v. Delano*, 46 Kan. 345.

**An Order that a Special Writ of Injunction** be issued, without stating for what purpose or what the party is commanded to do or refrain from doing, is void. *Norris v. Cobb*, 8 Rich. L. (S. Car.) 58.

**Construction of Order with Reference to the Bill.** — An order directing an injunction to issue is not to be treated as a nullity because it does not specifically define the matter upon which the writ is to operate, because the order is to be construed with reference to the prayer and object of the bill upon which it was granted. *Hamilton v. State*, 32 Md. 348, in which case the question arose in an action on the injunction bond.

**Conditions Precedent.** — If it be compatible with the nature of the remedy to issue the writ on any condition sub-

sequently to occur, that condition should be incorporated in the order or appear upon the face of the process, and should never be left to the option and control of the party obtaining the order. *Betts, J., in McCormick v. Jerome*, 3 Blatchf. (U. S.) 486.

**Provision Relative to Motion to Dissolve.** — In *Maryland*, where the equity of the bill appears to be doubtful and the circumstances seem to warrant such force, the chancellor, in granting an injunction, will specify the time at which and the terms upon which a motion for dissolution of the injunction may be heard. *Per* Chancellor Bland, in *Jones v. Magill*, 1 Bland (Md.) 177.

**Where the Terms upon Which the Injunction Shall Be Granted** are not required by statute to be stated in the order, it is sufficient to make an order, "injunction granted on the usual terms," which means that it is granted on terms of giving a bond with conditions as prescribed by law. *Harman v. Howe*, 27 Gratt. (Va.) 676.

**There Is Nothing in the Code** which requires direction as to the undertaking to be embodied in the injunction order. *Per* Barrett, J., in *Manley v. Leggett*, 62 Hun (N. Y.) 562.

**Form of Fiat.** — In *Wallis v. Dilley*, 7 Md. 237, the order was in these words: "Mr. Bradford will issue injunction as prayed for in this bill on the complainants, or some person or persons for them, giving bond, with security to be approved by you, in a penalty of fifteen hundred dollars; said bond to be with the usual condition."

3. *Per* Lord Eldon, in *Vipan v. Mortlock*, 2 Meriv. 476; *Read v. Dews*, R. M. Charl. (Ga.) 358, *per* Law, J.; *Beal v. Gibson*, 4 Hen. & M. (Va.) 481; *Read v. Consequa*, 4 Wash. (U. S.) 174.

In *Read v. Dews*, R. M. Charl. (Ga.) 358, Law, J., said that the more modern practice, as established since Lord Eldon's time, is to order an injunction until answer or further order, rather than until answer and further order.

it will be definitely informed as to what they are restrained from doing.<sup>1</sup>

**Perpetual Injunction and Final Decree.** — It is neither regular nor proper, on an interlocutory application for an injunction, to issue a perpetual injunction or to render a final decree, and no more than a preliminary injunction should be ordered, to be in force until the final hearing had upon the pleadings and proofs.<sup>2</sup>

*b. IMPOSITION OF TERMS* — (1) *Power of the Court.* — An application for a preliminary injunction may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for granting or refusing the order, as the exigencies of the case may require.<sup>3</sup>

(2) *Discretion of the Court.* — The power to impose such conditions is founded upon and arises from the discretion which the court has to grant or not to grant the injunction applied for. It

1. *Kiser v. Lovett*, 106 Ind. 325, in which case it was held that the restraining order must be signed.

**Limitation as to Time.** — An order issued in a case of emergency, until the defendant can be given notice, should contain a provision limiting it to a day certain, fixed by the court, upon which a hearing shall be had. *Larsen v. Winder*, 14 Wash. 109.

**Form of Restraining Order.** — As to the recitals which should be contained in a temporary restraining order, see *Strickland v. Griffin*, 70 Ga. 541.

2. *Calvert v. State*, 34 Neb. 616, in which case Maxwell, C. J., cited *People v. Simonson*, 10 Mich. 335, and *Hemingway v. Preston*, Walk. (Mich.) 528. See also *Society, etc., v. Holsman*, 5 N. J. Eq. 126; *Pennsylvania R. Co. v. National Docks, etc., Connecting R. Co.*, 53 N. J. Eq. 178; *Adams v. Crittenden*, 17 Fed. Rep. 42, 4 Woods (U. S.) 618; *Porter v. U. S.*, 2 Paine (U. S.) 313.

**Where an Injunction Is Sought Against a Nuisance.** — The plaintiff is not allowed at first anything but a temporary injunction until an answer can be filed admitting or denying the right of the plaintiff; and if the answer denies the plaintiff's right only, the trial at law can be had if it be so desired by the defendant or be deemed proper by the court. *Irwin v. Dixon*, 9 How. (U. S.) 10.

3. *Furbush v. Bradford*, 1 Fisher Pat. Cas. 317; *Anonymous*, 1 Vern. 120. See also *Neal v. Taylor*, 56 Ark. 521; *Miller v. O'Bryan*, 36 Ark. 200; *Guttenberger v. Woods*, 51 Cal. 523; *Hitt v. Americus, etc., Warehouse Co.*,

96 Ga. 788; *Semmes v. Columbus*, 19 Ga. 471; *Chattanooga, etc., R. Co. v. Jones*, 80 Ga. 264; *Jordan v. Gaulden*, 73 Ga. 191; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1; *Thompson v. Hall*, 67 Ga. 627; *Bradley v. Lamb*, Hard. (Ky.) 536; *Brown v. Speight*, 30 Miss. 45, *per* Fisher, J.; *Martin v. Broadus*, Freem. (Miss.) 35; *Cox v. Vogh*, 33 Miss. 187; *Ham v. Schyler*, 2 Johns. Ch. (N. Y.) 140; *Litchfield v. Brooklyn*, 10 N. Y. Misc. Rep. (Brooklyn City Ct.) 74; *Great Falls Mfg. Co. v. Henry*, 25 Gratt. (Va.) 575; *Warwick v. Norvell*, 1 Leigh (Va.) 96; *White v. Fitzhugh*, 1 Hen. & M. (Va.) 1; *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425; *Woodworth v. Edwards*, 3 Woodb. & M. (U. S.) 120; *Parker v. Maryland*, 12 Wheat. (U. S.) 561; *Mechanics' Bank v. Lynn*, 1 Pet. (U. S.) 376; *McCaull v. Braham*, 21 Blatchf. (U. S.) 278; *Meyers v. Block*, 120 U. S. 206; *Blake v. Greenwood Cemetery*, 14 Blatchf. (U. S.) 342; *Russell v. Farley*, 105 U. S. 433; *Jones v. Florida, etc., R. Co.*, 41 Fed. Rep. 70.

**Illustrations of Rule.** — Among the instances illustrating the power of the court to impose terms before granting an injunction are the following:

*Release of Errors.* — The court, before granting an injunction to stay proceedings upon a judgment at law, may require a release of errors. *Bradley v. Lamb*, Hard. (Ky.) 536.

*Confession of Judgment.* — Where an injunction is sought against proceedings at law, the court may require the defendant to confess judgment and rely solely on the court of equity for relief. *Warwick v. Norvell*, 1 Leigh (Va.) 105.

is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.<sup>1</sup>

(3) *Payment of Money.* — The chancellor, in his discretion, may require the plaintiff to pay to the defendant or into court any sum of money which the plaintiff admits to be due to the defendant.<sup>2</sup>

(4) *Denial of Injunction upon Terms Imposed on the Defendant.* — Courts of equity will sometimes substitute an indemnity bond for an injunction if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. Such course has been frequently pursued where an injunction has been sought against an infringement of a patent, against the taking of property for public use without first compensating the plaintiff, or against trespasses or nuisances where the real object of the plaintiff is to obtain money compensation; and it is sometimes justified on the ground that the plaintiff's equity is doubtful.<sup>3</sup> The usual course,

1. *Russell v. Farley*, 105 U. S. 433, *per* Bradley, J., whose language is given in the text.

It is always in the discretion of the court to impose terms or not, and what particular terms should be imposed is a matter resting in the discretion of the court. *Phillips v. Davis*, 61 Ga. 159 [in which case the court cited *Kerr Injunctions*, pp. 18 and 19]; *Jordan v. Gaulden*, 73 Ga. 191; *Chattanooga, etc., R. Co. v. Jones*, 80 Ga. 264; *Thompson v. Hall*, 67 Ga. 627, in which case it was declared that the court will consider the relative convenience and inconvenience which the parties will sustain from the granting or withholding of relief; *Lomax v. Picot*, 2 Rand. (Va.) 247; *Atty.-Gen. v. Chicago, etc., R. Co.*, 35 Wis. 425; *Meyers v. Block*, 120 U. S. 206.

**How Discretion Should Be Exercised.** — "This power to impose terms is a conservative power, merely intended as a shield to protect the party whose hands, by the act of the court, are tied, to preserve his right intact as far as practicable, but not to be used as an instrument of aggression and attack on the other side." *Per* Bouldin, J., in *Great Falls Mfg. Co. v. Henry*, 25 Gratt. (Va.) 575.

**Bond.** — As to the power of the court to require that the plaintiff shall give a bond, see *infra*, p. 1012.

2. *Allen v. Etheredge*, 84 Ga. 550; *Phillips v. Davis*, 61 Ga. 159, *per* Jackson, J.

**Averments in the Bill as to Tender.** — As to the offer which the plaintiff should

make to do equity, and the allegations which the bill should contain as to the plaintiff's having made a tender of such sums as are justly due to the defendant, see *supra*, pp. 932, 933.

3. *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 4 Fed. Rep. 688; *Ely v. Monson, etc. Mfg. Co.*, 4 Fisher Pat. Cas. 64; *Jones v. Florida, etc. R. Co.*, 41 Fed. Rep. 70 [in which last mentioned case the court cited *Stewart v. Raymond R. Co.*, 7 Smed. & M. (Miss.) 568; *Floyd v. Turner*, 23 Tex. 292; and *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 2 McCrary (U. S.) 260]. See also the following cases: *Wilkins v. Aikin*, 17 Ves. Jr. 422, in which case an injunction was sought against the infringement of a copyright, and it being doubtful whether there was any infringement, Lord Eldon denied a preliminary injunction, but required the defendant to give an undertaking to account according to the result of the action; *Leary v. McDonough*, 74 Ga. 838, in which case an injunction was sought against a trespass; *Mayo v. McPhaul*, 71 Ga. 758; *Tift v. Harrell*, 68 Ga. 291; *Gardner v. Waters*, 68 Ga. 294; *Oliver v. Union Point, etc., R. Co.*, 83 Ga. 257; *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 27; *Fales v. Wentworth*, 5 Fisher Pat. Cas. 302; *Swift v. Jenks*, 19 Fed. Rep. 641; *Wood v. Braxton*, 54 Fed. Rep. 1005; *Wells v. Gill*, 6 Fisher Pat. Cas. 89; *Goldmark v. Kreling*, 25 Fed. Rep. 349; *Morris v. Shelbourne*, 4 Fisher Pat. Cas. 377.

**Nuisance Injurious to Rental Value of Property.** — In *Equitable L. Assur. Soc.*

where the court deems that an indemnity bond will afford the plaintiff sufficient security, is to deny an injunction upon con-

*v. Brennan*, 30 Abb. N. Cas. (N. Y. Supreme Ct.) 260, an injunction was sought against the use of premises as a stable in the neighborhood of plaintiff's premises, in violation of a building covenant; and as the nuisance merely injured the rental value of the premises, and they were not used by the plaintiff as a place of residence, the court made an order granting an injunction unless the defendant should pay a stated sum of money to the plaintiff, upon the payment of which the plaintiff was required to release to the defendant the right to maintain the stable.

**The Defendant Cannot Complain** of the imposition of such terms upon him as a condition upon which he may be relieved from the injunction, where the plaintiff is entitled to an absolute and unconditional injunction. *Eno v. Metropolitan El. R. Co.*, 56 N. Y. Super. Ct. 313, following *New York Nat. Exch. Bank v. Metropolitan El. R. Co.*, 53 N. Y. Super Ct. 511.

**In New York, by Statute** (Code Civ. Pro., § 629), it has been provided that where an alleged wrong is not irreparable, the court, upon the hearing of an application to vacate or modify an injunction order, may vacate such order upon the execution by the defendant of an indemnity bond. *Williams v. Western Union Tel. Co.*, 65 How. Pr. (N. Y. Super. Ct.) 326, in which case it was held that such course may be pursued notwithstanding the pendency of an appeal. *Citing Ireland v. Nichols*, 9 Abb. Pr. N. S. (N. Y. Super. Ct.) 71; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 65 How. Pr. (N. Y. C. Pl.) 319, in which case it was held that the court may make such order while a motion to continue an *ad interim* injunction is under advisement.

**In the New York Elevated Railroad Cases**, in which landowners have sought injunctions against the operation of elevated railroads without being first compensated for the destruction of their easements, it has been uniformly held that the court may, after the plaintiff has shown that he is entitled to relief by way of injunction, proceed to ascertain to what extent his property will be depreciated in rental value by the operation of the railroad, and also what damages he has sustained in the past, and adjudge that the plaintiff

shall be compensated in lieu of being awarded an injunction. Such proceedings, as was declared by *Finch, J.*, in *American Bank Note Co. v. New York El. R. Co.*, 129 N. Y. 252, are a substitute for the ordinary condemnation proceedings, with the practical difference only that in the one case the landowner is the moving party, and in the other, the railroad company.

The court does not adjudge that the railroad company *shall* compensate the landowner, but merely decrees that if a conveyance is made by the landowner of the right to operate the road, and the railroad company compensates the landowner, no injunction shall issue. *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436, wherein *Peckham, J.*, declared that the courts have never rendered judgment for the landowner's damages or authorized the collection thereof. See, further, in support of the doctrine that the court may award such conditional injunction: *Mead v. New York El. R. Co.* (Super. Ct.) 24 N. Y. Supp. 908; *Mitchell v. Metropolitan El. R. Co.*, 132 N. Y. 552; *Kearney v. Metropolitan El. R. Co.* (Super. Ct.) 14 N. Y. St. Rep. 854; *Pegram v. New York El. R. Co.*, 147 N. Y. 144; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 186; *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 123; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 151; *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Roberts v. New York El. R. Co.*, 128 N. Y. 464; *Story v. New York El. R. Co.*, 90 N. Y. 122.

**Trial by Jury.** — Where the objection is raised in the proper way and at the proper time, the railroad company can insist upon a trial by jury upon the law side of the court as to the damages which the landowner has sustained in the past. *Pegram v. New York El. R. Co.*, 147 N. Y. 135.

**Reference.** — The court has no authority to make an order appointing a referee to take testimony as to the value of the plaintiff's easements and the amount of loss sustained by him, with his opinion thereon, and Code Civ. Pro., § 1615, does not confer such authority. *Doyle v. Metropolitan El. R. Co.*, 136 N. Y. 505.

dition that such bond shall be given, or to grant an injunction with the proviso that the injunction shall be dissolved upon the execution of the bond.<sup>1</sup>

**Where Right to Injunction Is Clear.** — In a case, however, where the plaintiff's right to an injunction is clear, and an indemnity bond will not afford him all the security to which he is entitled, it is not proper to allow the defendant to substitute an indemnity bond for an injunction.<sup>2</sup>

(5) *Modification and Mitigation of Terms.* — Since terms are imposed for the sole purpose of effecting justice between the parties, in the absence of any imperative statute to the contrary, the court has, it would seem, power to mitigate the terms which it has imposed or to relieve therefrom altogether whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them.<sup>3</sup>

(6) *Necessity to Comply with Terms.* — An order for an injunction is not effectual until the terms imposed by such order have been complied with.<sup>4</sup>

*c. FINALITY OF THE DECISION.* — It is not proper, on an application for a preliminary injunction, to decide, or to consider with a view to a final decision, the merits of the controversy, especially where grave questions of law are involved; and the court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction.<sup>5</sup>

**In West Virginia** an indemnity bond has been frequently substituted for an injunction where the public interests demanded it and justice would be thereby subverted. *Spencer v. Point Pleasant, etc., R. Co.*, 23 W. Va. 406, 20 Am. & Eng. R. Cas. 125; *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448, 20 Am. & Eng. R. Cas. 157; *Hale v. Point Pleasant, etc., R. Co.*, 23 W. Va. 454, 20 Am. & Eng. R. Cas. 162; in which cases injunctions were sought against the taking of land by the railroad companies without first compensating the owners.

**In Iowa** it has been held that a bond conditioned to pay damages for property taken for public use without compensation should not be substituted for an injunction. *Horton v. Hoyt*, 11 Iowa 496.

1. *Wilkins v. Aikin*, 17 Ves. Jr. 422; *Leary v. McDonough*, 74 Ga. 838; *Tift v. Harrell*, 68 Ga. 291; *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 27; *Fales v. Wentworth*, 5 Fisher Pat. Cas. 302.

**Power to Require Additional Security.** — Where the court accepts an indemnity

bond and refuses to grant an injunction, the plaintiff may at any time obtain an order requiring the defendant to show cause why further security should not be given. *Goldmark v. Kreling*, 25 Fed. Rep. 349.

2. *Tilghman v. Mitchell*, 9 Blatchf. (U. S.) 18. See also *Horton v. Hoyt*, 11 Iowa 496.

3. *Per Bradley, J.*, in *Russell v. Farley*, 105 U. S. 433.

4. *Pell v. Lander*, 8 B. Mon. (Ky.) 554; *Williams v. Huff*, Dall. (Tex.) 554, in which case it was held that failure to give bond as required by the order vitiated all proceedings subsequent to the order.

**Failure to File Bill.** — Where it is ordered that an injunction shall issue upon the filing of a bill, the order is conditional upon the filing of the bill, and until the bill has been filed the order is not operative. *Winslow v. Nayson*, 113 Mass. 411. See also, as to the necessity for a bill and the necessity to file it, *supra*, pp. 918, 920.

5. *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Beaudry v. Felch*, 47 Cal. 183.

**One Reason**, it is said, why the merits should not be passed upon interlocutorily is that the testimony of witnesses as given in the affidavits is often different from what their testimony will be when they are examined on the hearing.<sup>1</sup>

**Res Judicata.** — An order granting or denying a preliminary injunction does not determine the rights of the parties, nor does it in any way preclude a final decree upon the hearing of the merits.<sup>2</sup>

Among the numerous cases in which this doctrine has been declared, are the following.

*Alabama.* — *Ricketts v. Garrett*, 11 Ala. 806.

*Florida.* — *McKinne v. Dickenson*, 24 Fla. 366; *Apalachicola v. Curtis*, 9 Fla. 340; *Yonge v. McCormack*, 6 Fla. 368.

*Georgia.* — *Nevin v. Printup*, 59 Ga. 281; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201; *Brewer v. Jones*, 44 Ga. 71; *Dorsey v. Simmons*, 49 Ga. 245; *Leake v. Smith*, 76 Ga. 524; *Gullatt v. Thrasher*, 42 Ga. 429; *Winn v. Ham*, R. M. Charl. (Ga.) 70.

As was said by Bleckley, J., in *National Bank v. Printup*, 63 Ga. 570: "The purpose of an interlocutory injunction is wholly provisional; it is preliminary and preparatory; it looks to a future and final hearing, more deliberate, solemn, and complete than any which has been had, and while contemplating what the result of that hearing may be, it by no means forestalls it, or settles what it shall be."

*Maryland.* — *Heflebower v. Buck*, 64 Md. 15.

*Montana.* — *Anaconda Copper Min. Co. v. Butte, etc.*, Min. Co., 17 Mont. 519.

*New Jersey.* — *Hutchinson v. Johnson*, 7 N. J. Eq. 40; *Kean v. Colt*, 5 N. J. Eq. 365.

*New York.* — In *Hartt v. Harvey*, 32 Barb. (N. Y.) 55, Mullin, J., said: "It is not usual, nor ordinarily is it proper, to inquire into the right of the court to grant relief upon an application for an injunction." See also *Paul v. Munger*, 47 N. Y. 469; *Brown v. Keeney Settlement Cheese Assoc.*, 59 N. Y. 242; *Pfohl v. Sampson*, 59 N. Y. 174.

*Oregon.* — *Helm v. Gilroy*, 20 Oregon 517, *per Bean*, J.

*South Carolina.* — *Sease v. Dobson*, 34 S. Car. 345; *Pelzer v. Hughes*, 27 S. Car. 408.

*Tennessee.* — *Owen v. Brien*, 2 Tenn. Ch. 295. This case was cited in *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952.

*Utah.* — *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah 304.

*Virginia.* — *Price v. Strange*, 2 Hen. & M. (Va.) 615.

*Washington.* — *State v. Lichtenberg*, 4 Wash. 407.

*United States.* — *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 4 U. S. App. 149; *Singer Mfg. Co. v. Union Button-Hole, etc., Co.*, 6 Fisher Pat. Cas. 480; *Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674; *Jones v. Hodges*, 1 Holmes (U. S.) 37; *Watson v. Jones*, 13 Wall. (U. S.) 679; *Robertson v. Hill*, 6 Fisher Pat. Cas. 465; *Chaffin v. St. Louis*, 4 Dill. (U. S.) 19; *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 642; *Northern Pac. R. Co. v. Spokane*, 52 Fed. Rep. 428; *Wood v. Braxton*, 54 Fed. Rep. 1005.

**Although Affidavits and Documents** have been produced and accepted and read to the court, it is not proper to decide upon the whole of the merits of the case. *Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674.

**Injunction by Consent.** — When there is no real contest between the parties, and the defendant in writing withdraws his opposition to the motion for a preliminary injunction, and it is apparent that the preliminary injunction is sought merely for the effect that it will have upon third parties, the court will make an order stating that the motion is granted because the defendant consents to it, but will not decide the motion on the merits. *American Middlings Purifier Co. v. Vail*, 15 Blatchf. (U. S.) 315, citing *Lord v. Veazie*, 8 How. (U. S.) 251.

1. *Wattson v. Scammel*, (Supreme Ct.) 1 N. Y. Supp. 845.

2. *Basche v. Pringle*, 21 Oregon 24.

As was said by Bleckley, J., in *Brown v. Wilson*, 56 Ga. 534, it does not necessarily follow that, because the judge, on inspecting the bill, is of opinion that it is without equity and declines to order the defendant to show cause, the plaintiff will be denied a

*d.* **DISMISSAL OF BILL UPON DENIAL OF INJUNCTION.** — Upon the denial of a motion for a preliminary injunction, the court should not dismiss the bill where facts are alleged therein sufficient to show that the plaintiff is entitled to equitable relief of some sort.<sup>1</sup>

**6. Bonds** — *a.* **NECESSITY TO GIVE BOND** — (1) *Statement of General Rule.* — In the Early History of equity jurisprudence, preliminary injunctions were often issued without requiring any bond or security, and upon the dissolution of an injunction which had been wrongfully sued out, the defendant had no other remedy than an action for malicious prosecution.<sup>2</sup>

**The Modern Practice.** — As the party enjoined frequently suffered great damage for which he had no adequate remedy, the custom grew up of requiring of the plaintiff a pledge or bond to indemnify the defendant against such loss as he might sustain by the wrongful issuance of an injunction; and it is now settled that the court has power to require a bond of the plaintiff, and it is proper as a general rule, very rarely, if ever, to be departed from, that an injunction bond should be required.<sup>3</sup>

hearing in support of his bill. See, likewise, the following cases: *Ex p. Conway*, 4 Ark. 302; *Cole v. Cady*, 2 Dakota 29; *Oliver v. Victor*, 74 Ga. 543; *Jenkins v. Nolan*, 79 Ga. 295; *Glass v. Clark*, 41 Ga. 546; *Union Terminal R. Co. v. Railroad Com'rs*, 54 Kan. 352; *Johnson v. Wilson County*, 34 Kan. 670; *Johns. v. Schmidt*, 32 Kan. 383; *Galvin v. Shaw*, 12 Me. 454; *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Wing v. Fairhaven*, 8 Cush. (Mass.) 363; *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376; *Thompson v. Paterson*, 9 N. J. Eq. 624; *Irwin v. Dane*, 4 Fisher Pat. Cas. 359; *Price v. Strange*, 2 Hen. & M. (Va.) 615.

1. *Cheney v. Jones*, 14 Fla. 587; *Lynn v. Mount Savage Iron Co.*, 34 Md. 603, in which case the bill was framed in the alternative.

In Florida it has been held that where the only relief prayed for is an injunction, and it is apparent on the face of the bill that there is no ground for relief, the court, on denying the application for injunction, will dismiss the bill. *Souls v. Freeman*, 24 Fla. 209.

**Dismissal of Bill Upon Dissolution of Injunction.** — For full discussion of this subject see *infra*, XV. 14. *d. Whether the Bill Should Be Dismissed.*

2. *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545, *per* Lotz, J.; *Teasdale v. Jones*, 40 Mo. App. 243; *Disbro v. Disbro*, 37 How. Pr. (N. Y. Supreme Ct.) 147.

3. *Smith v. Gufford*, 36 Fla. 481; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Foster v. Goodrich*, 127 Mass. 176; *St. Louis v. St. Louis Gaslight Co.*, 82 M.º 349; *Tobey Furniture Co. v. Colby*, 35 Fed. Rep. 592. In the last-mentioned case it was declared that the power to require bond is too well established to be subject to question at this day.

**There Being No Act of Congress** or rule of the Supreme Court on this subject, the courts of the United States are governed by the general principles and usages of equity. *Russell v. Farley*, 105 U. S. 433; *Bein v. Heath*, 12 How. (U. S.) 168.

**Inability to Give Bond.** — That the plaintiff may be unable to give the security required, is a misfortune common to all poor suitors, and will not excuse his failure to comply with the statute. *Ex p. State*, 15 Ark. 263.

**Injunction Against Proceedings at Law** — *Wrongful Levy.* — A statute requiring a bond to be filed before the issuance of an injunction against proceedings at law does not apply where an injunction is sought to stay the sale of property wrongfully levied upon, upon an execution. *Lewton v. Hower*, 18 Fla. 872; *State Bank v. Macy*, 4 Ind. 362; *Hardin v. White*, 63 Iowa 633.

**Proceedings Before or After Judgment.** — A statute providing that no injunction shall be granted "to stay proceedings in any suit at law," unless the plaintiff shall enter into bond, covers



**Statutory Provisions.** — The practice of requiring a bond to be given prevails generally throughout all the states and territories, and, indeed, in nearly all of them statutes are found expressly requiring that bonds shall be given, some of the statutes providing especially that a bond shall be given when an injunction is sought against proceedings at law or the enforcement of a judgment.<sup>1</sup>

injunctions to stay proceedings at law, as well before as after judgment. *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217.

But it does not apply when the purpose of the injunction is to stay proceedings under an execution against particular property. *Hanley v. Wallace*, 3 B. Mon. (Ky.) 184.

A *Stranger to a judgment* is not within the provision of a statute requiring a deposit to be made upon the procurement of an injunction against the collection of a judgment at law, and he need only give the ordinary undertaking required by statute. *Packer v. Nevin*, 67 N. Y. 550.

A *judgment by Confession* entered upon a bond with warrant of attorney is within the requirements of a statute providing that no injunction shall issue to stay proceedings at law in any personal action after verdict or judgment, unless a deposit be made or security given. *Marlatt v. Perrine*, 17 N. J. Eq. 49; *Farrington v. Freeman*, 2 Edw. Ch. (N. Y.) 572; *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167. See also *Eaton on Injunctions*, p. 144, note 2.

*Injunction Against Sale of Exempt Property.* — An injunction against the forced sale of property that is exempt from sale under any process of law is not within the meaning of a statute prohibiting the granting of an injunction to stay proceedings at law without bond. *Smith v. Gufford*, 36 Fla. 481, citing *Lewton v. Hower*, 18 Fla. 879.

1. *Alabama.* — Code 1886, § 3524 (Code 1876, § 3871), requires a bond where an injunction is sought against the enforcement of a judgment or a suit or proceeding at law. *Bolling v. Tate*, 65 Ala. 417; *Buckner v. Stewart*, 34 Ala. 529. See also *Thorington v. Gould*, 59 Ala. 461; *Jones v. Ewing*, 56 Ala. 360.

*Arizona.* — *Richards v. Green*, (Arizona 1890) 32 Pac. Rep. 266.

*Arkansas.* — A bond is required by statute. *Hunt v. Burton*, 18 Ark. 188; *Ex p. State*, 15 Ark. 263.

*California.* — Code Civ. Pro., § 529;

*Rice v. Cook*, 92 Cal. 144; *Elliott v. Osborne*, 1 Cal. 396.

*Florida.* — Act of 1828, as amended by laws of 1872, c. 526, provided that no injunction to stay proceedings at law should issue without bond being given. *Thompson v. Maxwell*, 16 Fla. 773; *Lewton v. Hower*, 18 Fla. 872; *Smith v. Gufford*, 36 Fla. 481.

Rev. Stat., § 1465, provides that no bond shall be required if the plaintiff makes affidavit that he is unable to give bond and the chancellor is satisfied of the truth of the affidavit; and this statute has been regarded as requiring by implication that a bond shall be given when no such affidavit of inability is made. *Stockton v. Harmon*, 32 Fla. 312.

*Georgia.* — It is declared by statute that no injunction shall be granted unless bond first be given. *Habersham v. Carter*, R. M. Charlt. (Ga.) 526; *Guerry v. Durham*, 11 Ga. 9; *Barnesville Sav. Bank v. Respass*, 73 Ga. 103; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309.

*Illinois.* — It is required by statute that bond shall be given where proceedings under a judgment are enjoined. *Brough v. Schanzenbach*, 59 Ill. App. 407.

*Indiana.* — Revised Statutes, 1881, § 1153, provides that a bond shall be given in all cases. *Stone v. Keller*, 4 Ind. App. 436; *Robertson v. Smith*, 129 Ind. 422; *Lewis v. Rowland*, 131 Ind. 103. See also *Lemon v. Morehead*, 8 Blackf. (Ind.) 561; *State Bank v. Macy*, 4 Ind. 362.

*Iowa.* — Revised Statutes, § 3778, requires a bond where an injunction is sought against proceedings in a civil action. *Way v. Lamb*, 15 Iowa 79. See also *Hardin v. White*, 63 Iowa 633, decided under a statute requiring bond to be given in a suit to enjoin proceedings on a judgment.

*Kansas.* — It is provided by statute that no injunction shall be operative until the party obtaining the same shall give a bond. *State v. Eggleston*, 34

**After Issuance of Injunction.** — Even after an injunction has been allowed without requiring the plaintiff to give security, the chan-

Kan. 714; *State v. Kearny County*, 42 Kan. 739; *State v. Rush County*, 35 Kan. 150.

*Kentucky.* — It is required by statute that a party obtaining an injunction restraining another from the enjoyment of his rights of property shall give a bond. *Cox v. Taylor*, 10 B. Mon. (Ky.) 17. See also *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217, and *Hanley v. Wallace*, 3 B. Mon. (Ky.) 184, which cases were decided under a statute requiring that bond shall be given when the object of the injunction is to stay proceedings in a suit at law. See further *Mahan v. Tydings*, 10 B. Mon. (Ky.) 351, and *Fellows v. Day*, 5 Bush (Ky.) 666.

*Louisiana.* — A bond, as a general rule, is required, but under Code Practice Louisiana, articles 739, 740, the defendant may arrest the proceeding without bond by alleging one or more of eight specified reasons. *Hodgson v. Roth*, 33 La. Ann. 941; *Berens v. Boutte*, 31 La. Ann. 112. See also *Robertson v. Travis*, 4 La. Ann. 151.

*Maine.* — Revised Statutes 1841, c. 96, § 11, requires bond to be given. *Union Wharf v. Mussey*, 48 Me. 307.

*Maryland.* — *Walsh v. Smyth*, 3 Bland (Md.) 9; *Chase's Case*, 1 Bland (Md.) 206; *Billingslea v. Gilbert*, 1 Bland (Md.) 566; *Negro Charles v. Sheriff*, 12 Md. 274; *Alexander v. Ghiselin*, 5 Gill (Md.) 138. See also *Robinson v. Cathcart*, 2 Cranch (C. C.) 590, *per Cranch*, C. J.

*Massachusetts.* — *Foster v. Goodrich*, 127 Mass. 176.

*Mississippi.* — *Freeman v. Lee County*, 66 Miss. 1; *Brown v. Speight*, 30 Miss. 45; *Duckworth v. Millsaps*, 7 Smed. & M. (Miss.) 308, *per Thacher*, J.

*Missouri.* — Revised Statutes 1889, § 5498 (Revised Statutes 1879, § 2710), provides that no injunction, unless on final hearing or judgment, shall issue without bond. *Teasdale v. Jones*, 40 Mo. App. 243; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349.

*Montana.* — Code Civil Procedure, § 176; *Lee v. Watson*, 15 Mont. 228.

*Nebraska.* — Code Civil Procedure, § 258; *State v. Greene*, 48 Neb. 327; *Baker v. Meisch*, 29 Neb. 227.

*New Jersey.* — Revision, p. 119, § 80, requires bond to be given where injunction is sought to stay proceedings at

law in any personal action after verdict or judgment, and it has been held that this provision is mandatory. *Phillips v. Pullen*, 45 N. J. Eq. 157; *Marlatt v. Perrine*, 17 N. J. Eq. 49. See also *Morris Canal, etc., Co. v. Bartlett*, 3 N. J. Eq. 9.

*New York.* — Code Civil Procedure, tit. 2, art. 2, § 611 *et seq.*

Section 611 does not require an undertaking to be given upon the granting of an injunction order to stay the trial of an action unless issue has been joined in such action. *Richards v. Goldberg*, 7 Misc. Rep. (N. Y. C. Pl.) 388.

There is no statute or rule of practice which disables a court or judge from staying proceedings on a judgment pending a motion in the action, with or without security, and Code Civ. Pro., § 613, is not applicable to such stay. *Carter v. Hodge*, 150 N. Y. 532. See also in general the following cases: *Packer v. Nevin*, 67 N. Y. 550; *Hutchinson v. New York Cent. Mills*, 2 Abb. Pr. (N. Y. Supreme Ct.) 394; *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16; *Benedict v. Benedict*, 15 Hun (N. Y.) 305, 76 N. Y. 600; *Phoenix Foundry, etc., Co. v. North River Constr. Co.*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 106; *Pratt v. Underwood*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 167; *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167; *Beebe v. Coleman*, 8 Paige (N. Y.) 392; *Manchester v. Dey*, 6 Paige (N. Y.) 295; *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Cayuga Bridge Co. v. Magee*, 2 Paige (N. Y.) 116.

*North Carolina.* — Code Civil Procedure, § 192; *Burnett v. Nicholson*, 79 N. Car. 548.

*Pennsylvania.* — *Com. v. Franklin Canal Co.*, 21 Pa. St. 117, which case was cited in *State v. Eggleston*, 34 Kan. 714.

*South Carolina.* — Code, § 243; *Garlington v. Copeland*, 43 S. Car. 389; *Tryon v. Robenson*, 10 Rich. L. (S. Car.) 160.

*Texas.* — Bond is required by statute. *Gaskins v. Peebles*, 44 Tex. 390; *Taylor v. Gilleam*, 23 Tex. 508; *Janes v. Reynolds*, 2 Tex. 250; *Williams v. Huff*, Dall. (Tex.) 554.

*Virginia.* — It is required by statute that a bond shall be given before the

cellor may, in his discretion, order the injunction to be dissolved, unless the plaintiff shall give security.<sup>1</sup>

**Validity of Injunction Issued Without Bond.** — The failure of the judge ordering the issue of the writ to require the plaintiff to execute a bond does not, it would seem, render the order void, but voidable only, and it is binding and conclusive until on a proper application it is vacated; but upon this question the cases are not in harmony.<sup>2</sup>

**An Administrator or Other Fiduciary** must give bond where it is required by statute that no injunction shall be granted unless bond first be given.<sup>3</sup>

**The Sovereign or State**, when a party plaintiff to a suit for an injunction, will not be required, it would seem, to give a bond.<sup>4</sup>

issuance of an injunction against a judgment, and this provision is regarded as taking away from the chancellor all discretion in the matter. *Lomax v. Picot*, 2 Rand. (Va.) 247. See also *Robinson v. Cathcart*, 2 Cranch. (C. C.) 590.

*Washington.* — Code 1881, § 159, provides that no injunction or restraining order shall be granted till the plaintiff shall have given a bond. *Keeler v. White*, 10 Wash. 420; *Cherry v. Western Washington Industrial Exposition Co.*, 11 Wash. 586.

*United States.* — *Brammer v. Jones*, 2 Bond. (U. S.) 100; *Shelly v. Brennan*, 4 Fisher Pat. Cas. 198; *Bein v. Heath*, 12 How. (U. S.) 168; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13; *Tobey Furniture Co. v. Colby*, 35 Fed. Rep. 592; *Lowenfeld v. Curtis*, 72 Fed. Rep. 105.

**Intervener.** — Parties who intervene in a suit and ask for an injunction must give bond. *Taylor v. Gillelan*, 23 Tex. 508.

1. *Beebe v. Coleman*, 8 Paige (N. Y.) 392.

2. *Jones v. Ewing*, 56 Ala. 360.

**In California, Kansas, and Nebraska** it has been held that an order for an injunction is inoperative until the undertaking required by statute has been given. *Elliott v. Osborne*, 1 Cal. 396; *State v. Rush County*, 35 Kan. 150; *Van Fleet v. Stout*, 44 Kan. 523; *State v. Kearny County*, 42 Kan. 739; *State v. Greene*, 48 Neb. 327, in which last-mentioned case the order required a bond to be given and none was executed, and it was held, under a statute providing that an injunction shall bind the defendant upon the execution of the undertaking required, that the restraining order was inoperative.

**In Indiana** it has been held that a decree granting an injunction without a bond is not absolutely void and cannot be attacked collaterally, and an action to set aside such a decree is considered a collateral attack. *Lewis v. Rowland*, 131 Ind. 103.

3. *Habersham v. Carter*, R. M. Charl. (Ga.) 526; *Mahan v. Tydings*, 10 B. Mon. (Ky.) 351; *Brown v. Speight*, 30 Miss. 45. But see *contra* *Lomax v. Picot*, 2 Rand. (Va.) 247. In all of the foregoing cases the question was whether or not a personal representative should be required to give a bond.

**Receivers.** — It is erroneous to grant an injunction at the suit of a receiver without requiring him to give the usual injunction bond, and the bond given by him as a receiver for the purpose of his general duties, is not sufficient. *Keeler v. White*, 10 Wash. 420; *Cherry v. Western Washington Industrial Exposition Co.*, 11 Wash. 586.

4. *U. S. v. Jellico Mountain Coke, etc., Co.*, 43 Fed. Rep. 898, merely intimating that the United States may sue for an injunction without giving a bond as a private suitor must do. See also *Ex p. State*, 15 Ark. 263, recognizing that the state may sue without giving bond, but holding that a private suitor cannot avoid giving bond by uniting the state as plaintiff where there is no identity of interests between them, and the state should properly be made a defendant. *Com. v. Franklin Coal Co.*, 21 Pa. St. 117, held that a statute requiring the "party applying" to give bond included the commonwealth, and that injunction must be denied as there was no agent authorized by law to execute such a bond.

(2) *Before Issue of Restraining Orders.* — According to the statutes of some of the states, a temporary restraining order may be granted pending the order to show cause without requiring bond of the plaintiff; but it is always the better practice to require a bond.<sup>1</sup>

(3) *Injunction After Final Hearing.* — It is not the practice to exact from the plaintiff a bond upon the award of an injunction after final hearing, and the only purpose of a statute requiring a bond to be given is to prevent the defendant's rights from being jeopardized by a preliminary injunction awarded during the pendency of the cause.<sup>2</sup>

(4) *Discretion of the Court.* — In the absence of any statute on the subject it rests in the sound discretion of the chancellor or court whether or not a bond shall be required.<sup>3</sup> Where the bill presents a strong case for an injunction, the court will, in its discretion, refuse to compel the plaintiff to give a bond.<sup>4</sup>

**Statutes Requiring a Bond** to be given divest the chancellor of all discretion in the matter.<sup>5</sup>

**Suit by County.** — In *Mississippi* it has been held that as a county is entitled, under Code 1880, § 897, to all the actions and remedies to which individuals are entitled, a county is entitled to no immunity from liability on an injunction bond given upon the procurement of an injunction. *Freeman v. Lee County*, 66 Miss. 1.

1. *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216; *In re Mitchell, McCahon* (Kan.) 256; *Burnett v. Nicholson*, 79 N. Car. 548, *per* Smith, C. J.

In **New York** security should be required before granting a restraining order. *Methodist Churches v. Barker*, 18 N. Y. 463. See also *Adams v. Crittenden*, 4 Woods (U. S.) 618.

2. *Com. v. Franklin Canal Co.*, 21 Pa. St. 117. See also *Boston v. Nichols*, 47 Ill. 353; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277, *per* Monell, J.

In **Alabama** it has been held that where a preliminary injunction has been irregularly awarded without requiring a bond of the plaintiff, a final decree which is supported by the pleadings and proof should not be reversed. *Thorington v. Gould*, 59 Ala. 461.

3. *Downshire v. Sandys*, 6 Ves. Jr. 107, *cited* in *Russell v. Farley*, 105 U. S. 433, 7 Am. and Eng. R. Cas. 453. See also the following cases: *Neal v.*

*Taylor*, 56 Ark. 521, *per* Cockrill, C. J.; *Smith v. Gufford*, 36 Fla. 481; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1; *County School Com'rs v. County School Com'rs*, 77 Md. 283; *Cape Sable Co.'s Case*, 3 Bland. (Md.) 606; *Wagner v. Shank*, 59 Md. 313; *White v. Davidson*, 8 Md. 169; *Lomax v. Picot*, 2 Rand. (Va.) 247; *Bein v. Heath*, 12 How. (U. S.) 168; *Adams v. Crittenden*, 4 Woods (U. S.) 618.

4. *Cape Sable Co.'s Case*, 3 Bland (Md.) 606.

**Mala Fides of the Defendant.** — In *Pasteur Chamberland Filter Co. v. Funk*, 52 Fed. Rep. 146, the court granted a preliminary injunction against the infringement of a patent, and did not require a bond as a condition of granting the injunction because the defendant had been guilty of bad faith towards the plaintiff to such an extent that he was not equitably entitled to the protection of a bond.

5. *Phillips v. Pullen*, 45 N. J. Eq. 157; *Russell v. Farley*, 105 U. S. 433, wherein Bradley, J., said that the object of such statutes is to make it compulsory on the chancellor to require security before granting an injunction; *State v. Kearny County*, 42 Kan. 739; *Van Fleet v. Stout*, 44 Kan. 523; *State v. Greene*, 48 Neb. 327; *Cherry v. Western Washington Industrial Exposition Co.*, 11 Wash. 586; *Com. v. Franklin Canal Co.*, 21 Pa. St. 117; *Lomax v. Picot*, 2 Rand. (Va.) 247.

**b. AT WHAT TIME BOND SHOULD BE GIVEN.** — The bond need not be tendered along with the bill, because no bond can be tendered until the court has fixed the amount of the penalty;<sup>1</sup> but the bond should always be executed before the injunction is issued.<sup>2</sup>

**c. FORM AND CONTENTS OF THE BOND.** — The bond should conform to the order of the court,<sup>3</sup> and to the requirements of the statute, if any, under which it is given;<sup>4</sup> but the statute need not be literally pursued, and substantial compliance therewith is sufficient.<sup>5</sup>

1. *Negro Charles v. Sheriff*, 12 Md. 274.

2. *Adams v. Olive*, 57 Ala. 249.

**Neglect of Officer to Take Bond.** — If the officer allowing an injunction neglects to take the bond required by the rules of court, the party liable to be injured by the injunction must make a special application to the court for relief. *Cayuga Bridge Co. v. Magee*, 2 Paige (N. Y.) 116.

**Dismissal of the Bill for Want of Bond.** — Where no bond is given all that defendant can require is the dissolution of the injunction unless security shall be given, and not the dismissal of the bill. *Guerry v. Durham*, 11 Ga. 9.

3. *Ballard v. Eckman*, 20 Fla. 661. Where it is ordered that a bond shall be given to save the defendant harmless "from the effects of the injunction issued in this cause," a bond conditioned to pay the defendant "all such damages as he may recover against them in case it should be decided that said writ of injunction was wrongfully issued" does not substantially comply with the order. *Block v. Myers*, 35 La. Ann. 220.

**Seal.** — The bond should be sealed. *Ballard v. Eckman*, 20 Fla. 661.

**The Obligees.** — In *Rice v. Smith*, 9 Iowa 570, it was held under Code Iowa, § 1693, that a defendant named in the bond as an obligee might maintain an action on the bond, and that therefore it was immaterial if the name of one of the defendants was omitted as an obligee.

**The Adverse Party.** — Where it is required by statute that bond shall be given to the adverse party, and an injunction is sought against the enforcement of a judgment recovered in the name of one person for the use of another, the bond may be executed to both such persons. *Scott v. Fowler*, 7 Ark. 299.

**Clerical Misnomer of Obligees.** — Where the bond is made payable to "Hull & Long" instead of "Hall & Long," the mistake is one which is relievable in either equity or law, and the discrepancy is not available in an action on the bond. *Thompson v. Hall*, 67 Ga. 627.

**The Consideration.** — It is sufficient that the consideration for the execution of the undertaking can be gathered from the chancellor's order and the undertaking. *Prader v. Purkett*, 13 Cal. 588.

**Recitals as to the Injunction.** — Where an order directs the issue of an injunction upon the filing of a bond, and the bond recites that the injunction has been obtained, it is nevertheless to be taken as referring to the injunction issued pursuant to the order. *Wallis v. Dilley*, 7 Md. 237.

**Description of Judgment Enjoined.** — Where an injunction is obtained against a judgment and execution issued thereon, it is not necessary to recite in the bond when and where the judgment was obtained. *Hanna v. McKenzie*, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122.

**In Louisiana,** the omission of descriptive matters is cured by reference to the petition, affidavit, and order of the judge. *Green v. Huey*, 23 La. Ann. 704, in which case the bond was placed among the papers, with the title and the number of the suit upon it, and it was held that it showed sufficiently what proceedings were enjoined.

4. *Stirlen v. Neustadt*, 50 Ill. App. 378; *Palmer v. Foley*, 71 N. Y. 106; *Pillow v. Thompson*, 20 Tex. 206.

5. *Episcopal Church of St. Peter v. Varian*, 28 Barb. (N. Y.) 644; *White v. Clay*, 7 Leigh (Va.) 68; *Cay v. Galliot*, 4 Strobb. L. (S. Car.) 282.

"It is laid down that to render a bond void for want of conformity to a

**By Whom Executed.** — The bond need not be executed by the plaintiff, but one executed in his behalf is sufficient;<sup>1</sup> and the bond may be signed by the plaintiff's attorney on behalf of the plaintiff.<sup>2</sup>

**The Conditions and the Penalty of the Bond.** — Where there is no statute describing the conditions to be inserted in the injunction bond, the matter is left to the discretion of the chancellor.<sup>3</sup> Likewise, in the absence of any statute as to the amount of the penalty, a reasonable discretion is left to the chancellor, and he should consider the probable injury which the injunction will do, and take care that the terms shall be such as to insure that the defendant shall sustain no ultimate loss.<sup>4</sup>

statute, it must be made so by express enactment or must be intended as a fraud on the obligors by color of law by an evasion of the statute." *Per* Hemphill, C. J., in *Janes v. Reynolds*, 2 Tex. 250.

In Illinois it has been held, under a statute (Rev. Stat., c. 69, § 8) requiring a bond in a suit to enjoin a judgment to be conditioned to pay all moneys and costs due on the judgment and such damages as may be awarded, that a bond conditioned to pay only "all such costs and damages as shall be awarded" is insufficient. *Stirlen v. Neustadt*, 50 Ill. App. 378.

1. *Pence v. Durbin*, 1 Idaho 550, which case was decided under a statute requiring an undertaking to execute it "on the part of the plaintiff." See also *Leffingwell v. Chave*, 19 How. Pr. (N. Y. Super. Ct.) 54, holding that where it is required that an undertaking shall be executed "on the part of the plaintiff" it may be executed by any competent person, and it is not necessary that it should be signed by the plaintiff or his agent or by some person who is described as acting on the part of the plaintiff.

**The Plaintiff Is Not Liable** on a bond which he does not himself sign. *Patterson v. Bloomer*, 9 Abb. Pr. N. S. (N. Y. Supreme Ct.) 27, wherein the court said: "It is said that the code does not expressly require the plaintiff to sign this class of undertakings, and that the sureties may not be, as it is suggested they were not in this case, sufficiently responsible to afford the defendant indemnity; but the remedy for an insufficient security is to apply to the court to compel the plaintiff to furnish new security, which is a very common practice." *Reversing Patter-*

*son v. Bloomer*, 38 How. Pr. (N. Y. Supreme Ct.) 280.

**The Names of the Sureties** need not appear in the body of the bond. *Griffin v. Wallace*, 66 Ind. 410, following *Potter v. State*, 23 Ind. 550.

And it has been held that the bond may be signed by a surety in blank and afterwards filled up. *Eyssallenne v. Citizens' Bank*, 3 La. Ann. 663.

2. *Cunningham v. Tucker*, 14 Fla. 251, in which case it was held that a statute prohibiting attorneys from signing bonds as sureties does not prevent them from signing them as principals or in behalf of the parties.

3. *Walker v. Pritchard*, 135 Ill. 109. *Citing* *Billings v. Sprague*, 49 Ill. 509, and *Barnes v. Brookman*, 107 Ill. 317. See also *Brownfield v. Brownfield*, 58 Ill. 152; *Beckley v. Palmer*, 11 Gratt. (Va.) 625.

**Where the Statute Furnishes the Model** of an injunction bond, an order directing a bond to be given "as the law directs" is sufficiently explicit, but when the chancellor grants injunctions and restraining orders in cases in which the statute does not prescribe the form of the bond, the order itself should direct what kind of a bond should be given. *Stevenson v. Miller*, 2 Litt. (Ky.) 306.

**No Order Fixing Penalty.** — Where a bond is executed in the presence of the court, it is immaterial that the order granting the injunction did not fix the penalty of the bond. *Harman v. Howe*, 27 Gratt. (Va.) 676.

4. *Bell v. Riggs*, 37 La. Ann. 813; *Green v. Huey*, 23 La. Ann. 704; *Billingslea v. Gilbert*, 1 Bland (Md.) 566; *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65; *Pratt v. Underwood*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 167; *Ryckman v. Coleman*, 21 How. Pr.

**Informalities.** — A bond may be informal and insufficient when it is relied upon to sustain the injunction, and yet be not destitute of binding force when a recovery is sought against the obligors.<sup>1</sup>

**Bond Unnecessarily Onerous.** — The fact that a bond is more comprehensive than it need be, or is in a larger sum than is necessary, does not render it illegal and void or without consideration.<sup>2</sup>

**d. ACCEPTANCE AND APPROVAL OF THE BOND.** — The bond is taken without the consent of the party enjoined, and is valid without his acceptance;<sup>3</sup> but as a general rule it is necessary that the bond should be approved by the court or clerk, usually by the clerk.<sup>4</sup>

(N. Y. Supreme Ct.) 404; *Lomax v. Picot*, 2 Rand. (Va.) 247.

**The Uniform Practice** is to require that the penalty of the bond shall be in a sum sufficiently large to cover all loss that may accrue, and it is very unusual when an indebtedness or tax is enjoined to fix the penalty at less than the sum enjoined, with all costs which are likely to accrue. *Drake v. Phillips*, 40 Ill. 388, *per* Walker, C. J. To the same effect is *Billingslea v. Gilbert*, 1 Bland (Md.) 566.

**Increase of Amount.** — In *Bell v. Riggs*, 37 La. Ann. 813, it was said: "The right of the judge to increase the amount of the bond, upon proper showing that the amount originally fixed was inadequate, is too clear to admit of question."

**Defeasance Clause.** — The bond should not be so framed as to leave the obligors bound notwithstanding they may pay all damages the plaintiffs may sustain. *Washington v. Timberlake*, 74 Ala. 259, in which case the bond provided that if the obligors should pay all damages sustained by the issuing out of the injunction, "then this obligation to remain in full force and effect."

1. *Per* Merritt, C. J., in *Vicksburg, etc., R. Co. v. Barksdale*, 15 La. Ann. 465. See also *Hopkins v. State*, 53 Md. 502.

**Common-Law Obligation.** — Where the chancellor fails to prescribe what kind of bond shall be taken, and the clerk is left to dictate the bond, and it is one of his making, it is nevertheless good as a common-law instrument. *Stevenson v. Miller*, 2 Litt. (Ky.) 306. See also *Cox v. Vogh*, 33 Miss. 187, in which case the plaintiff, instead of executing a bond, gave the defendant a simple contract with sureties; and it was held that the irregularity was waived by the defendant's failure to ask the dissolu-

tion of the injunction, and that the contract was valid and enforceable upon the dissolution of the injunction.

**In Maine**, by statute, a bond which is informal is nevertheless a binding obligation according to its terms. *Barrett v. Bowers*, 87 Me. 185.

2. *Mahan v. Tydings*, 10 B. Mon. (Ky.) 351; *Buckner v. Stewart*, 34 Ala. 529. In the latter case the court cited *Bagby v. Chandler*, 9 Ala. 770; *M'Caraher v. Com.*, 5 W. & S. (Pa.) 21; and *State Treasurers v. Bates*, 2 Bailey L. (S. Car.) 376.

In *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217, it was said: "The insertion of conditions in an injunction bond not required by law, but not against law, will not vitiate those that are required by law."

**Defects Which Are Not Injurious to the Plaintiff** are not available in an action on the bond. *Gillespie v. Thompson*, 5 Gratt. (Va.) 132, in which case the bond was in the proper form except that it did not bind the obligors to pay such costs as might become due.

3. *Per* Martin, J., in *Pargoud v. Morgan*, 2 La. 99; *Union Wharf v. Mussey*, 48 Me. 307; *Burgess v. Lloyd*, 7 Md. 178.

4. *Ballard v. Eckman*, 20 Fla. 661.

**Indorsement of Approval.** — It is proper, but not absolutely essential, that the approval of the court or judge should be indorsed upon the bond or undertaking. *Griffin v. Wallace*, 66 Ind. 410, *citing* *Patterson v. Stair*, 26 Ind. 137, in which case the court considered the fact that the undertaking was read to the court, and that thereupon the restraining order was continued, as conclusive evidence that the court approved the bond.

**In Kentucky** it has been held, under a statute making it the duty of the clerk to approve and accept injunction bonds,

*c.* AMENDMENTS AND NEW BONDS. — The chancellor may allow a defective injunction bond to be amended, and may, where the circumstances of the case justify it, allow or require a new bond to be given.<sup>1</sup>

that so much of an order for an injunction as requires the execution of a bond with a named person as surety is "to be regarded as surplusage and against law," and that notwithstanding the form of the order, the clerk may approve a bond with another surety than the one named. *Greathouse v. Hord*, 1 Dana (Ky.) 105.

In New Jersey the chancellor directs not that the bond shall be delivered to the defendant, but that it shall be filed with the clerk, and it is considered as being in escrow to be used by the clerk for indemnifying those who may be damaged by the issuance of the injunction. *Brown v. Easton*, 30 N. J. Eq. 725.

In Virginia the bond is not required by law to be executed in the presence of the court, but to be given before the clerk of the court. *Harman v. Howe*, 27 Gratt. (Va.) 676.

**The Delivery of the Bond to the Clerk** does not import acceptance and approval. *Burgess v. Lloyd*, 7 Md. 178.

**Presumption as to Approval.** — It will be presumed that the clerk has approved the bond, from the fact of his having issued the injunction. *Catalogne v. Bauries*, 4 La. Ann. 567. See also *Burgess v. Lloyd*, 7 Md. 178, in which case it was held that acceptance and approval of the bond by the proper authorities are to be presumed from the fact that the bond is tendered and remains in the clerk's office and is acted under by the authorities.

**The Clerk Need Not Witness Its Execution.** — It is immaterial whether or not the bond is signed by the surety in the presence of the clerk. *Catalogne v. Bauries*, 4 La. Ann. 567. But it was said by Underwood, J., in *Robards v. Wolfe*, 1 Dana (Ky.) 155, that it is better that the clerk should attend the execution of the bond and witness it.

**Objection Taken by Motion to Dissolve.** — The objection that the court has not approved the bond is one properly arising on a motion to dissolve, and cannot be made on the hearing. *Boston v. Nichols*, 47 Ill. 353.

**Necessity to File Bond.** — In New York the undertaking must be filed with the clerk as required by Code,

§§ 222 and 423. *O'Donnell v. McMurn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 391.

In Maryland it has been held, under a statute which did not prescribe what should be done with the bond, that it should remain in the clerk's office, but that it need not be recorded. *Burgess v. Lloyd*, 7 Md. 178.

**Justification of Sureties.** — In California it has been provided by statute (Code Civ. Pro., § 529) that the sureties, upon notice to the defendant of not less than nor more than five days, shall justify before a judge or county clerk in the same manner as upon bail on arrest, and that upon failure to justify at the time and place appointed the order granting an injunction shall be dissolved. *McSherry v. Pennsylvania Consol. Gold Min. Co.*, 97 Cal. 637.

In Montana the affidavit required by statute, stating that the sureties are each worth the sum specified in the bond, should properly accompany the bond, but not being a part of the bond is not indispensable to the validity of the obligation of the sureties. *Lee v. Watson*, 15 Mont. 228, in which case the court cited *Miller v. Pine Min. Co.*, (Idaho 1893) 32 Pac. Rep. 207, wherein the question was as to the justification of sureties of a bond filed to stay the execution of a judgment.

In New York it was early held that the sureties may be required to justify in double the amount of the penalty of the bond; the decision being based upon a rule of the court. *Carroll v. Sand*, 10 Paige (N. Y.) 298.

1. *Smith v. Harrington*, 49 Miss. 771, in which case it was held that a statute authorizing amendments in the pleadings and proceedings in chancery conferred upon the chancellor ample power, limited only by sound discretion, to allow the amendment of a defective injunction bond. See also *Miller v. McDougall*, 44 Miss. 682. See likewise *Hall v. Livingston*, 3 Del. Ch. 348, holding that the chancellor may discharge a surety and allow a new bond to be taken in order to relieve the surety from his disqualification to justify, the court in that case disapproving *Artz v. Grove*, 21 Md. 456; *Palmer v.*



**XIII. FRAME OF THE INJUNCTION — 1. In General.** — No Particular Form is requisite, it being essential merely that the defendant shall be given an authentic notification of the mandate of the court or judge, which the defendant must at his peril obey.<sup>1</sup>

Ellegood, 4 Del. Ch. 53, which is an authority for requiring the plaintiff to give additional security where the original bond is insufficient; *New v. Wright*, 44 Miss. 202; *Galt v. Carter*, 6 Munf. (Va.) 245.

**Insolvency of Surety.** — When one of the sureties becomes insolvent, the court has power in its discretion to require additional security to be given. *Willett v. Stringer*, 15 How. Pr. (N. Y. Super. Ct.) 310, wherein Hoffman, J., said: "It is obvious that there is a substantial distinction between the case of an injunction and that of an appeal. In the former, the court, as in this instance, finds the party apparently entitled to the remedy, but, in its discretion, substitutes the security as sufficiently protecting the party; and because of the great inconveniences resulting from breaking up the business of the other party, when, perhaps, it may result that the injunction ought not to have been allowed. If the protection by the security thus substituted should become entirely lost, as, by insolvency of all the obligors, certainly the right to the injunction would be restored."

**Order Authorizing New Bond.** — Where the plaintiff files an insufficient bond, and thereafter files such a bond as he should have given in the first instance, and the court refuses to dissolve the injunction, presumably because of the new bond on file, the plaintiff will not afterwards be heard to say that the bond is not valid because the record shows no formal order authorizing it to be given and filed. *Farni v. Tesson*, 51 Ill. 393.

**Dissolution of Injunction.** — As to the dissolution of an injunction because of the plaintiff's failure to file a bond or the insufficiency of the bond filed, see *infra*, p. 1042.

1. *Summers v. Farish*, 10 Cal. 347, in which case the court said: "This notification is made by the clerk in the usual form which is adopted to certify his official acts. The paper commences and ends as a writ; it informs the defendants of the order of the judge and cautions them to obey 'this writ,' the body of which is made

up of this order. It answered every purpose of a formal writ, and created every obligation on the defendants, and gave all the benefits of such process to the plaintiffs. We cannot see why it is not, in every substantial quality, a good and valid writ of injunction."

**The Return Day.** — An injunction is not technically made returnable in court, yet the nature of all intermediary or final process requires that it shall be served before a stated term of the court intervenes after its award. *McCormick v. Jerome*, 3 Blatchf. (U. S.) 486.

**Authority for Issuance of Injunction.** — It should appear upon the face of the process, either by the recital of facts or necessary inference, that it was issued on proper authority. *Governor v. Wiley*, 14 Ala. 172.

**Seal.** — An injunction is issued under the seal of the court. *Matter of Hemmiup*, 2 Paige (N. Y.) 316.

**Combination of Injunction and Subpœna.** — It is sometimes the practice to combine the writ of injunction with the subpœna, in which case it is the duty of the clerk to indorse upon the process that its effect is suspended, as to the injunction, until the plaintiff shall execute a sufficient bond. *Per Thatcher, J., in Duckworth v. Millsaps*, 7 Smed. & M. (Miss.) 308.

**Order Regarded as Injunction.** — An order requiring the defendant to refrain from certain acts is an injunction from the granting of which an appeal will lie, and the disobedience of which will be punished. *Lindblom v. Williams*, 51 Ill. App. 483, in which case it was held that the plaintiff could not insist that because no writ of injunction had been issued, no damages could be awarded upon the dissolution of the injunction. But see *Eakle v. Smith*, 27 Md. 467, in which case it was held that no liability accrued on the bond until the writ had been actually issued.

**Money Penalty.** — In *Low v. Häuel*, 1 Wall. Jr. (C. C.) 345, the court declined to issue an injunction enjoining the defendant "under the penalty of \$— to be levied upon his lands, goods, and

**Statutory Provisions** as to the form of an injunction should be conformed to.<sup>1</sup>

**Adaptability to the Circumstances of the Case.** — The writ may be so molded as to suit the various circumstances and occasions which may be presented to the court for its use.<sup>2</sup>

**2. Conformity to the Order of the Court.** — It is the duty of the plaintiff to see that the writ is no broader than the order of the court will authorize.<sup>3</sup>

**3. Conformity to the Bill.** — The writ of injunction should be so restricted as not to deprive the defendant of any rights which the case made by the bill does not require that he should be restrained from exercising.<sup>4</sup>

chattels," henceforth to desist, etc., and declared that an injunction in such form is liable to be misunderstood as meaning that the defendant may pay the penalty and do the acts enjoined.

**In Iowa** it has been declared that an injunction against a liquor nuisance shall be binding on the party or parties enjoined throughout the judicial district in which the action is brought. *McGlasson v. Johnson*, 86 Iowa 477.

**In Louisiana** it is usual to insert a provision in the writ to the effect that "you are so to remain enjoined and prohibited until further orders of this court." *Per Fenner, J.*, in *State v. Levy*, 36 La. Ann. 941.

1. *Matter of Keiler*, 4 Abb. N. Cas. (U. S. Dist. Ct.) 150.

**Recital as to Grounds for Injunction.** — Code Civ. Pro. N. Y., § 610, requires that the injunction order shall "briefly recite the grounds for the injunction;" but it has been held that failure to comply with this provision is not a jurisdictional defect. *Atlantic, etc., Tel. Co. v. Baltimore, etc.*, R. Co., 46 N. Y. Super. Ct. 377.

It is immaterial that the order does not declare that the conduct of the defendant will defeat, impair, impede, or prejudice the right or remedy of the plaintiff when the papers upon which the order rests contain facts showing that the commission of the acts will have such effect. *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443, following *Fischer v. Langbein*, 103 N. Y. 84.

**A Recital in the Language of Section 603**, to the effect that the plaintiff demands and is entitled to a judgment restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to

the plaintiff, is not sufficient. *Hotchkiss v. Hotchkiss*, 16 Civ. Pro. Rep. (N. Y. Supreme Ct.) 129. But see *Richards v. Goldberg*, 7 Misc. Rep. (N. Y. C. Pl.) 388, wherein it was held that an order reciting the several acts of the defendant, followed by a statement in the language of section 610, was a sufficient compliance with the requirement of that section.

2. *Tucker v. Carpenter, Hempst.* (U. S.) 440, in which case the court said: "It is so malleable that it may be molded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications, for the purposes of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual; and it may be dissolved, revived, continued, extended, or contracted. In short, it is adapted and is used by courts of equity as a process for preventing wrong between and preserving the rights of parties in controversy before them." See also, to the same effect, *Woodruff v. Wallace*, 3 Okla. 355; *Sproat v. Durland*, 2 Okla. 24.

3. *Sturges v. Hart*, 45 Ill. 103.

4. *Laurie v. Laurie*, 9 Paige (N. Y.) 234; *Leitham v. Cusick*, 1 Utah 242. See also *Baker Mfg. Co. v. Washburn, etc., Mfg. Co.*, 5 McCrary (U. S.) 504, holding that where the bill asks an injunction against the cancellation of a license by a patentee because of the plaintiff's refusal to pay a higher royalty than that exacted by the patentee from another licensee, the mandate of the writ should go no further than the allegations of the bill and should not restrain the patentee from annulling or attempting to annul or to revoke the license for any cause whatever.

**4. Unnecessary Restraint.** — The writ should be so framed as to protect the rights of the plaintiff with as little injury to the defendant as possible.<sup>1</sup>

**5. Certainty.** — The writ, as a general rule, should contain a concise description of the particular acts or things in respect to which the defendant is enjoined, and should be broad enough to cover everything which it is intended to prevent.<sup>2</sup>

**6. Reference to the Bill.** — A writ of injunction should of itself contain sufficient to apprise the defendant what he is restrained from doing, without examining the bill.<sup>3</sup> But it would seem that where the injunction refers to the bill and the defendant has knowledge of the contents of the bill, and the meaning of the

1. *Boardman v. Meriden Britannia Co.*, 36 Conn. 207.

Where the plaintiff's only complaint is that the defendant is making an improper use of property to which the plaintiff claims title, the injunction should not require the defendant to refrain from using the property altogether, but should only restrict his use of the same so far as necessary to prevent injury to the plaintiff. *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y. Supreme Ct.) 394. See also *Snyder v. Hopkins*, 31 Kan. 557, in which case an injunction was sought pending an action of ejectment, and it was held that the court ought not to have restrained the defendant from continuing the ordinary and natural use of the premises and the enjoyment of all benefits which flow from possession, but that the injunction should have been directed against waste and substantial and injurious changes in the condition of the property only.

2. *Whipple v. Hutchinson*, 4 Blatchf. (U. S.) 190; *German Sav. Bank v. Habel*, 80 N. Y. 273; *St. Louis Min., etc., Co. v. Montana Min. Co.*, 58 Fed. Rep. 129.

In *Laurie v. Laurie*, 9 Paige (N. Y.) 234, the court said: "The language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction." See also the following cases in which the doctrine finds support: *Governor v. Wiley*, 14 Ala. 172; *Boardman v. Meriden Britannia Co.*, 36 Conn. 207; *Robinson v. Clapp*, 65 Conn. 365; *William Rogers Mfg. Co. v. Rogers*, 38

Conn. 121; *Baldwin v. Miles*, 58 Conn. 496; *Ballentine v. Webb*, 84 Mich. 38; *Avery v. Onillon*, 10 La. Ann. 127; *Richards v. West*, 3 N. J. Eq. 456; *Moat v. Holbein*, 2 Edw. Ch. (N. Y.) 188; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Standard Stock Farm v. National Trotting Assoc.*, (Supreme Ct.) 9 N. Y. Supp. 898; *Lyon v. Botchford*, 25 Hun (N. Y.) 57; *Clark v. Clark*, 25 Barb. (N. Y.) 76.

**Illustrations — Description of Execution.** — Where an injunction is intended to operate upon an execution, it is not sufficient to state merely the parties to it, and that the execution is in the sheriff's hands. *Governor v. Wiley*, 14 Ala. 172.

**Description of Premises.** — An injunction against trespass upon land should describe the premises. *Avery v. Onillon*, 10 La. Ann. 127.

An injunction enjoining the sale of intoxicating liquors contrary to law upon "part of lot number two" (further describing lot number two), is not void for uncertainty, and a performance of the acts prohibited on any part of lot number two will be considered as a violation of the writ. *Ver Straeten v. Lewis*, 77 Iowa 130. *Granger, J., dissenting.*

**Nuisance.** — It is insufficient to require merely that the defendant shall refrain from conducting his business "in such a way as to be offensive to or become a nuisance to" the plaintiff, but the acts which the defendant should refrain from doing should be specifically pointed out. *Ballentine v. Webb*, 84 Mich. 38.

3. *Lyon v. Botchford*, 25 Hun (N. Y.) 57; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Hopkins v. State*, 53 Md. 502. But see *Williamson v. Hall*, 1 Ohio St. 190.

injunction is obvious, he cannot insist that the injunction is too vague and uncertain.<sup>1</sup>

**7. Against Whom Directed.** — A writ of injunction is usually directed to and against the defendant and his counselors, solicitors, attorneys, and agents, and, when the thing forbidden to be done is in the nature of labor or mechanical work, his laborers, servants, and employees;<sup>2</sup> and this is especially the proper form of an injunction when the party defendant is a corporation.<sup>3</sup>

**8. Construction of Injunctions.** — To ascertain the meaning of any part of an injunction, the entire injunction should be looked to;<sup>4</sup> and its language, like that of all other instruments, must have a reasonable construction with reference to the subject about which it is employed,<sup>5</sup> and the prayer of the bill is to be considered.<sup>6</sup>

**XIV. SERVICE OF SUBPŒNA AND WRIT OF INJUNCTION** — 1. **Necessity to Serve Subpœna.** — A suit for injunction is not instituted by

1. *Whipple v. Hutchinson*, 4 Blatchf. (U. S.) 190; *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121. In the latter case it was said that references to the bill are very common, and often save repetitions which would be tedious and useless.

2. *Per Cobb, J.*, in *Boyd v. State*, 19 Neb. 128. See also *Smith v. Cook*, 39 Ga. 191; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 53 Am. & Eng. R. Cas. 307. In the last mentioned case the court cited *Foster's Fed. Prac.* 234; 2 *Daniell's Ch. Prac.* 1673; *Seaton's Decrees* 173; *Wellesley v. Mornington*, 11 Beav. 180; *Hodson v. Coppard*, 29 Beav. 4; and *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. Rep. 351.

In *Nebraska*, "where no writ is used, nor even a formal order necessary, the thing enjoined, or to be refrained from, as well as the person or persons bound by the injunction (and who will be punished in a summary manner for a breach of it), will usually be designated by the allegations of the petition, when the injunction is allowed as a provisional remedy, and by the terms of the judgment itself in other cases." *Boyd v. State*, 19 Neb. 128, wherein it was said by *Cobb, J.*: "Where the allegations of the petition designate, either by name or description, the persons or class of persons who, in a subordinate capacity, under or in privity with the principal defendant or defendants, are about to do the acts which it is the object or intention of the court or judge to enjoin by a provisional or temporary injunction, the persons so designated, as well as the parties defendant who

are served with process in the action, as well as those having knowledge or notice of the allowance of the injunction, are bound by it to the extent of being amenable to summary punishment for violating it."

3. *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746, 53 Am. & Eng. R. Cas. 293.

4. *Baldwin v. Miles*, 58 Conn. 496.

**Reference to the Bill.** — Where the writ of injunction refers to the bill, the latter may be examined for the purpose of ascertaining to what the injunction applies. *Hopkins v. State*, 53 Md. 502. See also *Levy v. Taylor*, 24 Md. 291; *Endicott v. Mathis*, 9 N. J. Eq. 110.

5. *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

**The Purpose of an Injunction.** — It is to be supposed that the injunction was intended to restrain acts which would be injurious to the plaintiff, and much less acts which would be beneficial to him. *Per Andrews, J.*, in *Wilkinson v. First Nat. F. Ins. Co.*, 72 N. Y. 499. Citing *Parker v. Wakeman*, 10 Paige (N. Y.) 485, and *Hudson v. Plets*, 11 Paige (N. Y.) 184.

**Strict Construction Where Violation Is a Penal Offense.** — Where disobedience of an injunction is a penal offense and punishable as such, the injunction, like penal and criminal statutes, should be construed strictly in favor of the person charged with violating it. *Wisconsin Cent. R. Co. v. Smith*, 52 Wis. 140, 10 Am. & Eng. R. Cas. 364.

As to whether or not the violation of an injunction is to be regarded as a penal offense, see *infra*, XX. 12. a.

6. *Powell v. Hammond*, 81 Ga. 567.

he issuance and service of a writ of injunction, and it is the duty of the plaintiff to take out and serve upon the defendant a subpœna to appear and answer. Unless the defendant be brought before the court by proper service, or voluntarily appears and has his day in court, no final judgment can be rendered against him.<sup>1</sup> The court can acquire jurisdiction over the person of the defendant by any service of process authorized by the laws of the state.<sup>2</sup>

**2. Irregularities Waived.** — The failure of the plaintiff to take out a subpœna and serve it upon the defendant, and irregularities in the service, are waived where the defendant appears and answers the bill and makes no objection to the irregularities.<sup>3</sup>

**3. Service of Writ of Injunction** — *a.* **WHETHER THE WRIT SHOULD BE SERVED.** — Regularly, the injunction should be

<sup>1</sup> *England.* — Atty.-Gen. *v.* Nichol, 16 Ves. Jr. 338; Patrick *v.* Harrison, 3 Bro. C. C. 476.

*Alabama.* — Robertson *v.* Robertson, 58 Ala. 68; *Ex p.* Sayre, 95 Ala. 291.

*Florida.* — State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

*Iowa.* — District Tp. *v.* District Tp., 54 Iowa 115; Death *v.* Pittsburg Bank, 1 Iowa 382.

*Kansas.* — State *v.* Rush County, 35 Kan. 150; McCarthy *v.* Marsh, 41 Kan. 17.

*Kentucky.* — Hofman *v.* Marshall, 1 J. J. Marsh. (Ky.) 64.

*New Jersey.* — Lee *v.* Cargill, 10 N. J. Eq. 331.

*New York.* — Seebor *v.* Hess, 5 Paige (N. Y.) 85; Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377; Parker *v.* Williams, 4 Paige (N. Y.) 439.

*United States.* — Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 1 Sawy. (U. S.) 470.

In California service of summons may be made upon a corporation by service upon the person designated by the corporation, under Act Cal. April 1, 1872; and the corporation will not be heard to say that the person so designated is not the proper person. *Eureka Lake, etc., Canal Co. v. Superior Ct.*, 66 Cal. 311.

In Iowa, by statute, notice of an action for an injunction may be served by leaving a copy at the defendant's usual place of residence, with some member of his family over fourteen years of age, when the defendant is not within the county. *Jordan v. Circuit Ct.*, 69 Iowa 177.

In Kansas the clerk is required by

statute to issue a summons with the indorsement thereon, "injunction allowed." *State v. Rush County*, 35 Kan. 150.

**Service of Bill with Subpœna.** — The subpœna alone is served, the bill remaining on file; and successive subpœnas may be obtained to meet the various exigencies that may require this to be done in the progress of the cause. *Per* Chancellor Barrett in *Howe v. Willard*, 40 Vt. 654.

**Service of Subpœna on Defendant's Attorney.** — In *Doe v. Johnston*, 2 McLean (U. S.) 323, it was held that a bill for injunction to restrain proceedings at law is not an original bill, and service of the subpœna on the attorney of the plaintiff in the proceedings at law is sufficient.

But see *Seebor v. Hess*, 5 Paige (N. Y.) 85, wherein it was declared that it is not sufficient to serve a copy of the injunction upon any one of the defendants and upon their attorney, but that the subpœna must be served upon each defendant unless some of them elect to appear voluntarily.

<sup>2</sup> *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377, in which case the defendant was a foreign corporation.

<sup>3</sup> *Sweatt v. Faville*, 23 Iowa 321, in which case it was held that delay in the service of the original notice, and defects in the form thereof, were waived by appearance; *Ex p.* Sayre, 95 Ala. 291; *Parker v. Williams*, 4 Paige (N. Y.) 439; *Seebor v. Hess*, 5 Paige (N. Y.) 85; *Thayer v. Wales*, 5 Fisher Pat. Cas. 130, 9 Blatchf. (U. S.) 170; *Logan v. Patrick*, 5 Cranch (U. S.) 288; *People v. Central R. Co.*, 42 N. Y. 283, *per E. D. Smith, J.*

actually served upon the party as the most sure and certain way of notifying him of its contents.<sup>1</sup> There is, however, no objection to the service of the injunction and subpoena upon the defendant at the same time.<sup>2</sup>

**Final Injunction.** — The service of the bill as an original bill in equity without an injunction is sufficient to give effect to an injunction subsequently ordered, and imposes on the defendant an obligation to obey it.<sup>3</sup>

**b. WAIVER OF SERVICE.** — Where the defendant is present in court at the time an order for an injunction is made, and agrees to respect the order without the formality of issuing the writ, he is bound to observe the order.<sup>4</sup>

1. *Farnsworth v. Fowler*, 1 Swan (Tenn.) 1, 55 Am. Dec. 718; *Watson v. Fuller*, 9 How. Pr. (N. Y. Supreme Ct.) 425; *Johnson v. Casey*, 28 How. Pr. (N. Y. Super. Ct.) 492; *Lee v. Cargill*, 10 N. J. Eq. 331.

**The Service Must Be Within a Reasonable Time.** — It is irregular for the plaintiff after the writ has been issued to delay its service and serve it at his discretion whenever he may determine that a new act committed by the defendant violates the order of the court. *McCormick v. Jerome*, 3 Blatchf. (U. S.) 486.

2. *Thebaut v. Canova*, 11 Fla. 143; *Robertson v. Robertson*, 58 Ala. 68; *Heyman v. Landers*, 12 Cal. 107.

**Injunction Served Before Service of Summons.** — In *New York*, under Code Civ. Pro., § 608, providing that an injunction order "may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment," although an injunction served prior to the service of the summons is irregular it is not void and cannot be disregarded by the defendant. *Daly v. Amberg*, 126 N. Y. 490.

**Service of Copy.** — Where the statute does not point out any mode for the service of an injunction in a case where personal service is essential, the delivery of a copy is sufficient, unless, perhaps, the exhibition of the original be specially requested by the defendant. *Edmondson v. Mason*, 16 Cal. 386; *Eureka Lake, etc., Canal Co. v. Superior Ct.*, 66 Cal. 311.

In *New York* the original injunction order must be shown to the defendant, and it is insufficient to serve a copy. *Watson v. Fuller*, 9 How. Pr. (N. Y. Supreme Ct.) 425, following *Coddinton v. Webb*, 4 Sandf. (N. Y.) 639.

3. *Morris v. Bradford*, 19 Ga. 527.

In *Milne v. Van Buskirk*, 9 Iowa 558, it was said: "It has been repeatedly determined that when a party is in court and hears the order pronounced, he is as much bound as if he had been actually served with the writ." Citing *Monell v. Lawrence*, 12 Johns. (N. Y.) 521; *Kimpton v. Eve*, 2 Ves. & B. 349; *Osborne v. Tennant*, 14 Ves. Jr. 136; and 1 *Eden Injunctions* 93.

**Service of Copy of Affidavit.** — In *New York*, notwithstanding the positive terms of Code, § 220, requiring a copy of the affidavit to be served with the injunction, "when the injunction is plain and explicit and leaves no doubt as to the act which the party upon whom it is served is required to perform, or desist from performing, it may well be doubted whether the irregular omission of the affidavit should be held to release him from the duty of obedience." *Per Duer, J.*, in *Davis v. New York*, 1 *Duer* (N. Y.) 451. But see *Penfield v. White*, 8 How. Pr. (N. Y. Supreme Ct.) 87; *Watson v. Fuller*, 9 How. Pr. (N. Y. Supreme Ct.) 425.

It is immaterial whether the complaint and verification are to be regarded as an affidavit or not, as in either view it is sufficient to serve with the injunction the complaint and verification upon which it was granted. *Leffingwell v. Chave*, 19 How. Pr. (N. Y. Super. Ct.) 54.

4. *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Elliott v. Osborne*, 1 Cal. 396.

**A Telegram to the Defendant** from the judge of the court, stating that he has signed a restraining order, is sufficient notice of the injunction, although the telegram is not signed by the judge; it being the duty of the defendant, if he has any doubt as to the genuineness of

*c.* KNOWLEDGE OF INJUNCTION. — If the defendant be otherwise informed of the issuance of an injunction, or if he be informed that an injunction has been granted, and there has been no unnecessary delay in causing it to be issued, he will be bound to obey it.<sup>1</sup>

*d.* METHOD OF MAKING SERVICE. — When the statute is silent as to how or by whom an injunction shall be served, it is sufficient to make the service in the mode prescribed with reference to the service of summons.<sup>2</sup>

**XV. DISSOLUTION OF PRELIMINARY INJUNCTIONS** — 1. **Control of the Court Over the Process.** — The power to issue an injunction implies the power to dissolve it, and a court which has issued a preliminary injunction has inherent power to suspend, dissolve, or modify it upon attention being called to the impropriety of the order.<sup>3</sup> In several states power to dissolve an injunction

the telegram, to ascertain whether or not it is genuine. *State v. Knight*, 3 S. Dak. 509.

**Issuance on Sunday.** — An injunction may be issued on Sunday, where there is an imperious necessity for it. *Langabier v. Fairbury*, etc., R. Co., 64 Ill. 243, in which case it was held that the issuance of an injunction is a work of necessity within the meaning of the statute.

1. *Farnsworth v. Fowler*, 1 Swan (Tenn.) 1, 55 Am. Dec. 718. *Citing* *Kimpton v. Eve*, 2 Ves. & B. 349; *Osborne v. Tennant*, 14 Ves. Jr. 136; *James v. Downes*, 18 Ves. Jr. 522; *Eden Injunctions* 194; and 3 *Jap. Ch. Pr.* 1908. See also *Elliott v. Osborne*, 1 Cal. 396. See further, for a more detailed discussion of this question, and of the liability of a defendant to be proceeded against for contempt where he has violated an injunction with knowledge of it, *infra*, XX. 4. *Knowledge of Injunction*.

2. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187, in which case it was held that Pol. Code Cal., § 4176, providing that the sheriff must serve all process and notices in the manner prescribed by law, does not give to or impose upon that officer exclusively the duty of serving injunctions; *citing* *Edmondson v. Mason*, 16 Cal. 388.

3. *Arkansas*. — *Sanders v. Plunkett*, 40 Ark. 507.

*California*. — *Hobbs v. Amador*, etc., Canal Co., 66 Cal. 161, 8 Am. & Eng. Corp. Cas. 249; *Creanor v. Nelson*, 23 Cal. 464.

*Georgia*. — *Howard v. Lowell Mach.*

*Co.*, 75 Ga. 325; *Semmes v. Columbus*, 19 Ga. 471.

*Louisiana*. — *Mengelle v. Abadie*, 45 La. Ann. 676.

*Maryland*. — *Haight v. Burr*, 19 Md. 130; *Binney's Case*, 2 Bland (Md.) 99; *Frostburg Bldg. Assoc. v. State*, 47 Md. 338; *Jones v. Magill*, 1 Bland (Md.) 177.

*Massachusetts*. — *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

*New York*. — *Galusha v. Flour City Nat. Bank*, 1 Hun (N. Y.) 573; *Adams v. Grey*, 11 Misc. Rep. (N. Y. City Ct.) 446; *Garretson v. Weaver*, 3 Edw. Ch. (N. Y.) 385; *National Gaslight Co. v. O'Brien*, 38 How. Pr. (N. Y. Super. Ct.) 271.

*Oklahoma*. — *Couch v. Orne*, 3 Okla. 508.

*Washington*. — *State v. Hunter*, 4 Wash. 712.

*United States*. — *Barnard v. Gibson*, 7 How. (U. S.) 650; *Muller v. Henry*, 5 Sawy. (U. S.) 644; *Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674; *Goldmark v. Kreling*, 25 Fed. Rep. 349; *Woodworth v. Hall*, 1 Woodb. & M. (U. S.) 248; *Tucker v. Carpenter*, *Hempst.* (U. S.) 440.

**Power to Dissolve Injunction Allowed after Hearing.** — In *Galusha v. Flour City Nat. Bank*, 1 Hun (N. Y.) 573, the court said: "Although the county judge heard the parties before allowing it, it was still a preliminary order only, and was a proper subject of a motion to dissolve it on bill and answer."

In *California*, however, an injunction granted upon an order to show cause after a full hearing of the case upon the merits, will not be dissolved because of the insufficiency of the com-

is either expressly conferred by statute or by necessary implication.<sup>1</sup>

**Void Injunction.** — The fact that the writ is void and of no effect is no reason why the defendant should not be heard on a motion to dissolve;<sup>2</sup> but a motion to dissolve is unnecessary when the injunction is no longer in force.<sup>3</sup>

**2. Distinction Between Dissolution and Discharge.** — In some of the cases a distinction has been taken between the dissolution and the discharge of an injunction, it being declared that an injunction is dissolved for want of equity in the bill, and discharged for irregularities in the writ or its issuance.<sup>4</sup>

**3. Dissolution Ex Mero Motu.** — Where the court becomes acquainted with the fact that the injunction has been improvidently issued, it may order its dissolution *ex mero motu*.<sup>5</sup>

**4. Ipso Facto Dissolution.** — The dismissal of the bill, or so much of it as asks an injunction, is tantamount to a dissolution of the injunction;<sup>6</sup> but where an injunction is granted restraining the

plaint, the only remedy being by appeal. *Natoma Water, etc., Co. v. Parker*, 16 Cal. 83. See also *Natoma Water, etc., Co. v. Clarkin*, 14 Cal. 544; *Curtis v. Sutter*, 15 Cal. 259; *Hicks v. Michael*, 15 Cal. 115.

In *Kansas*, under Gen. Stat. 1889, § 4345, where a temporary injunction is granted upon notice, and after hearing both parties, the court is not bound to entertain a motion to vacate, based upon matters existing at the time the suit was commenced, and the evidence of which could have been adduced, if desired, on the previous hearing. *Scott v. Paulen*, 15 Kan. 162.

**1. Georgia.** — Code, §§ 3217, 4186. *Howard v. Lowell Mach. Co.*, 75 Ga. 325.

**Iowa.** — Revised Statutes, §§ 3782, 3399; *Curtis v. Crane*, 38 Iowa 459; *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74; *Hughes v. Eckerson*, 55 Iowa 641.

**Nebraska.** — Code Civ. Pro., § 263; *Browne v. Edwards*, 44 Neb. 361.

**Virginia.** — Code 1887, § 3444; *Ingles v. Straus*, 91 Va. 209.

**2. Walton v. Develing**, 61 Ill. 201.

In *Hughes v. Eckerson*, 55 Iowa 641. it was said that the defendant is not bound to assume that an injunction is void for want of jurisdiction, and take his chances of its being so held upon his being arrested for contempt, but he may move to have it dissolved and have the error, if any, corrected.

**3. Hatch v. Chicago, etc., R. Co.**, 6 Blatchf. (U. S.) 105.

**4. Ex p. Sayre**, 95 Ala. 291; *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 275; *Jones v. Ewing*, 56 Ala. 360; *Hamilton v. Hendrickx*, 1 Bibb (Ky.) 67; *Judah v. Chilse*, 3 J. J. Marsh. (Ky.) 302; *Clarke v. Young*, 2 B. Mon. (Ky.) 57.

**Waiver of Irregularities.** — In *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 275, it was declared that a motion to dissolve is a waiver of the errors or irregularities which may have attended the order for the issue of the writ or which may be in the writ alone. See also *Beauchamp v. Kankakee County*, 45 Ill. 274.

In *Vipan v. Mortlock*, 2 Meriv. 477, Lord Eldon said: "The motion being to dissolve the injunction, I must take it that the injunction itself was properly granted."

**5. Conover v. Ruckman**, 32 N. J. Eq. 685, in which case the fact that the injunction should not have been issued was brought to the attention of the court on a motion to dismiss the bill for want of equity; *National Gaslight Co. v. O'Brien*, 38 How. Pr. (N. Y. Super. Ct.) 271, *per* McCunn, J.

**6. Thomsen v. McCormick**, 136 Ill. 135; *Disbro v. Disbro*, 37 How. Pr. (N. Y. Supreme Ct.) 147.

**Expiration of Letters Patent.** — Where an interlocutory injunction is granted against the infringement of a patent, the injunction terminates upon the termination of the letters patent. *Gamewell F. Alarm Tel. Co. v. Municipal Signal Co.*, 21 U. S. App. 1.



defendant until further order of the court, it is not dissolved, *ipso facto*, by the plaintiff's failure to procure an order making it perpetual.<sup>1</sup>

**Temporary Restraining Orders.**—A temporary restraining order expires by its own limitation upon the denial of the formal application for a preliminary injunction, without any formal order setting it aside.<sup>2</sup>

**Effect of Final Decree.**—A preliminary injunction is abrogated by the final decree, and any restraint thereafter desired should be inserted in the final decree.<sup>3</sup>

**5. Discretion of Court**—*a.* DISSOLUTION NOT A MATTER OF COURSE.—The dissolution of a preliminary injunction, like the granting of one, is a matter resting largely in the discretion of the court to which the motion to dissolve is addressed, and except in cases of palpable error or abuse of discretion the action of the court will not be disturbed on appeal or otherwise restrained or controlled.<sup>4</sup> A motion to dissolve an injunction is an appeal to the favor of the court, and regard must be had to the degree of

1. *Curtis v. Crane*, 38 Iowa 459.

2. *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216; *Hicks v. Michael*, 15 Cal. 112; *Walton v. Develing*, 61 Ill. 201; *Palmer v. Vermilion County*, 46 Ill. 447; *Leech v. State*, 78 Ind. 570; *Central R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 372, 2 Am. & Eng. R. Cas. 286.

In *Montana* it is not the proper practice on the part of the defendant to ignore the order to show cause and to make a motion to dissolve the restraining order as though the restraining order were a preliminary injunction, but he should resist the plaintiff's application for a preliminary injunction. *Fabian v. Collins*, 2 Mont. 510, *citing* 1 *Whittaker's Pr.* 477.

3. *Gardner v. Gardner*, 62 How. Pr. (N. Y. Ct. App.) 265; *Christopher, etc., R. Co. v. Central Cross-town R. Co.*, 4 Hun (N. Y.) 630, 67 Barb. (N. Y.) 315, *per* Davis, J.; *People v. Randall*, 73 N. Y. 416. See also *Heagy v. Black*, 90 Ind. 534, holding that where a final judgment is rendered for a perpetual injunction and no appeal is taken until the rendition of such judgment, the fact that the court refuses to dissolve an interlocutory injunction is not a fatal error. To the same effect is *Clay County v. Markle*, 46 Ind. 96.

4. *Alabama*.—*Planters', etc., Bank v. Lauchheimer*, 102 Ala. 454; *Harrison v. Yerby*, 87 Ala. 185; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Barnard v. Davis*, 54 Ala. 565; *Reid v.*

*Moulton*, 51 Ala. 255; *Brooks v. Diaz*, 35 Ala. 599.

*Arkansas*.—*Sanders v. Plunkett*, 40 Ark. 507.

*California*.—*Hiller v. Collins*, 63 Cal. 235; *Porter v. Jennings*, 89 Cal. 440; *Parrott v. Floyd*, 54 Cal. 534; *Efford v. South Pac. Coast R. Co.*, 52 Cal. 277; *McCreery v. Brown*, 42 Cal. 402; *Rogers v. Tennant*, 45 Cal. 186; *Patterson v. Santa Cruz County*, 50 Cal. 345; *Beaudry v. Felch*, 47 Cal. 183; *Hicks v. Compton*, 18 Cal. 209; *White v. Nunan*, 60 Cal. 406; *De Godey v. Godey*, 39 Cal. 167; *Coolot v. Central Pac. R. Co.*, 52 Cal. 65; *Payne v. McKinley*, 54 Cal. 532; *Hicks v. Michael*, 15 Cal. 112.

*Florida*.—*Hayden v. Thrasher*, 20 Fla. 715; *Allen v. Hawley*, 6 Fla. 142.

*Georgia*.—*Semmes v. Columbus*, 19 Ga. 471; *Fouche v. Rome St. R. Co.*, 84 Ga. 233; *Howard v. Lowell Mach. Co.*, 75 Ga. 325; *Cook v. Houston County*, 54 Ga. 163; *Clark v. Herring*, 43 Ga. 226; *Hollis v. Williams*, 43 Ga. 214; *Gullatt v. Thrasher*, 42 Ga. 429; *Robenson v. Ross*, 40 Ga. 375; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Connally v. Cruger*, 40 Ga. 259; *Douglass v. Thomson*, 39 Ga. 134; *Savannah, etc., Canal Co. v. Ryan*, 38 Ga. 144; *Powell v. Parker*, 38 Ga. 644; *Taylor v. Harp*, 37 Ga. 358; *Upson County R. Co. v. Sharman*, 37 Ga. 644; *Woolfolk v. Rumph*, 37 Ga. 684; *Howell v. Lee*, 36 Ga. 76; *Louis v. Bamberger*, 36 Ga. 589; *Webb v. Wynn*, 35 Ga. 216;

inconvenience and expense to which continuing the injunction would subject the defendant in the event of his being right, as

*Johnson v. Allen*, 35 Ga. 252; *Carroll v. Martin*, 35 Ga. 261; *Edwards v. Banksmith*, 35 Ga. 213; *Smith v. Bryan*, 34 Ga. 53; *Rhodes v. Lee*, 32 Ga. 470; *Rainey v. Jones*, 31 Ga. 111; *Cash v. Williams*, 30 Ga. 20; *Buchanan v. Ford*, 29 Ga. 490; *Horn v. Thomas*, 19 Ga. 270; *Cox v. Griffin*, 18 Ga. 728; *Loyless v. Howell*, 15 Ga. 556; *Dent v. Summerlin*, 12 Ga. 8; *Holt v. Augusta Bank*, 9 Ga. 552; *Swift v. Swift*, 13 Ga. 145; *Hemphill v. Ruckersville Bank*, 3 Ga. 445; *Field v. Howell*, 6 Ga. 423; *Read v. Dews, R. M. Charlt. (Ga.)* 358; *Crutchfield v. Danilly*, 16 Ga. 432; *West v. Rouse*, 14 Ga. 715; *Shellman v. Scott, R. M. Charlt. (Ga.)* 380.

*Iowa*. — In *Stewart v. Johnston*, 44 Iowa 435, it was said: "The question is not now whether this court would have dissolved the injunction at the hearing of the motion, but the question now is whether this court shall control the discretion of the court below in refusing to dissolve it." See also the following cases: *Clark v. American Coal Co.*, 86 Iowa 451; *Walker v. Stone*, 70 Iowa 103; *Kelley v. Briggs*, 58 Iowa 332; *District Tp. v. Barrett*, 47 Iowa 110; *Fargo v. Ames*, 45 Iowa 494; *Stewart v. Johnston*, 44 Iowa 435; *Sinnett v. Moles*, 38 Iowa 25; *Stevens v. Myers*, 11 Iowa 183; *Rice v. Smith*, 9 Iowa 570; *Shricker v. Field*, 9 Iowa 366.

*Kansas*. — An order vacating a preliminary injunction will not be disturbed on appeal if the reasons in favor of sustaining the injunction slightly preponderate over those against it, unless the preponderance is so great that it can be said that the vacation of the injunction was an abuse of discretion. *Wood v. Millsbaugh*, 15 Kan. 14. See also *Long v. Kasebeer*, 28 Kan. 226.

*Massachusetts*. — *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

*Michigan*. — *Atty.-Gen. v. Oakland County Bank, Walk. (Mich.)* 90.

*Minnesota*. — *Pineo v. Heffelfinger*, 29 Minn. 183.

*Mississippi*. — *Miller v. McDougall*, 44 Miss. 682, citing *Adams Eq.* 196, 356. See also *Richardson v. Lightcap*, 52 Miss. 508; *Bowen v. Hoskins*, 45 Miss. 183; *Jones v. Commercial Bank*, 5 How. (Miss.) 43.

*Montana*. — *Klein v. Davis*, 11 Mont. 155. See also *Cotter v. Cotter*, 16 Mont. 63.

*New Jersey*. — *Salomon v. Hertz*, 40 N. J. Eq. 400; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Christie v. Griffing*, 24 N. J. Eq. 76; *Dellett v. Kémble*, 23 N. J. Eq. 58; *Dey v. Dey*, 23 N. J. Eq. 88; *Murray v. Elston*, 23 N. J. Eq. 127; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Carr v. Weld*, 18 N. J. Eq. 41; *Irick v. Black*, 17 N. J. Eq. 189; *Morris Canal, etc., Co. v. Matthiesen*, 17 N. J. Eq. 385; *Furman v. Clark*, 11 N. J. Eq. 135; *Bechtel v. Carlslake*, 11 N. J. Eq. 244; *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Fleischman v. Young*, 9 N. J. Eq. 622; *Van Horn v. Talmage*, 8 N. J. Eq. 108; *Williams v. Kingsley*, 5 N. J. Eq. 119; *Chetwood v. Brittan*, 2 N. J. Eq. 438.

*New York*. — *Strasser v. Moonelis*, 108 N. Y. 611; *Young v. Campbell*, 75 N. Y. 525; *Pfohl v. Sampson*, 59 N. Y. 174; *Van Dewater v. Kelsey*, 1 N. Y. 533; *People v. Schoonmaker*, 50 N. Y. 499; *Paul v. Munger*, 47 N. Y. 469; *Steele v. Pittsburgh, etc., R. Co.*, (Supreme Ct.) 36 N. Y. St. Rep. 198; *Adams v. Grey*, 11 Misc. Rep. (N. Y. City Ct.) 446; *Ciancimino v. Man*, 1 Misc. Rep. (N. Y. C. Pl.) 121; *Middletown v. Rondout, etc., R. Co.*, 43 How. Pr. (N. Y. Supreme Ct.) 481; *Sixth Ave. R. Co. v. Kerr*, 28 How. Pr. (N. Y. Supreme Ct.) 382; *Grill v. Wiswall*, 82 Hun (N. Y.) 281; *Hessler v. Schafer*, 82 Hun (N. Y.) 199; *Pomeroy v. Drury*, 14 Barb. (N. Y.) 418; *Rodgers v. Rodgers*, 1 Paige (N. Y.) 426; *Monroe Bank v. Schermerhorn, Clarke Ch. (N. Y.)* 303; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315. See also the language of Chancellor Kent in *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202 [which case was cited in *Barnard v. Davis*, 54 Ala. 565; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; and in *Poor v. Carleton*, 3 Sumn. (U. S.) 70].

*North Carolina*. — *McBrayer v. Hardin*, 7 Ired. Eq. (N. Car.) 1, 53 Am. Dec. 389; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 434; *James v. Lemly*, 2 Ired. Eq. (N. Car.) 278.

*South Dakota*. — *Huron Water-works Co. v. Huron*, 3 S. Dak. 610.

*Texas*. — *Friedlander v. Ehrenworth*, 58 Tex. 350.

*Utah*. — *Leitham v. Cusick*, 1 Utah 242.

*Virginia*. — *Ingles v. Straus*, 91 Va. 209; *Clinch River Mineral Co. v. Har-*

well as the loss which would accrue to the plaintiff if it should turn out that his complaint is well founded, and the discretion should be exercised in favor of the party most liable to do injury, and so as to prevent injustice.<sup>1</sup>

**b. CONSIDERATIONS INFLUENCING THE EXERCISE OF DISCRETION — Fraud.** — Especially when fraud is charged will an appellate court decline to control the discretion of the trial court in retaining an injunction until the final hearing.<sup>2</sup>

**The Plaintiff's Bond.** — The court will sometimes be influenced to continue the injunction *pendente lite* by the consideration that the defendant is protected by adequate security against any loss which he may sustain.<sup>3</sup>

**Solvency of the Defendant.** — In exercising its discretion the court will consider the solvency of the defendant and his ability to respond in damages.<sup>4</sup>

**Rights of the Public.** — The court, in exercising its discretion, will consider the interests of the public, if any.<sup>5</sup>

rison, 91 Va. 122; Jenkins v. Waller, 80 Va. 668; Wise v. Lamb, 9 Gratt. (Va.) 294; Beale v. Digges, 6 Gratt. (Va.) 582; Nelson v. Armstrong, 5 Gratt. (Va.) 354.

*Wisconsin.* — Koeffler v. Milwaukee, 85 Wis. 397.

*United States.* — Buffington v. Harvey, 95 U. S. 99; Tucker v. Carpenter, Hempst. (U. S.) 440; Poor v. Carleton, 3 Sumn. (U. S.) 70; Norton v. Hood, 12 Fed. Rep. 764; Orr v. Littlefield, 1 Woodb. & M. (U. S.) 13.

**Question of Law — Sufficiency of Bill.** — The rule that the dissolution of the injunction is a matter resting largely in the discretion of the court, and that the refusal of a motion to dissolve will not be disturbed unless such discretion has been abused, does not apply to cases involving questions of law arising upon the face of the bill itself. Burlington, etc., R. Co. v. Dey, 82 Iowa 312.

**Restraining Orders.** — The dissolution of a restraining order rests in the discretion of the court, and the court's action will not be disturbed where there has been no abuse of discretion. Harrell v. Griffin, 92 Ga. 571; Cotter v. Cotter, 16 Mont. 63.

1. Hicks v. Compton, 18 Cal. 209; Bowen v. Hoskins, 45 Miss. 183; Cammack v. Johnson, 2 N. J. Eq. 163; New York Printing, etc., Establishment v. Fitch, 1 Paige (N. Y.) 97; Michel v. O'Brien, 6 Misc. Rep. (N. Y. Supreme Ct.) 408; McHugh v. Boston, etc., R. Co., 66 Barb. (N. Y.) 612.

In Hart v. Ogdensburg, etc., R. Co. (Supreme Ct.) 20 N. Y. Supp. 918.

Herrick, J., said: "Where it appears that vacating the injunction granted *pendente lite* by the court of original jurisdiction may result in depriving the plaintiff of the remedy he seeks in his action, I do not think the general term should reverse the action taken by such court, unless it appears pretty plainly that the plaintiff is not entitled to the relief sought by him in his main proceeding."

2. Hollis v. Williams, 43 Ga. 214.

3. Corneil v. Utica, etc., R. Co., 61 How. Pr. (N. Y.) 184; Huron Waterworks Co. v. Huron, 3 S. Dak. 610. See also Church of Holy Innocents v. Keech, 5 Bosw. (N. Y.) 691; Spear v. Cutter, 5 Barb. (N. Y.) 486. See further Hicks v. Compton, 18 Cal. 206, in which case the court said: "The rights of the defendants are protected by a bond, and no injury can result to them from the continuance of the injunction. The plaintiff has no security whatever, and the dissolution of the injunction leaves him at the mercy of the defendants."

4. Stevenson v. Fayerweather, 21 How. Pr. (N. Y. Supreme Ct.) 449; Sixth Ave. R. Co. v. Kerr, 28 How. Pr. (N. Y. Supreme Ct.) 382; Storer v. Coe, 2 Bosw. (N. Y.) 661, in which last-mentioned case the fact that there was no pretense in the bill that the defendant was insolvent, or not fully able to meet any responsibility which the plaintiff might be able to charge upon him, influenced the court to dissolve the injunction.

5. Sioux City, etc., R. Co. v. Chi-

*c.* **ARBITRARY DISCRETION.** — The motion is addressed to the sound discretion of the court; such discretion should always be exercised with a proper regard to well-established rules, but not in such slavish obedience to them as to defeat the ends of justice,<sup>1</sup> and the discretion must not be abused or arbitrarily exercised.<sup>2</sup> An appellate court will more readily interfere with an order dissolving an injunction than with one continuing it.<sup>3</sup>

*d.* **MANDAMUS AND PROHIBITION.** — Mandamus will not lie from a superior to an inferior court to compel the latter to dissolve the injunction;<sup>4</sup> nor will prohibition lie where a motion to dissolve an injunction has been denied.<sup>5</sup>

**6. To What Court the Motion Should Be Addressed.** — As a general rule, in the absence of a statute to the contrary, no court or judge has power to dissolve an injunction except the one who issued it.<sup>6</sup>

cago, etc., R. Co., 27 Fed. Rep. 770, 25 Am. & Eng. R. Cas. 150, in which case an injunction was sought to restrain a railroad company from proceeding with the condemnation of a right of way, and the injunction was dissolved because, among other reasons, the public interests required that the condemnation proceedings should be continued.

1. *Per* Chancellor Williamson in *Fleischman v. Young*, 9 N. J. Eq. 620.  
2. *De Godey v. Godey*, 39 Cal. 157; *Connally v. Cruger*, 40 Ga. 259; *Sinnett v. Moles*, 38 Iowa 25; *Wigg v. Fairhaven*, 8 Cush. (Mass.) 363; *Chetwood v. Brittan*, 2 N. J. Eq. 438.

3. *Per* Warner, J., in *Dent v. Summerlin*, 12 Ga. 5, it was said: "In the one case the rights of the complainant are cut off, without having an opportunity to controvert the defendant's answer by evidence before the jury. In the other the cause is only held up, to be submitted to a special jury and tried on its merits."

**Hardship and Doubt.** — The injunction will be dissolved where there is a doubt as to the plaintiff's right to have it continued, and its continuance would be a great hardship upon the defendant. *Edison Electric Light Co. v. Buckeye Electric Co.*, 59 Fed. Rep. 700.

4. *Ex p.* *Montgomery*, 24 Ala. 98; *State v. Judge*, 36 La. Ann. 394; *Ex p.* *Schwab*, 98 U. S. 240. In the last-mentioned case the court cited *Ex p.* *Loring*, 94 U. S. 418; and *Ex p.* *Flippin*, 94 U. S. 350.

In *Detroit, etc., R. Co. v. Newton*, 61 Mich. 33, the court, in denying a mandamus to compel the dissolution of

an injunction, said: "A mandamus to disturb action by a judge in equity can only issue upon some exigency that requires prompt action to prevent mischief. The only end to be reached by the action sought is to remove obstructions to allowing relator to use active measures, outside of legal proceedings, to prevent the further use and occupancy of the disputed territory. So long as the law is open, we do not think we are called upon to use our extraordinary powers with a view of assisting private redress of supposed wrongs. Whether the injunction was right or wrong, we do not think the exigency is of such a nature that we should interfere by summary process in the matter." But see *Port Huron, etc., R. Co. v. Judge*, 31 Mich. 456, in which case the granting of an injunction on an interlocutory *ex parte* application was considered "absolutely void, as entirely beyond the power of the court," and was considered such an abuse as might be corrected by mandamus.

5. *Ex p.* *Montgomery*, 24 Ala. 98. See also the articles **MANDAMUS**; **PROHIBITION**.

6. *Sanders v. Plunkett*, 40 Ark. 507; *Martin v. O'Brien*, 34 Miss. 21.

**One United States Judge** will not, as a rule, modify or set aside an injunction issued by another judge unless there is urgency for immediate action. *Klein v. Fleetford*, 35 Fed. Rep. 98.

In *Louisiana* it has been held that the judge of one division has power to dissolve an injunction, although the motion to dissolve has been previously allotted to the judge of another division,

**Removal of Cause into United States Court.** — After an injunction has been granted by a state court and the cause has been removed into a United States Circuit Court, the motion to dissolve may be addressed to the latter court.<sup>1</sup>

**7. At What Stage** — *a.* BEFORE SERVICE OF PROCESS. — The defendant may make an application to dissolve an injunction as soon as he has knowledge that it has been issued against him, without waiting until he has been served with either the injunction or a subpoena.<sup>2</sup>

the judge of such other division being absent on leave. *Mengelle v. Abadie*, 45 La. Ann. 676.

**The Supreme Court, on Appeal**, upon determining that the injunction was improvidently issued, has power to dissolve it co-extensive with the power of the court which granted it. *Bolling v. Tate*, 65 Ala. 417.

**Dissolution by Appellate Court on Motion.** — Original jurisdiction conferred upon an appellate court to issue writs of injunction and *quo warranto* does not authorize that court to dissolve a preliminary injunction on a motion made pending an appeal from a decree rendered in a suit for an injunction. *State v. Westmoreland*, 27 S. Car. 625. See also *Pittsburg, etc., R. Co. v. Hurd*, 17 Ohio St. 144; *Kent v. Mahaffey*, 2 Ohio St. 498.

**At Chambers and in Vacation.** — As to the power to dissolve an injunction at chambers or in vacation, see the article CHAMBERS AND VACATION, vol. 4, p. 336; and also the following cases: *Welch v. People*, 38 Ill. 20; *Semmes v. Columbus*, 19 Ga. 471; *Holderman v. Jones*, 52 Kan. 743; *Foot v. Forbes*, 25 Kan. 359; *Champion v. Sessions*, 1 Nev. 478; *Palmer v. Vermilion County*, 46 Ill. 447; *Read v. Dews*, R. M. Charl. (Ga.) 358; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Griffin v. Branch Bank*, 9 Ala. 201; *Randolph v. Randolph*, 6 Rand. (Va.) 194; *Goddin v. Vaughn*, 14 Gratt. (Va.) 122.

1. *Texas, etc., R. Co. v. Rust*, 5 McCrary (U. S.) 348, wherein it was said that the motion to dissolve may be made at any time after the record has been filed; *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 468; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 289.

2. *Waffle v. Vanderheyden*, 8 Paige (N. Y.) 45.

**Continuance.** — The general rule is never to continue the motion unless from some very great necessity, be-

cause the court is always open to reinstate an injunction whenever it appears proper to do so, and because the plaintiff should always be ready to prove his bill. *Radford v. Innes*, 1 Hen. & M. (Va.) 8.

*Except for Special Cause*, as for the illness of counsel, a motion to dissolve an injunction for want of equity in the bill should not be delayed. *Morris Canal, etc., Co. v. Biddle*, 4 N. J. Eq. 222.

*In Illinois*, by statute, it was provided that the court may continue the motion until the next term, upon the production of an affidavit in behalf of the plaintiff that the answer, or any material part of it, is untrue, that at the next term witnesses can be procured whose testimony will disprove the answer, and that the plaintiff has had no opportunity to procure such testimony since the coming in of the answer; under which statute it has been held that an affidavit which does not give the names of witnesses and state where they reside, or set forth the facts which they will prove, is not sufficient. *Smith v. Powell*, 50 Ill. 21.

**After a Trial at Law Has Been Directed**, if the chancellor afterwards becomes satisfied that the injunction was improvidently awarded, he may make an order dissolving the injunction and setting aside the order directing the trial at law, without waiting for the verdict to be certified. *Vass v. Magee*, 1 Hen. & M. (Va.) 2.

**Dissolution of Perpetual Injunction.** — A motion to dissolve a perpetual injunction order on a final decree should not be heard on the pleadings, order for injunction, and records of the court, as the whole matter is *res judicata*. *Woffenden v. Woffenden*, 1 Arizona 328.

**Pending Appeal and Supersedeas.** — A motion to dissolve will not be entertained after an injunction has been stayed by filing notice of appeal. *Osborne v. Williams*, 40 N. J. Eq. 490.

*b. BEFORE ANSWER.* — Ordinarily it is the right of the defendant, where he conceives that the bill is without equity, to file a motion to dissolve before he has answered, and to have the same disposed of as soon as practicable.<sup>1</sup>

**Dissolution Regardless of the Answer or Its Sufficiency.** — Where a bill is wanting in equity, and a motion to dissolve is made after the answer has been put in, the court may dissolve the injunction regardless of the answer or its sufficiency.<sup>2</sup> Where, however, an

**Removal into United States Court — Pendency of Motion to Remand.** — Where a petition for removal from a state court into a Circuit Court of the United States shows all the jurisdictional facts to warrant removal and the cause is removed, the pendency of a motion to remand on the ground that the bond for removal is insufficient does not arrest a motion to dissolve the injunction. *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 791.

1. *Georgia.* — *Semmes v. Columbus*, 19 Ga. 471.

*Illinois.* — *Reynolds v. Mitchell*, 1 Ill. 177.

*Iowa.* — Rev. Stat., § 3790, provides that the motion may be made before or after the filing of the answer. *Curtis v. Crane*, 38 Iowa 459; *Taylor v. Dickinson*, 15 Iowa 483; *Fitch v. Richardson*, 1 Morr. (Iowa) 245; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312.

*Kentucky.* — *Beard v. Geran, Hard.* (Ky.) 14.

*Maryland.* — *Heck v. Vollmer*, 29 Md. 507; *Jones v. Magill*, 1 Bland (Md.) 177, *per* Chancellor Bland.

*Mississippi.* — *Drane v. Winter*, 41 Miss. 517, *per* Ellett, J.

*New Jersey.* — Rule 9, section 2, provides that "no motion to dissolve an injunction before answer shall be entertained, unless the defendant shall show good cause why an answer hath not been put in." See note to *Woodhull v. Neafie*, 2 N. J. Eq. 409.

In *Morris Canal, etc., Co. v. Biddle*, 4 N. J. Eq. 222, it was said: "Where the motion is to dissolve the injunction for want of equity in the bill, the rule requiring an answer clearly does not apply." See also *Cornelius v. Post*, 9 N. J. Eq. 196.

*New York.* — *Minturn v. Seymour*, 4 Johns. Ch. (N. Y.) 173, which case was cited in *Heck v. Vollmer*, 29 Md. 507.

*Virginia.* — *Tapp v. Rankin*, 9 Leigh (Va.) 478; *Hudson v. Kline*, 9 Gratt. (Va.) 379; *Muller v. Bayley*, 21 Gratt.

(Va.) 529; *Slack v. Wood*, 9 Gratt. (Va.) 40. See also 2 Rob. Pr. 241.

*United States.* — *Metropolitan Grain, etc., Exch. v. Mutual Union Tel. Co.*, 11 Biss. (U. S.) 531; *Fenwick Hall Co. v. Old Saybrook*, 66 Fed. Rep. 389. See also *Poor v. Carleton*, 3 Sumn. (U. S.) 70, which case was cited in *Heck v. Vollmer*, 29 Md. 507.

**After Amendment of Bill.** — When a bill praying an injunction is amended, the court may hear and decide a motion to dissolve before the bill as amended has been answered. *Semmes v. Columbus*, 19 Ga. 471.

**Proof Without Answer.** — In *Louisiana* it has been held that the defendant, before he has filed an answer, will not be permitted to make a motion to dissolve based on proof that the plaintiff is not entitled to an injunction. *Taylor v. Morgan*, 2 Martin (La.) 77.

**Answer to Bill for Discovery.** — Where an injunction is sought to enjoin a suit at law upon an obligation alleged to have been obtained by fraud and without consideration, and discovery is prayed, and the bill makes out a case entitling the plaintiff to discovery, the court will not dissolve the injunction on the ground that the bill is without equity until the defendant has put in his answer and made discovery. *Shotwell v. Smith*, 20 N. J. Eq. 79.

2. *Williams v. Berry*, 3 Stew. & P. (Ala.) 284; *Barr v. Collier*, 54 Ala. 39; *Nelson v. Dunn*, 15 Ala. 501; *Hart v. Clark*, 54 Ala. 490; *Bishop v. Wood*, 59 Ala. 253; *Cummins v. Bentley*, 5 Ark. 9; *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; *Thebaut v. Canova*, 11 Fla. 143; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; *Falls v. Robinson*, 5 Md. 365; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476.

**Opportunity to Perfect Answer.** — Where it is proper to dissolve the injunction on the bill regardless of the answer, the court will not retain the injunction in order that the answer may be made

injunction is granted until answer and further order, it is never dissolved until the answer comes in.<sup>1</sup>

*c. LIMITATION AS TO TIME.* — The defendant may, according to well-settled practice, move to dissolve an injunction at any stage of the cause, no limit of time being fixed within which the motion must be made.<sup>2</sup> But the foregoing statement is to be taken with the qualification that the defendant's laches will sometimes influence the court to deny the motion, and the court may, in its discretion, after the cause has ripened, order the motion to stand over until the hearing, unless there are very particular reasons which render delay improper.<sup>3</sup>

*d. PENDENCY OF DEMURRER TO THE BILL.* — Whether or not the court should pass upon a demurrer to the bill before hearing a motion to dissolve the injunction rests entirely within the discretion of the court.<sup>4</sup>

more perfect. *Thebaut v. Canova*, 11 Fla. 143.

1. *Read v. Consequa*, 4 Wash. (U. S.) 174, in which case it was said that a motion to dissolve the injunction absolutely, without the answer of the defendant, is altogether 'unprecedented, citing *Snow v. Cameron*, 1 Fow. Ex. Pr. 282. See also, to the same effect, *Read v. Dews*, R. M. Charl. (Ga.) 358, but in that case it was held that the defendant may move for dissolution before filing his answer, upon an affidavit denying the equity of the bill.

2. In *Sanders v. Plunkett*, 40 Ark. 507, the court said: "It would be unreasonable to hold him [the chancellor] to his original view of the case on first blush, and if he might recall his order in an hour, why not next day, or a week afterwards?" See also *Ottawa v. Walker*, 21 Ill. 605.

See likewise the following cases: *Robertson v. Robertson*, 58 Ala. 68; *Marvel v. Ortlip*, 3 Del. Ch. 9; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *Deklyn v. Davis*, Hopk. (N. Y.) 135; *Fenwick Hall Co. v. Old Saybrook*, 66 Fed. Rep. 390.

In **New York** it has been provided by the code that an application to vacate or modify the injunction may be made at any time. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182.

In **Virginia** the rules require that unless the answer is filed within a certain time after issuance of the subpoena, the defendant shall not be allowed to move a dissolution until a certain time has elapsed after the answer has been filed; but these rules are

subject to the discretion of the court. *Hudson v. Kline*, 9 Gratt. (Va.) 379.

3. *Dorsey v. Hobbs*, 10 Md. 412; *Frazier v. Keller*, 71 Md. 58; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509, *per* Chancellor Walworth.

On the **Final Hearing** the court may, in its discretion, refuse to dissolve the injunction, although the bill is without equity, and may give the plaintiff leave to amend. *Kriechbaum v. Bridges*, 1 Iowa 14.

**Nature and Effect of Laches.** — The doctrine that after long acquiescence an application for dissolution will not be readily entertained applies only to cases where the delay and acquiescence have so changed the status of the parties that the subsequent dissolution of the injunction will injuriously and inequitably affect the plaintiff, or permit the defendant to exercise some inequitable or unfair advantage acquired by reason of his acquiescence and delay. *Perry v. Wittich*, 37 Fla. 237.

**After Bill Taken for Confessed.** — After the bill has been taken for confessed, for want of answer, a motion to discharge the injunction as having been improvidently awarded will not be received. *Turpin v. Jefferson*, 4 Hen. & M. (Va.) 483.

4. *Clark v. Shaw*, 101 Ind. 563, in which case the court cited *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412.

In **Kansas** it has been held, under a statute (Civ. Code, § 250) providing that the application may be made at any time before the trial, that where an injunction has been granted without

**8. Notice of Motion to Dissolve — Necessity for Notice.** — As a general rule an injunction will not be dissolved without notice, and in some states it is required by statute that notice shall be given.<sup>1</sup>

notice it is not error to hear a motion to dissolve while the case stands on demurrer to the petition. *Challis v. Atchison County*, 15 Kan. 49.

1. *Newton Mfg. Co. v. White*, 47 Ga. 400, 1 Hoff. Ch. Pr. 211.

**English Practice.** — In *Lacy v. Hornby*, 2 Ves. & B. 291, Lord Eldon said: "When an order *nisi* to dissolve an injunction has been obtained upon the answer's coming in, the defendant shall not immediately move upon the answer, without giving the plaintiff sufficient time to look into it, as he ought to have an opportunity of knowing whether it is sufficient; and upon seeing the answer, he determines whether he shall meet the order *nisi* upon the merits, or by showing exceptions for cause." See also, as to the English practice, *Rentfroe v. Dickinson*, Overt. (Tenn.) 196, and *Newton Mfg. Co. v. White*, 47 Ga. 400.

Reference is likewise made to the following cases and statutes:

**California.** — Under Code Civ. Pro., § 532, it is necessary to give notice where an injunction has been granted without notice, unless, it would seem, the defendant rests his right to have the injunction dissolved upon the same matters which were considered by the court in granting the injunction. *Heffon v. Bowers*, 72 Cal. 270.

**Iowa.** — Code, § 3400, requires notice to be given. *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74.

**Louisiana.** — It is well established that notice of the motion is necessary, although in extreme cases the judge may dissolve at chambers and *ex parte*. *Pike v. Bates*, 34 La. Ann. 391; *State v. Judge*, 37 La. Ann. 118; *Gravais v. Falgoust*, 34 La. Ann. 99; *Marin v. Thierry*, 29 La. Ann. 362; *Clafin v. Lisso*, 31 La. Ann. 171.

**Mississippi.** — Code 1892, § 567 (Code 1880, § 1914), provides that in term time a motion to dissolve on bill and answer may be heard five days after answer filed, on three days' notice. When the motion has been on the docket for three days preceding the hearing no notice is necessary. *Strong v. Harrison*, 62 Miss. 61; *Martin v. O'Brien*, 34 Miss. 21.

**New Jersey.** — *Manhattan Mfg., etc.,*

*Co. v. Van Keuren*, 23 N. J. Eq. 251; *Cattel v. Nelson*, 7 N. J. Eq. 122.

**United States.** — *Wilkins v. Jordan*, 3 Wash. (U. S.) 226; *Stoddert v. Waters*, 1 Cranch (C. C.) 483.

In **Kentucky** a motion to dissolve an injunction may be made during term time, without notice. *Williams v. Cooper*, (Ky. 1892) 20 S. W. Rep. 229.

In **New York** it has been held that a judge of the Supreme Court, or a county judge, has the power on an *ex parte* application to vacate or modify an injunction order made by himself, without notice, as Code Civ. Pro., § 324, applies as well to injunction orders as to other orders, and the special provision contained in section 225 was merely intended as an addition to the powers conferred by section 324, and not as a substitute for them. *Peck v. Yorks*, 41 Barb. (N. Y.) 547, following *Bruce v. Delaware, etc., Canal Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 440. In the latter case the court overruled *Mills v. Thurstby*, 1 Code Rep. (N. Y.) 121.

In **Tennessee** it has been a long-settled rule of practice to move to dissolve without notice. *Rentfroe v. Dickinson*, Overt. (Tenn.) 196.

In **Utah** an injunction obtained without notice from a judge at chambers may be vacated without notice, under Prac. Act, § 326, providing that orders made at chambers without notice may be vacated without notice. *Leitham v. Cusick*, 1 Utah 242.

**Dissolution for Want of Equity.** — In **Kentucky** a motion to dissolve on the ground that the bill contains no equity may be made without previous notice to the plaintiff. *Beard v. Geran*, Hard. (Ky.) 14.

In **California** it has been said that it is immaterial whether or not an injunction is dissolved without notice, where it appears that it ought never to have been granted. *Robinson v. Gaar*, 6 Cal. 273. See also *Borland v. Thornton*, 12 Cal. 440.

**The Time and Place** when and at which the application to dissolve will be made must be stated in the notice. *Florence v. Paschal*, 48 Ala. 458, which case was decided under a statute which provided for a migratory court.

**Length of Notice.** — The defendant is

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**Discretion of Court.** — In some states, however, it is competent to vacate or modify an injunction without notice, but even when the court has this power it should never be exercised except when from the urgency of the case it is necessary to guard against serious loss, which sometimes may be occasioned by the delay incident to serving notice.<sup>1</sup>

**Waiver of Notice.** — The defendant's failure to give notice, or defects in the notice or in the service thereof, may be waived.<sup>2</sup>

**9. Grounds for Dissolution** — *a.* IN GENERAL — **Improvident Issuance of Writ.** — The grounds for dissolving the injunction, as will be seen hereinafter, are numerous, but as a general proposition it may be said that whenever an injunction has been improvidently granted through mistake or misapprehension on the part of the chancellor, the defendant may ask its dissolution.<sup>3</sup>

at liberty to give notice for a length of time which is within the period allowed by the rules of court for excepting to the answer. *Satterlee v. Bargy*, 3 Paige (N. Y.) 142.

**Reasonable Notice.** — In the United States courts reasonable notice is required. *Caldwell v. Walters*, 4 Cranch (C. C.) 577, in which case three days' notice was considered reasonable, although the notice was left at the office of the plaintiff's solicitor in the absence of the latter from the city. See also *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 791, in which case eleven days' notice was considered sufficient.

In *California*, under Code Civ. Pro., § 1005, ten days' notice is sufficient. *Younglove v. Steinman*, 80 Cal. 375.

**Notice to Solicitors.** — Code Mississippi, 1871, § 2255, authorizes the notice to be served on the plaintiff's solicitor. *Hiller v. Cotten*, 54 Miss. 551.

1. *Bruce v. Delaware, etc., Canal Co.*, 8 How. Pr. (N. Y. Supreme Ct.) 440; *Peck v. Yorks*, 41 Barb. (N. Y.) 547, in which latter case the court considered the circumstances that the application was not made until more than a year had elapsed since service of the injunction upon the defendants, or some of them, and not until all of them, except one, had appeared and answered. See also *Borland v. Thornton*, 12 Cal. 440.

**Notice after Dissolution.** — Where an injunction has been dissolved without notice, the plaintiff should be given notice after it has been dissolved. *State v. Judge*, 37 La. Ann. 118, wherein it was objected that an application for a

suspensive appeal from an *ex parte* order dissolving an injunction was made too late, and it was held that the time within which the application should have been made should be calculated from the time when the plaintiff acquired knowledge of the dissolution.

2. *Penrice v. Wallis*, 37 Miss. 172. See also *Miller v. McDougall*, 44 Miss. 682.

In *Kemper v. Campbell*, 45 Kan. 529, it was held that failure to give the plaintiff notice for a sufficient length of time was cured by the obtaining of a continuance by the plaintiff.

3. *Alabama.* — *Mobile School Com'rs v. Putnam*, 44 Ala. 506.

*California.* — *Perrine v. Marsden*, 34 Cal. 14; *Borland v. Thornton*, 12 Cal. 440; *Waldron v. Marsh*, 5 Cal. 120; *King v. Hall*, 5 Cal. 83.

*Georgia.* — *Howard v. Lowell Mach. Co.*, 75 Ga. 325.

*Illinois.* — *Lake Shore, etc., R. Co. v. Taylor*, 134 Ill. 603; *Northern Electric R. Co. v. Chicago, etc., R. Co.*, 57 Ill. App. 409; *Marble v. Bonhotel*, 35 Ill. 240; *Fahs v. Roberts*, 54 Ill. 192; *Wangelin v. Goe*, 50 Ill. 459.

*Indiana.* — *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

*Iowa.* — *Small v. Somerville*, 58 Iowa 362.

*Kansas.* — *Atchison, etc., R. Co. v. Troy*, 10 Kan. 513.

*Kentucky.* — *Kilpatrick v. Tunstall*, 5 J. J. Marsh. (Ky.) 80.

*Louisiana.* — *Mahan v. Accommodation Bank*, 26 La. Ann. 34; *Mengelle v. Abadie*, 45 La. Ann. 676; *Lee v. Hubbell*, 20 La. Ann. 551; *Devron v. First Municipality*, 4 La. Ann. 11; *Barrow*

**Injunction Useless.** — When it is manifest that the injunction is useless, and that the grounds upon which it was granted no longer

*v. Robichaux*, 15 La. Ann. 70; *Lafon v. Desessart*, 1 Martin N. S. (La.) 71.

*Maryland.* — *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

*Massachusetts.* — *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

*Mississippi.* — *Port Wood v. Feld*, 72 Miss. 542; *Davis v. Davis*, 65 Miss. 498; *Scott v. Searles*, 5 Smed. & M. (Miss.) 25; *Sinking Fund Com'rs v. Patrick, Smed. & M. Ch. (Miss.)* 110; *Freeman v. Lee County*, 66 Miss. 1.

*Montana.* — *McCormick v. Riddle*, 10 Mont. 467.

*New Jersey.* — *Collings v. Camden*, 27 N. J. Eq. 293; *Society, etc. v. Butler*, 12 N. J. Eq. 498; *Endicott v. Mathis*, 9 N. J. Eq. 110; *Kinney v. Ogden*, 3 N. J. Eq. 168.

*New York.* — *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371; *Fellows v. Fellows*, 4 Johns. Ch. (N. Y.) 25; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *National Gaslight Co. v. O'Brien*, 38 How. Pr. (N. Y. Super. Ct.) 271; *Fullan v. Hooper*, 66 How. Pr. (N. Y. Supreme Ct.) 75.

*Oregon.* — *Garrett v. Bishop*, 27 Oregon 349.

*Virginia.* — *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 936; *Robertson v. Tapscott*, 81 Va. 533; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Baldwin v. Darst*, 3 Gratt. (Va.) 126; *Vass v. Magee*, 1 Hen. & M. (Va.) 2; *Pulliam v. Winston*, 5 Leigh (Va.) 324.

**Effect of Giving an Injunction Bond.** — Where an injunction has been impropvidently granted, the fact that an injunction bond has been given is no reason why it should not be dissolved, because the defendant will be put to the cost and delay of an action on the bond and may not recover sufficient damages adequately to compensate him. *King v. Hall*, 5 Cal. 82.

**Effect of Asking Continuance.** — Where an injunction has been impropvidently issued, the fact that the defendant asks a continuance until the determination of another suit involving the title to the property in dispute does not prejudice his right to ask the dissolution of the injunction. *Davis v. Davis*, 65 Miss. 498.

**Acts Already Performed.** — It is ground

for dissolving an injunction, that the acts sought to be restrained were performed before the order for the injunction was made or served. *Delger v. Johnson*, 44 Cal. 182; *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

**Harmless Errors.** — In *Louisiana*, though the injunction may have been impropvidently granted, it will not be dissolved when it is plain from the record that the plaintiff will be entitled to another writ immediately. *Dupre v. Swafford*, 25 La. Ann. 222; *Savoie v. Thibodeaux*, 28 La. Ann. 169.

**Failure to Require Release of Errors.** — An injunction against a judgment at law will be discharged where it has been impropvidently granted without a release of error being given or required. *Bradley v. Lamb*, Hard. (Ky.) 536.

**Improper Interference of the Press.** — In *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y. Supreme Ct.) 193, it is intimated that the improper interference of the press to aid the plaintiff and prejudice the defendant with the courts, which interference has been instigated by the plaintiff, or his attorneys, or some one interested in the plaintiff's side of the case, is a ground for dissolving the injunction.

**Subsequently Acquired Right to Injunction.** — In *Hiss v. Baltimore, etc., Pass. R. Co.*, 52 Md. 242, it was held that a final order dissolving the injunction was proper because the injunction ought not to have been granted when it was granted; and that the right of the complainant to an injunction at the time of the dissolution of the injunction was waived by failure to file a supplemental bill suggesting additional reasons for the injunction.

**Failure to File Papers.** — Where the plaintiff has not filed the papers upon which the injunction was granted, as required by the rules of court, on a motion being made to dissolve, the court, in its discretion, will relieve him from the consequence of his omission, and will permit the papers to be filed on terms. *Leffingwell v. Chave*, 19 How. Pr. (N. Y. Super. Ct.) 54.

**After Removal into United States Court.** — Where, after an injunction has been issued, the cause is removed into a Circuit Court of the United States, it

exist, or that by reason of matters which have occurred since the issuance of the injunction its continuance will subserve no useful purpose, it is proper that the injunction should be dissolved;<sup>1</sup> and it may be stated broadly that the injunction will be dissolved when there is no equitable ground for continuing it.<sup>2</sup>

will be presumed on a motion to dissolve that all questions relating to the form and sufficiency of the bill, and of the verification thereof, were considered and decided by the state court upon the hearing before that tribunal of the motion for an injunction, and that the bill and affidavit were held to be good. *Smith v. Schwed*, 6 Fed. Rep. 455, citing *Duncan v. Gegan*, 101 U. S. 810.

#### Successive Applications for Injunctions.

— Where an injunction has been obtained after an order has been made dissolving an injunction previously issued, which order is *res judicata*, such second injunction will be dissolved. *Grubbs v. Lipscomb*, 1 Bibb (Ky.) 145; *Cummins v. Bennett*, 8 Paige (N. Y.) 79; *Gallaher v. Moundsville*, 34 W. Va. 730.

**Fraud and Abuse of Process.**— It has been held that where the plaintiff has wilfully concealed facts which would have materially influenced the judge who granted the injunction, and the order of the court has been prostituted and abused, the court is authorized to discredit the statements of the plaintiff, though not specifically denied, and to dissolve the injunction. *Ciancimino v. Man*, 1 Misc. Rep. (N. Y. C. Pl.) 121, in which case the plaintiff had wilfully concealed the existence of an injunction which would have influenced the judge who granted his application. Citing *Dietlin v. Egan*, 22 Civ. Pro. Rep. (N. Y. C. Pl.) 398; *Higgins v. Dewey*, 27 Abb. N. Cas. (N. Y. C. Pl.) 81, and *Depeyster v. Graves*, 2 Johns. Ch. (N. Y.) 148.

1. *Steiner v. Scholze*, 105 Ala. 607; *Sylvester v. Jerome*, 19 Colo. 128; *Phelps v. Foster*, 18 Ill. 309; *Crook v. People*, 16 Ill. 534; *Draper v. Draper*, 68 Ill. 17; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Matter of Wilbur*, 1 Ben. (U. S.) 527; 3 Nat. Bank Reg. 71; *In re Jackson*, 9 Fed. Rep. 493.

See likewise *Thibodeau v. Thibodeau*, 18 La. Ann. 609; *Fulton v. Greacen*, 44 N. J. Eq. 443, in which case it appeared that the plaintiff, since the filing of the bill, had conveyed all

his interest in the subject-matter of the controversy; *Reeves v. Dickey*, 10 Gratt. (Va.) 138.

**Tender of Damages Sought by the Plaintiff.**— Where an injunction is obtained against cutting a road across the plaintiff's land, on the sole ground that the damages assessed by the county court have not been paid, upon a tender being made of the damages the injunction should be dissolved, and the tender may be made by a volunteer. *Chenault v. George*, (Ky. 1894) 25 S. W. Rep. 4.

**Abatement of Nuisance.**— Where a reservoir complained of as a nuisance is changed by the defendant so as to prevent injury to the plaintiff, the defendant may apply to the court to have the injunction modified or dissolved. *Sylvester v. Jerome*, 19 Colo. 128.

**Violation of Injunction.**— Where the mischiefs intended to be prevented have been committed in violation of the injunction, so as to render the continuance of the injunction useless, the court may dissolve the injunction and dismiss the bill and leave the plaintiff to proceed at law to recover his damages and to obtain his remedy by an attachment against the defendant for contempt. *Crook v. People*, 16 Ill. 534.

**A Verdict at Law** in favor of the defendant will not authorize the dissolution of an injunction previously issued where the plaintiff is under statute entitled, as of right, to another trial. *Neisler v. Smith*, 2 Ga. 265.

2. *Prout v. Gibson*, 1 Cranch (C. C.) 389.

**Ouster of Jurisdiction by Defendant.**— The rule is that equity, having acquired jurisdiction, will retain it for all the purposes of the case; and where an injunction has been granted to enjoin a sale under an execution because of the sheriff's refusal to accept an affidavit of illegality tendered to him, and thereafter the sheriff receives the affidavit and files it in the clerk's office as required by law, such action on the part of the sheriff cannot be made the basis of a motion to dissolve. *Newton Mfg. Co. v. White*, 47 Ga. 400.

**Defective Service** of the injunction is not, it would seem, a ground for setting it aside.<sup>1</sup>

**b. STATUTE AUTHORIZING THE DEFENDANT'S ACTS.** — It is ground for dissolving an injunction, that since it was issued a statute has been enacted authorizing the acts enjoined.<sup>2</sup>

**c. VAGUENESS AND UNCERTAINTY.** — It is ground for dissolving the injunction, that it is so vague and uncertain that the defendant is unable to understand what is prohibited.<sup>3</sup>

**d. WANT OF NOTICE.** — It is ground for dissolving the injunction, that it was issued without notice, provided the defendant has not waived the notice, especially where it is required by statute that notice shall be given.<sup>4</sup> Where, however, the case is

1. *Corey v. Voorhies*, 2 N. J. Eq. 6, in which case the injunction was served out of the jurisdiction of the court and in a manner not in conformity with settled practice; *Becker v. Hager*, 8 How. Pr. (N. Y. Supreme Ct.) 68, in which case it was held that service of the injunction upon the defendant's attorney, instead of upon the defendant, furnished no reason why the order itself should be set aside.

It has been held, however, that it is ground for dissolving the injunction that there has been no service of the injunction and affidavit upon the defendant. *Johnson v. Casey*, 28 How. Pr. (N. Y. Super. Ct.) 492.

2. *Baird v. Shore Line R. Co.*, 6 Blatchf. (U. S.) 461.

**Statute Giving Remedy at Law.** — It may admit of doubt whether an injunction rightful in all respects when issued should be dissolved because of the subsequent enactment of a statute giving the plaintiff a remedy at law, as jurisdiction is generally determined by the status of the law and facts as they exist when the suit is instituted. *Farris v. Houston*, 78 Ala. 250.

**Motion Based on Subsequent Decision in Other Cases.** — Where an injunction is granted against the construction of a bridge, on the theory that the bridge will affect the navigation of a river, and thereafter the Supreme Court renders decisions which seem to militate against the plaintiff's right to an injunction, the court will not entertain a motion to modify the injunction or to give leave to proceed in disregard of it, as the only way in which the question can be brought up is by a proceeding to enforce the injunction. *Hatch v. Wallamet Iron Bridge Co.*, 27 Fed. Rep. 673, in which case *Deady, J.*,

said: "If the petitioners see proper to go on with the erection of the bridge, and parties interested in maintaining this decree desire to proceed by attachment against them for contempt, the court will require notice to be given to the parties, and will then proceed to examine into the question as to whether the decree should, under the circumstances, be enforced. In this investigation two questions will be considered: first, whether the recent decision of the Supreme Court has superseded the decree and changed the law on this subject; and, second, whether this is the bridge in reference to which the injunction was issued."

3. *Avery v. Onillon*, 10 La. Ann. 127; *Lyon v. Botchford*, 25 Hun (N. Y.) 57; *Rose v. Rose*, 11 Paige (N. Y.) 166. In the last mentioned case the injunction was too broad, and it was dissolved with leave to the plaintiff to apply for a new injunction.

4. *Fischer v. Superior Ct.*, 110 Cal. 129, *per* McFarland, J.; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164; *District Tp. v. Barrett*, 47 Iowa 110; *Hughes v. Eckerson*, 55 Iowa 641; *Snediker v. Pearson*, 2 Barb. Ch. (N. Y.) 107; *Couch v. Orne*, 3 Okla. 508; *Texas, etc., R. Co. v. Rust*, 5 McCrary (U. S.) 348; *Marsh v. Bennett*, 5 McLean (U. S.) 117, *per* Wilkins, J.; *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78.

**Waiver of Notice.** — The injunction will not be dissolved because it was issued without notice, where the defendant has waived the irregularity by voluntarily appearing. *Marsh v. Bennett*, 5 McLean (U. S.) 117.

In *Iowa* it has been held, however, that by filing an answer and moving to dissolve, the defendant does not waive

one in which the rule requiring a notice might properly have been dispensed with, the court in its discretion may dissolve the injunction.<sup>1</sup>

*e. WANT OF JURISDICTION.* — If, for any reason, the court exceeded its jurisdiction in granting the injunction, the injunction will, as a matter of course, be dissolved.<sup>2</sup>

*Consent to Jurisdiction by Appearance.* — The defendant by appearing for the sole purpose of making a motion to dissolve, on the ground that the court has no jurisdiction over him, because he is a citizen of another state, does not submit to the court's jurisdiction.<sup>3</sup>

*f. DEFECT OF PARTIES.* — The general rule is that non-joinder of an essential party, *i. e.*, one whose rights will be affected, is ground for dissolving an injunction.<sup>4</sup> But a defect

the irregularity. *Hughes v. Eckerson*, 55 Iowa 641.

In *Florida* the insufficiency of the notice will not authorize a dissolution of the injunction. *Gamble v. Campbell*, 6 Fla. 347.

1. *Buckley v. Corse*, 1 N. J. Eq. 504.

2. *York v. Kile*, 67 Ill. 233, in which case the amount involved was insufficient; *Phelan v. Johnson*, 80 Iowa 727, in which case suit was brought in the wrong county; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Shields v. Pipes*, 31 La. Ann. 765; *American Colonization Soc. v. Wade*, 8 Smed. & M. (Miss.) 610; *Scott v. Searles*, 5 Smed. & M. (Miss.) 25; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932, 936, in which case suit was instituted in the wrong county; *Beckley v. Palmer*, 11 Gratt. (Va.) 625; *Hudson v. Kline*, 9 Gratt. (Va.) 379; *Campbell's Case*, 1 Abb. (U. S.) 185; *Ruggles v. Simonton*, 3 Biss. (U. S.) 325, in which case an injunction restraining parties proceeding at law in the state court was granted by the United States court in violation of an Act of Congress.

*Injunction Granted Before Removal into United States Court.* — Although a United States court is prohibited from granting an injunction to stay proceedings in any state court, where such an injunction is granted by a state court and the cause is thereafter removed into a Circuit Court of the United States the latter court will not dissolve the injunction; it being provided by Act of Congress, March 3, 1875, that "when any suit shall be removed \* \* \* all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and

effect until dissolved or modified by the court to which such suit shall be so removed." *Smith v. Schwed*, 6 Fed. Rep. 455.

3. *Adams v. Lamar*, 8 Ga. 83, in which case Nisbet, J., said: "It is the privilege of a foreign citizen to waive the want of jurisdiction over him in the courts of Georgia. He may come in and submit to the jurisdiction and plead, and would, in that event, be concluded by a judgment *in personam*. \* \* \* But what is it to appear and defend? He must appear and plead, or answer, to the merits, submitting voluntarily to the jurisdiction. \* \* \* But if, on the contrary, the record should disclose a plea to the jurisdiction — *dis-sent* to the jurisdiction — he could aver against the judgment; it would not bind him. In this case, upon a motion to dissolve, the defendant, by counsel, resists the jurisdiction. He solemnly disclaims it. He asserts his immunity. \* \* \* Strange absurdity, that the very act of resisting the jurisdiction should be held an assent to it."

But it has been held that an injunction cannot be dissolved upon the ground that the service of the writ preceded service of the original notice. *District Tp. v. District Tp.*, 54 Iowa 115. See further *Cooley v. Lawrence*, 5 Duer (N. Y.) 605, in which case it was held that defendant had entered an appearance by appearing and opposing a motion for injunction and reading affidavits in opposition to the motion. Likewise see the article APPEARANCES, vol. 2, p. 588.

4. *Binney's Case*, 2 Bland (Md.) 99; *Heck v. Vollmer*, 29 Md. 507, in which case the bill was filed by a *feme covert* in her own name, without the inter-

of parties defendant is not necessarily a reason for dissolving an injunction, as the bill may be amended without prejudice to the injunction.<sup>1</sup>

*g.* NONCOMPLIANCE WITH TERMS. — As a general rule, it is ground for dissolving the injunction, that the plaintiff has not complied with the terms imposed upon him by the court.<sup>2</sup>

*h.* INSUFFICIENCY OR WANT OF BOND. — According to some of the cases, the failure of the defendant to give bond, or the insufficiency of the bond, is ground for dissolving the injunction;<sup>3</sup> but the rule which has the greater weight of authority, and which is more in consonance with the discretion which the court exercises in granting and dissolving an injunction, is that the court should not dissolve an injunction unconditionally, but should give the plaintiff an opportunity to remedy the defect.<sup>4</sup>

vention of a next friend, as required by statute; *Morgan v. Rose*, 22 N. J. Eq. 583, *per* Beasley, C. J.; *Privett v. Stevens*, 26 Kan. 528; *Freeman v. Lee County*, 66 Miss. 1, in which case the plaintiff was not interested in the subject-matter of the litigation; *Beatty v. Smith*, 2 Smed. & M. (Miss.) 567.

1. *Irick v. Black*, 17 N. J. Eq. 189; *Fairchild v. House*, 18 Fla. 770.

In *Morgan v. Rose*, 22 N. J. Eq. 583, an injunction was issued against the acts of corporate officers, and the defect complained of was that the corporation had not been subpœnaed; but as all of the corporators were before the court the motion to dissolve was denied, it being held that it would be a matter quite of course to permit the plaintiff to amend.

**Objection to Misjoinder Taken by Demurrer.** — In *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, it was said that, as a general rule, an objection that there is a misjoinder should be taken by demurrer, and the court cited *Hudson v. Madison*, 12 Sim. 416, and *Jones v. Del Rio, T. & R.* 297, as authorities in support of the propriety of dissolving the injunction.

**Amendment.** — As to the right to amend where there is defect of parties, and the effect of the amendment upon the injunction previously issued, see *supra*, VII. 1. *d. Amendments.*

2. *Clayton v. Shoemaker*, 67 Md. 216, in which case the plaintiff had been required to institute an action at law, but had failed to bring such action; *Morris Canal, etc., Co. v. Bartlett*, 3 N. J. Eq. 9, in which case the plaintiff had failed to bring into court a sum of money; *Livingston v. Kane*, 3 Johns.

Ch. (N. Y.) 224, in which case the plaintiff had failed to stay proceedings at law and had declared that he would not do so.

3. *Farni v. Tesson*, 51 Ill. 393; *Berens v. Boutte*, 31 La. Ann. 112; *Jenkins v. Wilde*, 2 Paige (N. Y.) 394; *Fullan v. Hooper*, 66 How. Pr. (N. Y. Supreme Ct.) 75; *Ryckman v. Coleman*, 21 How. Pr. (N. Y. Supreme Ct.) 404; *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65; *Christie v. Bogardus*, 1 Barb. Ch. (N. Y.) 167; *Pillo v. Thompson*, 20 Tex. 206; *Gaskins v. Peebles*, 44 Tex. 390.

4. *Alabama.* — *Jones v. Ewing*, 56 Ala. 360.

*Delaware.* — *Palmer v. Ellegood*, 4 Del. Ch. 53.

*Florida.* — *Gamble v. Campbell*, 6 Fla. 347; *Fuller v. Cason*, 26 Fla. 476; *Scarlett v. Hicks*, 13 Fla. 314.

*Georgia.* — *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1.

*Illinois.* — *Beauchamp v. Kankakee County*, 45 Ill. 274, in which case it was held that where the plaintiff moves for another injunction, the court should allow the motion or retain the existing injunction, subject to the filing of a new bond.

*Iowa.* — *Massie v. Mann*, 17 Iowa 131.

*Louisiana.* — *Lewis v. Daniels*, 23 La. Ann. 170; *Henderson v. Maxwell*, 22 La. Ann. 357.

*Maryland.* — *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Williams v. Hall*, 1 Bland (Md.) 182, note *i*, which case is reported in a note to *Jones v. Magill*, 1 Bland (Md.) 177.

*Montana.* — *Lee v. Watson*, 15 Mont. 228.

*New Jersey.* — *Phillips v. Pullen*, 45

**2. WANT OF PROSECUTION.** — The rule is well settled that a party who relies upon the protection of the court by injunction must use due diligence in the prosecution of his suit, and that if he fails to sue out a subpoena, or to use due diligence in expediting his cause, the injunction will be dissolved.<sup>1</sup> This rule rests upon sound principles and should be strictly enforced, as every principle of justice requires that the defendant should be restrained no longer than is essential to investigate the matter at issue.<sup>2</sup>

**Excusable Delay.** — Where the plaintiff's delay is not, under all the circumstances, without reasonable excuse, and a dissolution of the injunction will probably incapacitate the court from afterwards doing justice to the parties, a motion to dissolve will be denied.<sup>3</sup>

N. J. Eq. 157; *Marlatt v. Perrine*, 17 N. J. Eq. 49.

*New York.* — *Chappell v. Potter*, 11 How. Pr. (N. Y. Supreme Ct.) 365; *Harrington v. American L. Ins. Co.*, 1 Barb. (N. Y.) 244; *Pratt v. Underwood*, 4 Civ. Pro. Rep. (N. Y. Supreme Ct.) 167; *O'Donnell v. McMurn*, 3 Abb. Pr. (N. Y. Supreme Ct.) 391; *Manley v. Leggett*, 62 Hun (N. Y.) 562; *New York Attrition Pulverizing Co. v. Van Tuyl*, 2 Hun (N. Y.) 373; *Skinner v. Dayton*, 2 Johns. Ch. (N. Y.) 226; *Beebe v. Coleman*, 8 Paige (N. Y.) 392.

1. *Grey v. Northumberland*, 17 Ves. Jr. 281, in which case was cited in *Hoagland v. Titus*, 14 N. J. Eq. 81, and in *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511. In the latter case the court cited also 3 Dan. Ch. Pr. 1896, and 1 Hoff. Ch. Pr. 360.

*Delaware.* — *Russell v. Stockley*, 4 Del. Ch. 567.

*Florida.* — *Perry v. Wittich*, 37 Fla. 237, in which case it was held that the court properly dissolved the injunction because the plaintiff had failed for over seven years to take steps looking towards the final disposition of the cause, it being provided by Equity Rule 1 that any chancery cause not disposed of within three years from the filing of the bill shall be dismissed by the courts, unless the court shall otherwise direct for cause shown.

*Georgia.* — *Baird v. Moses*, 21 Ga. 249, in which case the general doctrine is recognized.

*Illinois.* — *Classen v. Danforth*, 56 Ill. App. 552, in which case it was declared that greater diligence is required in prosecuting a suit for injunction than an ordinary suit; *Duncan v. Finch*, 10 Ill. 296; *Atkins v. Billings*,

72 Ill. 598; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373.

*Mississippi.* — *Payne v. Cowan*, Smed. & M. Ch. (Miss.) 26.

*New Jersey.* — *Lee v. Cargill*, 10 N. J. Eq. 331; *West v. Smith*, 2 N. J. Eq. 309; *Hoagland v. Titus*, 14 N. J. Eq. 81; *Greenin v. Hoey*, 9 N. J. Eq. 137; *Corey v. Voorhies*, 2 N. J. Eq. 6; *Brown v. Fuller*, 13 N. J. Eq. 271; *Dodd v. Flavell*, 17 N. J. Eq. 255.

*New York.* — *Hastings v. Palmer*, *Clarke Ch.* (N. Y.) 52; *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511; *Waffle v. Vanderheyden*, 8 Paige (N. Y.) 45; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100.

*Vermont.* — *Howe v. Willard*, 40 Vt. 654, *per* Chancellor Barrett.

*United States.* — *Read v. Consequa*, 4 Wash. (U. S.) 174, *per* Washington, J.

2. *Per* Chancellor Green, in *Hoagland v. Titus*, 14 N. J. Eq. 81.

**By the Court Suo Motu.** — Where the plaintiff does not prosecute his suit diligently, the court may dissolve the injunction and dismiss the bill of its own motion. *Classen v. Danforth*, 56 Ill. App. 552.

3. *Schermerhorn v. L'Esperance*, 2 Dall. (U. S.) 360.

See also *Read v. Consequa*, 4 Wash. (U. S.) 174, in which case the defendant resided abroad beyond the reach of process, and the delay in the prosecution of the cause was not imputable to the plaintiff, and the court refused to dissolve the injunction. See likewise *Payne v. Cowan*, Smed. & M. Ch. (Miss.) 26.

**Acquiescence in Delay.** — The motion to dissolve should be denied where the defendant has acquiesced in the delay. *Baird v. Moses*, 21 Ga. 249.

**10. Dissolution on the Bill**—*a. WANT OF EQUITY.*—The injunction will be dissolved where the bill does not show that the writ should have been issued in the first instance;<sup>1</sup> and want of

**Expedition Pending Motion to Dissolve.**

—The pendency of a motion to dissolve is no obstacle to plaintiff's proceeding to procure the answer of a defendant who has not answered, or to take the bill as confessed against him. *Hastings v. Palmer*, *Clarke Ch. (N. Y.)* 52.

**Laches in Making Motion to Dissolve.**

After an order has been made requiring the defendant to answer and setting down the cause for trial, a motion to dissolve on the ground that the plaintiff has failed to speed his cause comes too late. *Smith v. Cooper*, 21 Ga. 359.

1. *Alabama.*—*Louisville, etc., R. Co. v. Bessemer*, 108 Ala. 238; *Triest v. Enslin*, 106 Ala. 180; *Knabe v. Rice*, 106 Ala. 516; *Cobb v. Garner*, 105 Ala. 467; *Winter v. Montgomery*, 101 Ala. 653; *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274; *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396; *Morrison v. Coleman*, 87 Ala. 655; *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520; *Anniston, etc., R. Co. v. Jacksonville, etc., R. Co.*, 82 Ala. 297; *Murphree v. Bishop*, 79 Ala. 404; *Birmingham, etc., R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465; *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 275; *Weems v. Weems*, 73 Ala. 462; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Montgomery v. Sayre*, 65 Ala. 564; *Hart v. Life Assoc.*, 54 Ala. 495; *Yonge v. Shepherd*, 44 Ala. 315; *Alabama, etc., R. Co. v. Kenney*, 39 Ala. 307; *Miller v. Bates*, 35 Ala. 580; *Cave v. Webb*, 22 Ala. 583; *Womack v. Powers*, 50 Ala. 5; *Nelson v. Dunn*, 15 Ala. 501; *Dunlap v. Clements*, 7 Ala. 539.

*Arkansas.*—*Coblentz v. Wheeler, etc., Mfg. Co.*, 40 Ark. 180; *Earle v. Hale*, 31 Ark. 473; *Eads v. Brazelton*, 22 Ark. 499; *Menifee v. Ball*, 7 Ark. 520; *Bently v. Dillard*, 6 Ark. 79; *Dugan v. Cureton*, 1 Ark. 31.

*California.*—*Gardner v. Stroeve*, 81 Cal. 148; *Yuba County v. Cloke*, 79 Cal. 239; *Pfister v. Wade*, 59 Cal. 273; *Payne v. McKinley*, 54 Cal. 532; *Sanchez v. Carriaga*, 31 Cal. 170; *Creanor v. Nelson*, 23 Cal. 464; *Real Del Monte Consol. Gold, etc., Min. Co. v. Pond Gold Min. Co.*, 23 Cal. 82; *Burnett v. Whitesides*, 13 Cal. 156; *Borland*

*v. Thornton*, 12 Cal. 440; *Robinson v. Gaar*, 6 Cal. 273; *Middleton v. Franklin*, 3 Cal. 238.

*Colorado.*—*Breeze v. Haley*, 10 Colo. 5; *Union Iron Works v. Bassick Min. Co.*, 10 Colo. 24; *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554.

*Connecticut.*—*Hawley v. Beardsley*, 47 Conn. 571.

*Dakota.*—*Wood v. Bangs*, 1 Dakota 172.

*Delaware.*—*Hayes v. Hayes*, 2 Del. Ch. 191.

*Florida.*—*Bevill v. Smith*, 25 Fla. 209; *Shivery v. Streeper*, 24 Fla. 103; *Finegan v. Fernandina*, 18 Fla. 127; *Gamble v. Campbell*, 6 Fla. 347.

*Georgia.*—*Vaughn v. Fuller*, 23 Ga. 366; *Miller v. Maddox*, 21 Ga. 327; *Loyless v. Howell*, 15 Ga. 554; *Bethune v. Wilkins*, 8 Ga. 118.

*Illinois.*—*Andrews v. Knox County*, 70 Ill. 65; *Fahs v. Roberts*, 54 Ill. 192; *Phelps v. Foster*, 18 Ill. 309; *Richardson v. Prevo*, 1 Ill. 216; *Densch v. Scott*, 58 Ill. App. 33; *Simpson v. Wright*, 21 Ill. App. 67; *Herrington v. Herrington*, 11 Ill. App. 121; *Duncan v. Morrison*, 1 Ill. 151; *Cornelius v. Coons*, 1 Ill. 37.

*Indiana.*—*Sutherland v. Lagro, etc., Plank Road Co.*, 19 Ind. 192; *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165; *Addleman v. Mormon*, 7 Blackf. (Ind.) 31.

*Iowa.*—*Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; *Patterson v. Seaton*, 64 Iowa 115; *Small v. Somerville*, 58 Iowa 362; *Street v. Rider*, 14 Iowa 506; *Shricker v. Field*, 9 Iowa 366.

*Kansas.*—*Barber County v. Smith*, 48 Kan. 331; *Henderson v. Marcell*, 1 Kan. 137.

*Kentucky.*—*Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 346.

*Louisiana.*—*Butchers' Benev. Assoc. v. Cutler*, 26 La. Ann. 500; *Mahan v. Accommodation Bank*, 26 La. Ann. 34; *Lee v. Hubbell*, 20 La. Ann. 551.

*Maryland.*—*Laupheimer v. Rosenbaum*, 25 Md. 219; *Hubbard v. Mobra*, 20 Md. 165; *Brawner v. Franklin*, 4 Gill (Md.) 463.

*Mississippi.*—*Hiller v. Cotten*, 54 Miss. 551; *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456; *Nevit v. Hamer*, 5



equity in the bill is frequently made the ground for dissolving an injunction, because the chancellor, when an application is

Smed. & M. (Miss.) 145; Beatty v. Smith, 2 Smed. & M. (Miss.) 567.

*Montana.* — McCormick v. Riddle, 10 Mont. 467; Heaney v. Butte, etc., Commercial Co., 10 Mont. 590.

*New Jersey.* — McKibbin v. Brown, 14 N. J. Eq. 13; Vaughn v. Johnson, 9 N. J. Eq. 173; Morris Canal, etc., Co. v. Biddle, 4 N. J. Eq. 222; Haight v. Bergh, 3 N. J. Eq. 386; West v. Walker, 3 N. J. Eq. 279; Kinney v. Ogden, 3 N. J. Eq. 168.

*New York.* — Gentil v. Arnand, 38 How. Pr. (N. Y. Super. Ct.) 94; Hazard v. Hudson River Bridge Co., 27 How. Pr. (N. Y. Supreme Ct.) 296; Smith v. Reno, 6 How. Pr. (N. Y. Supreme Ct.) 124; Roome v. Webb, 1 Code Rep. (N. Y.) 114, 3 How. Pr. (N. Y. Supreme Ct.) 327; Grill v. Wiswall, 82 Hun. (N. Y.) 281; Galusha v. Flour City Nat. Bank, 1 Hun. (N. Y.) 573; Bennett v. American Art Union, 5 Sandf. (N. Y.) 614; Pullman v. New York, 54 Barb. (N. Y.) 169; Mallett v. Weybossett Bank, 1 Barb. (N. Y.) 217; Strange v. Longley, 3 Barb. Ch. (N. Y.) 650; Hall v. Fisher, 1 Barb. Ch. (N. Y.) 53; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118; West v. New York, 10 Paige (N. Y.) 539; Lasala v. Holbrook, 4 Paige (N. Y.) 169; People v. Spalding, 2 Paige (N. Y.) 326; Morgan v. Schermerhorn, 1 Paige (N. Y.) 544; New York Printing, etc., Establishment v. Fitch, 1 Paige (N. Y.) 97; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 173, which last mentioned case was cited in Walker v. Gilbert, 7 Smed. & M. (Miss.) 456, and in Tapp v. Rankin, 9 Leigh (Va.) 478.

*North Carolina.* — Washington v. Emery, 4 Jones Eq. (N. Car.) 29, in which case the bill disclosed the pendency of another suit in which the relief prayed for might have been obtained upon a motion or by a petition in that cause.

*Tennessee.* — In Rentfro v. Dickson, Overt. (Tenn.) 196, it was held that a motion to dissolve an injunction is irregular before answer or demurrer, but may be made after either. The court remarked that the demurrer might be immediately looked into with a view to dissolution and to avoid an imputation of contempt, without being set down regularly for argument in the course of practice, and that as respects

foreign or nonresident defendants, a motion to dissolve may be heard before the coming in of the answer, when it appears from the face of the bill that a decree cannot be ultimately made, the court in these cases not presuming contumely. This case was cited in Walker v. Gilbert, 7 Smed. & M. (Miss.) 456.

*Texas.* — Hale v. McComas, 59 Tex. 484; Taylor v. Gillean, 23 Tex. 508.

*Virginia.* — Hudson v. Kline, 9 Gratt. (Va.) 379; Griffith v. Reynolds, 4 Gratt. (Va.) 460; Baldwin v. Darst, 3 Gratt. (Va.) 126; Threlkelds v. Campbell, 2 Gratt. (Va.) 198; Webster v. Couch, 6 Rand. (Va.) 519; Tapp v. Rankin, 9 Leigh (Va.) 478.

*West Virginia.* — Shonk v. Knight, 12 W. Va. 667.

*Wisconsin.* — Chicago, etc., R. Co. v. Ft. Howard, 21 Wis. 45.

*United States.* — Barnard v. Gibson, 7 How. (U. S.) 650; Ridgway v. Hays, 5 Cranch (C. C.) 23; McKenzie v. Cowing, 4 Cranch (C. C.) 479; Kidwell v. Masterson, 3 Cranch (C. C.) 52; Ramsay v. Riddle, 1 Cranch (C. C.) 399; Chapman v. Scott, 1 Cranch (C. C.) 302; Fenwick Hall Co. v. Old Saybrook, 66 Fed. Rep. 390.

**Allegations on Information and Belief.** — It is ground for dissolving the injunction that the allegations upon which it is based are made upon information and belief only. *Middletown v. Rondout, etc., R. Co.,* 43 How. Pr. (N. Y. Supreme Ct.) 481.

**Effect of Exhibits.** — In *Westcott v. Gifford*, 5 N. J. Eq. 24, the injunction was dissolved because the plaintiff's exhibits disproved his title and right to relief.

**Failure to Make Tender.** — If the defendant answers the bill without making any objection to it on the ground that the plaintiff has not tendered money which he should have tendered, the court will not afterwards dissolve the injunction if it appears that the plaintiff is entitled to relief, and on the motion to dissolve he makes it known that he is willing to pay the sum really due. *Morgan v. Schermerhorn*, 1 Paige (N. Y.) 544.

**Failure to Release Errors.** — In *Addleman v. Mormon*, 7 Blackf. (Ind.) 31, an injunction against proceedings on a judgment at law was dissolved because

made to him for an injunction, is unable to give the case the mature consideration which he can afterwards give it on a motion to dissolve, and it often happens that a bill which is without equity appears, on a hasty inspection, to be sufficient to entitle the plaintiff to an injunction.

**Motion Equivalent to Motion for Injunction on Notice.** — Where a motion is made to dissolve the injunction on the bill only, the case must be viewed in the same manner as if it were an original application for an injunction of which the defendant has been given notice and which he resists.<sup>1</sup>

**Truth of Bill Admitted.** — On a motion to dissolve the injunction for want of equity in the bill, facts which are well pleaded in the bill are to be taken as true the same as upon a demurrer.<sup>2</sup> The

no release of errors was indorsed on the bill.

**Irreparable Injury.** — Failure to charge that an alleged trespass against which the injunction was sought will produce irreparable injury is ground for dissolving the injunction. *Grill v. Wiswall*, 82 Hun (N. Y.) 281.

**Objection Waived.** — After the defendant has put in an answer to the bill submitting himself to the jurisdiction of the court without objection, it is too late to make a motion to dissolve the injunction on the ground that the plaintiff has a perfect remedy at law, unless the court is wholly incompetent to grant the relief sought by the bill. *Grandin v. Le Roy*, 2 Paige (N. Y.) 509, wherein Chancellor Walworth said that "the defendant should have taken that objection either by demurrer to the bill or by insisting on it in his answer as a bar," citing *Smith v. Haviland*, an unreported case decided by Chancellor Jones in June, 1827, and *Hawley v. Cramer*, 4 Cow. (N. Y.) 727; in which last mentioned case the court cited *Ludlow v. Simond*, 2 Cal. Cas. (N. Y.) 56, *per* Kent, C. J., and *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 369.

**Laches.** — In *Collings v. Camden*, 27 N. J. Eq. 293, the injunction was dissolved because the bill showed that the plaintiff had been guilty of such laches that he was not entitled to relief.

**Multifariousness.** — In *Fuhn v. Weber*, 38 Cal. 636, it was held that if facts alleged in the complaint are sufficient to entitle the plaintiff to an injunction, it is no ground for dissolving the injunction upon a motion made upon the complaint alone, that two causes of action have been improperly joined

without separately stating them, and that this objection must be taken by demurrer. See also, to the same effect, *Shirley v. Long*, 6 Rand. (Va.) 764. But see *Rose v. Rose*, 11 Paige (N. Y.) 166.

**Demurrer Previously Overruled.** — Where a general demurrer has been heard and adjudicated, the court will not, on a motion subsequently made on the coming in of the answer to dissolve the injunction, consider an objection to the bill that was properly involved in the demurrer. *McGinnis v. Justices*, 30 Ga. 47.

1. *Per* Chancellor Walworth, in *New York Printing, etc., Establishment v. Fitch*, 1 Paige (N. Y.) 97.

2. *Alabama.* — *Montgomery v. Louisville, etc., R. Co.*, 84 Ala. 127.

*Delaware.* — *Plunkett v. Dillon*, 3 Del. Ch. 496.

*Georgia.* — *Semmes v. Columbus*, 19 Ga. 471; *Crutchfield v. Danilly*, 16 Ga. 432.

*Illinois.* — *Bennett v. McFadden*, 61 Ill. 334; *Nelson v. Rockwell*, 14 Ill. 375.

*Kansas.* — *Muse v. Wafer*, 29 Kan. 279.

*Louisiana.* — *Ferriere v. Schreiber*, 16 La. Ann. 7; *Herbert v. Joly*, 5 La. 50; *Robertson v. Travis*, 4 La. Ann. 151.

*Mississippi.* — *Woods v. Riley*, 72 Miss. 73; *Gaillard v. Thomas*, 61 Miss. 166; *McKinney v. Kuhn*, 59 Miss. 186.

*New Jersey.* — *Oakley v. Pound*, 14 N. J. Eq. 178.

*New York.* — *Dougrey v. Topping*, 4 Paige (N. Y.) 94.

*Virginia.* — *Peatross v. M'Laughlin*, 6 Gratt. (Va.) 64.

*United States.* — *McKenzie v. Cowling*, 4 Cranch (C. C.) 479.

motion to dissolve for want of equity in the bill is in effect, according to some of the cases, a demurrer to the bill;<sup>1</sup> but the motion does not perform all the offices of a demurrer, as the court in such a motion inquires merely whether the facts alleged, if properly pleaded, make a case calling for equitable interference, and does not give the bill the same scrutiny that it would in passing upon a demurrer.<sup>2</sup>

**Only Substantial Defects Regarded.** — When a motion is made to dissolve the injunction for want of equity in the bill, mere technical errors or inaccuracies and amendable defects are not available, and will be treated as amended.<sup>3</sup> Upon a nice question, the injunction should be held until the hearing, or the defendant driven to a demurrer.<sup>4</sup>

**Retention of Bill for Other Relief.** — Whenever the facts alleged in the bill are not sufficient to warrant interference of the court by injunction, it is proper to dissolve the injunction although it may be necessary to retain the bill with a view to other relief.<sup>5</sup>

**b. BILL SHOWING EQUITY.** — If the bill presents a case for equitable interference, the injunction should not be dissolved upon motion before an answer has been filed.<sup>6</sup>

**c. WANT OR DEFECT OF AFFIDAVIT.** — It is ground for dissolving the preliminary injunction, that the bill was not sworn to

1. *Wangelin v. Goe*, 50 Ill. 459; *Shaw v. Hill*, 67 Ill. 455; *Craig v. People*, 47 Ill. 487; *Hickey v. Stone*, 60 Ill. 458; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312; *Jenkins v. Felton*, 9 Rob. (La.) 200, in which case it was said that "a motion to dissolve an injunction on the face of the papers is not without its danger;" *Judd v. Fox Lake*, 28 Wis. 583. See also *Titus v. Mabey*, 25 Ill. 235, in which case the court said: "The practice is to allow either a demurrer to the bill or a motion to dissolve the injunction, and either course produces precisely the same result so far as the injunction is concerned."

**The Pleadings' Conclusions.** — Like a demurrer, the motion to dissolve does not admit the pleader's conclusions of law based upon the facts alleged. *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312.

2. *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 280; *Nathan v. Tompkins*, 82 Ala. 437; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Cahalan v. Monroe*, 56 Ala. 303, in which case it was said that for the purpose of such a motion "a bill is without equity when the facts alleged in it do not constitute a case that entitles the plaintiff to relief in a court of equity." See also *Oro Fino, etc., Min.*

*Co. v. Cullen*, 1 Idaho 113, holding that it is sufficient that a *prima facie* case for an injunction is made.

3. *Jones v. Ewing*, 56 Ala. 360; *Moses v. Tompkins*, 84 Ala. 616; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Nelson v. Dunn*, 15 Ala. 501; *Alabama, etc., R. Co. v. Kenney*, 39 Ala. 307; *Louisville, etc., R. Co. v. Bessemer*, 108 Ala. 238; *Elliott v. Sibley*, 101 Ala. 344; *Frome v. Freeholders*, 33 N. J. Eq. 464.

**After Amendment Made.** — An injunction, although improperly issued on account of defects in the original petition, should not be dissolved if the defects have been cured by an amendment. *Sweatt v. Fayville*, 23 Iowa 321.

4. *McKibbin v. Brown*, 14 N. J. Eq. 13, in which case, however, the injunction was dissolved because the chancellor had no real doubt upon the question.

5. *Harrison v. McCrary*, 37 Ala. 687; *Norris v. Norris*, 27 Ala. 519; *Satterfield v. John*, 53 Ala. 127; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 7.

6. *New v. Wright*, 44 Miss. 202; *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *Lines v. Spear*, 8 N. J. Eq. 154.

"The chancellor has no right, at the

at the time the injunction was granted;<sup>1</sup> and in like manner it is ground for dissolving the injunction, that the affidavit is defective in form or insufficient in substance.<sup>2</sup> The insufficiency of the affidavit is not within the rule that an injunction should not be dissolved if it appears that the party will be instantly entitled to a new one, because the court does not know that the plaintiff is able to make a sufficient affidavit.<sup>3</sup>

**11. Dissolution upon Denials Contained in the Answer — a. THE RULE STATED AND ITS APPLICATION.** — As a general rule, upon the coming in of an answer denying the equities of the bill, the defendant is entitled to have the injunction dissolved.<sup>4</sup> This

appearance term, and before the filing of an answer in the clerk's office, to dissolve an injunction, if the bill contain equity." *Judah v. Chiles*, 3 J. J. Marsh. (Ky.) 302.

**Scrutiny of Prayer.** — In determining whether the injunction shall be continued, it is necessary to examine whether the prayer of the bill in any of its aspects may be granted at the final hearing. *Carter v. Bennett*, 6 Fla. 214.

1. *Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79, *per* Worden, J.; *Stump v. Busick*, 3 Greene (Iowa) 245; *Porter v. Moffett*, 1 Morr. (Iowa) 108, *per* Mason, C. J.; *Robertson v. Travis*, 4 La. Ann. 151; *Barrow v. Richardson*, 23 La. Ann. 203; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Gaskins v. Peebles*, 44 Tex. 390.

In *Ballard v. Eckman*, 20 Fla. 661, it was said that when an injunction is granted without the oath of some person to the facts, it is a matter of course to dissolve injunction before answer.

**Facts Evident to the Court.** — The injunction should not be dissolved for want of an affidavit to the petition where the facts upon which it is based are evident to the court from an inspection of the record, and it is apparent that the injunction was not improperly granted and that the plaintiff would have an undoubted right to a new one on the dissolution of the former. *Campbell v. His Creditors*, 8 La. 71.

2. *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165; *Elder v. New Orleans*, 31 La. Ann. 500; *Perkins v. Collins*, 3 N. J. Eq. 482; *Pullen v. Baker*, 41 Tex. 419; *Shonk v. Knight*, 12 W. Va. 667.

In *Alabama* the insufficiency of the affidavit is no ground for dissolving the injunction until the plaintiff has failed to perfect his bill upon being ruled to

do so. *Forney v. Calhoun County*, 84 Ala. 215; *Jacoby v. Goetter*, 74 Ala. 427; *Jones v. Ewing*, 56 Ala. 360; *Calhoun v. Cozens*, 3 Ala. 498.

**Objection Waived.** — Where the order for the injunction and the process are founded on insufficient affidavits, they are not irregular only, but are erroneous, and the principle of waiver cannot save them. *Perkins v. Collins*, 3 N. J. Eq. 482, *citing* *Levi v. Ward*, 1 Sim. & S. 334, and 1 Cond. Ch. Rep. 170.

**Silence of Answer.** — The fact that the defendant's answer is silent as to a matter charged in the bill which is verified only on information and belief, will not preclude the defendant from taking advantage of the defect in the verification. *Conover v. Ruckman*, 34 N. J. Eq. 293. See, likewise, *Barrow v. Richardson*, 23 La. Ann. 203, in which case it was shown that the affidavit was not made in the presence of the officer who took the oath, and that the officer did not in fact administer the oath.

**Admissions in Answer.** — The injunction will not be dissolved because of an insufficient verification after the defendant has admitted in his answer the unverified facts. *Conover v. Ruckman*, 34 N. J. Eq. 293.

3. *Catlett v. McDonald*, 13 La. 44.

4. In *Claphame v. White*, 8 Ves. Jr. 35, Lord Eldon said: "If the answer denies all the circumstances upon which the equity is founded, the universal practice as to the purpose of dissolving or not reviving the injunction is to give credit to the answer; and that is carried so far that, except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose." See also *Berkely v. Brymer*, 9 Ves. Jr. 355; *Norway v. Rowe*, 19 Ves.

rule is a very ancient one, and prevails with great uniformity in all courts which govern their proceedings by the general rules of

Jr. 144; *Vipan v. Mortlock*, 2 Meriv. 476; *Hill v. Thompson*, 3 Meriv. 622.

Reference is also made to the following text writers who have stated the rule: *Eden Inj.* 145, 146; 3 *Dan. Ch. Pr.* 1831, 1832; 1 *Whittaker Pr.* 479; 1 *Barton Ch. Pr.* 414, 426.

Among the multitude of cases decided by American courts in which the rule stated in the text has been affirmed and applied, though in some instances with modifications, according to the practice of the particular state and the circumstances of the individual case, are the following:

**Alabama.**—*Jackson v. Jackson*, 91 Ala. 292; *Worthington v. Hatch*, (Ala. 1893) 13 So. Rep. 518; *Turner v. Stephens*, 106 Ala. 546; *Louisville, etc., R. Co. v. Bessemer*, 108 Ala. 238; *Bowling v. Crook*, 104 Ala. 130; *Winter v. Montgomery*, 101 Ala. 653; *Hagler v. Jones*, 100 Ala. 541; *Birmingham Mineral R. Co. v. Bessemer*, 98 Ala. 274; *Rogers v. Haines*, 96 Ala. 586; *Hartley v. Matthews*, 96 Ala. 224; *Weems v. Roberts*, 96 Ala. 378; *Louisville, etc., R. Co. v. Philyaw*, 94 Ala. 463; *Morrison v. Coleman*, 87 Ala. 655; *Moses v. Tompkins*, 84 Ala. 613; *Jackson v. Jackson*, 84 Ala. 343; *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 280; *Weems v. Weems*, 73 Ala. 462; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Barr v. Collier*, 54 Ala. 39; *Collier v. Falk*, 61 Ala. 105; *Bishop v. Wood*, 59 Ala. 253; *Saunders v. Cavett*, 38 Ala. 51; *Mallory v. Matlock*, 10 Ala. 595; *Satterfield v. John*, 53 Ala. 127; *Colton v. Price*, 50 Ala. 424; *Lockhart v. Troy*, 48 Ala. 579; *Garrett v. Lynch*, 44 Ala. 683; *Yonge v. Shepherd*, 44 Ala. 315; *McClanahan v. Ware*, 42 Ala. 381; *Bibb v. Shackelford*, 38 Ala. 611; *McLaughlin v. McLaughlin*, 36 Ala. 145; *Brooks v. Diaz*, 35 Ala. 599; *Miller v. Bates*, 35 Ala. 580; *Barney v. Earle*, 13 Ala. 106; *Hudson v. Crutchfield*, 12 Ala. 433; *Hogan v. Branch Bank*, 10 Ala. 485; *Dunlap v. Clements*, 7 Ala. 539; *Long v. Brown*, 4 Ala. 622; *Williams v. Berry*, 3 *Stew. & P. (Ala.)* 284. See also *Robertson v. Walker*, 51 Ala. 484; *Withers v. Dickey*, 1 *Stew. (Ala.)* 190, *per Saffold, J.*; *Wingo v. Hardy*, 94 Ala. 184; *American Refrigerating, etc., Co. v. Linn*, 93 Ala. 610; *Moore v. Barclay*, 23 Ala. 739; *Rogers v. Bradford*, 29 Ala. 474.

**California.**—Where the answer denies all the material allegations of the complaint, and they are unsupported by any affidavits or other proof, the injunction should be dissolved. *Gardner v. Stroeever*, 81 Cal. 150; *Delger v. Johnson*, 44 Cal. 182; *Johnson v. Wide West Min. Co.*; 22 Cal. 479; *Real Del Monte Consol. Gold, etc., Min. Co. v. Pond Gold, etc., Min. Co.*, 23 Cal. 82. See also the following cases: *Rogers v. Tenant*, 45 Cal. 184; *McCreery v. Brown*, 42 Cal. 457; *De Godey v. Godey*, 39 Cal. 157; *Curtis v. Sutter*, 15 Cal. 259; *Burnett v. Whitesides*, 13 Cal. 156; *Fremont v. Mariposa County*, 11 Cal. 362; *Gardner v. Perkins*, 9 Cal. 553; *Crandall v. Woods*, 6 Cal. 449.

**Arkansas.**—*Bettison v. Jennings*, 8 Ark. 287; *Cummins v. Bentley*, 5 Ark. 9.

**Delaware.**—In *Marvel v. Ortlip*, 3 Del. Ch. 9, it was held that an allegation of the bill which is denied by the answer and is not supported by evidence, will not be taken into consideration on a motion to dissolve. See also *Kersey v. Rash*, 3 Del. Ch. 321, wherein the English rule was stated.

**Florida.**—In *Carter v. Bennett*, 6 Fla. 214, it was said: "We believe it to be the almost universal practice that if the answer fully denies all the circumstances upon which the equity is founded, credit is given to the answer and the injunction dissolved." See also *Douglass v. Baker County*, 23 Fla. 419; *Hayden v. Thrasher*, 20 Fla. 715 [*citing Carter v. Bennett*, 6 Fla. 214]; *Sullivan v. Moreno*, 19 Fla. 200 [*citing Carter v. Bennett*, 6 Fla. 236; *Linton v. Denham*, 6 Fla. 533; and *Allen v. Hawley*, 6 Fla. 142].

*By Statute*, however (Laws Fla., c. 1098), the old rule is modified to the extent of allowing either party to introduce evidence. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387, 29 Am. St. Rep. 258.

**Georgia.**—*Connally v. Cruger*, 40 Ga. 259; *Grubbs v. McGlawn*, 39 Ga. 672; *Thrasher v. Partee*, 37 Ga. 392; *Howell v. Lee*, 36 Ga. 76; *Johnson v. Allen*, 35 Ga. 252; *Carroll v. Martin*, 35 Ga. 261; *Wooding v. Malone*, 30 Ga. 979; *Howard v. Marine Bank*, 30 Ga. 841; *Applewhite v. Baldwin*, 30 Ga. 915; *Williams v. Garrison*, 29 Ga. 503; *Gravely v. Southerland*, 29 Ga. 335; *Weaver v. Garner*, 28 Ga. 503; *Alexander v. Mark-*

equity practice; but although it is so well established it is often difficult of application because of the many exceptions to it,

ham, 25 Ga. 148; *Rödahan v. Driver*, 23 Ga. 352; *Vaughn v. Fuller*, 23 Ga. 366; *Beckham v. Newton*, 21 Ga. 187; *Boring v. Rollins*, 20 Ga. 623; *Edmondson v. Jones*, 19 Ga. 19; *Semmes v. Columbus*, 19 Ga. 471; *Edwards v. Perryman*, 18 Ga. 374; *Loyless v. Howell*, 15 Ga. 554; *Dent v. Summerlin*, 12 Ga. 5; *Holt v. Augusta Bank*, 9 Ga. 552; *Dennis v. Green*, 8 Ga. 197; *Ford v. Tison*, 8 Ga. 466; *Jones v. Joyner*, 8 Ga. 562; *Hemphill v. Ruckersville Bank*, 3 Ga. 435 [citing *Moore v. Ferrell*, 1 Ga. 9]; *Shellman v. Scott*, R. M. Charl. (Ga.) 380; *Read v. Dews*, R. M. Charl. (Ga.) 358. See also *Spence v. Steadman*, 49 Ga. 133; *Douglass v. Thomson*, 39 Ga. 134; *Rhodes v. Lee*, 32 Ga. 470; *Rainey v. Jones*, 31 Ga. 111; *Miller v. Maddox*, 21 Ga. 327; *Cox v. Griffin*, 18 Ga. 728; *Lewis v. Leak*, 9 Ga. 95; *Swift v. Swift*, 13 Ga. 140; *Field v. Howell*, 6 Ga. 423. But see *Howell v. Lee*, 36 Ga. 76, wherein it was declared that the injunction will not be dissolved as a matter of course.

**Idaho.** — *Oro Fino, etc., Min. Co. v. Cullen*, 1 Idaho 113.

**Illinois.** — In *Parkinson v. Trousdale*, 4 Ill. 367, it was declared that, according to the general practice in courts of equity, a dissolution of the injunction is a matter of course unless in some instances the plaintiff, by filing affidavits to sustain the bill, excepting to the answer, etc., defers it. See also *Cornelius v. Coons*, 1 Ill. 37.

**Indiana.** — Each party may read affidavits, and where affidavits have been read it does not follow necessarily that the defendant is entitled to have the injunction dissolved because he has fully answered under oath; but where the material averments in the bill are positively denied and are entirely unsupported by proof, a motion to dissolve should be sustained. *Edwards v. Applegate*, 70 Ind. 325; *Aurora, etc., R. Co. v. Miller*, 56 Ind. 88; *Spicer v. Hoop*, 51 Ind. 365; *Rayle v. Indianapolis, etc., R. Co.*, 32 Ind. 259; *Cheek v. Tilley*, 31 Ind. 121; *Case v. Green*, 4 Ind. 526; *Doolittle v. Jones*, 2 Ind. 21.

**Iowa.** — *Clark v. American Coal Co.*, 86 Iowa 451; *Phillips v. Watson*, 63 Iowa 28; *Carrothers v. Newton Mineral Spring Co.*, 61 Iowa 681; *Sinnet v. Moles*, 38 Iowa 25; *Russell v. Wilson*, 37 Iowa 377; *Shricker v. Field*, 9 Iowa

366; *Anderson v. Reed*, 11 Iowa 177; *Walters v. Fredericks*, 11 Iowa 181; *Stevens v. Myers*, 11 Iowa 183; *Taylor v. Dickinson*, 15 Iowa 483; *Rice v. Smith*, 9 Iowa 570. See also *Brigham v. White*, 44 Iowa 677; *Stewart v. Johnston*, 44 Iowa 435.

**Maryland.** — In *Johnson Co. v. Henderson*, 83 Md. 125, it was held that where the answer is responsive to and expressly denies the averments of the bill, and the plaintiff fails to support by proof the averments in his bill, the injunction should be dissolved. To the same effect are *Neurath v. Hecht*, 62 Md. 221; *Ewing v. Nickle*, 45 Md. 413; *Drury v. Roberts*, 2 Md. Ch. 157; *Herr v. Bierbower*, 3 Md. Ch. 456; *Voshell v. Hynson*, 26 Md. 83; *Ruppertsberger v. Clark*, 53 Md. 402; *Briesch v. McCauley*, 7 Gill (Md.) 189. See also the following cases, holding that where a motion to dissolve is heard upon bill and answer, the responsive allegations of the latter must be taken to be true, and if the equity of the bill is sworn away, the injunction must be dissolved: *Webster v. Hardesty*, 28 Md. 592; *Dougherty v. Piet*, 52 Md. 425; *Philadelphia Trust, etc., Co. v. Scott*, 45 Md. 451; *Voshell v. Hynson*, 26 Md. 83; *Hamilton v. Whitridge*, 11 Md. 128; *Bouldin v. Baltimore*, 15 Md. 21; *Hyde v. Ellery*, 18 Md. 406; *Hubbard v. Mowbray*, 20 Md. 165; *Dorsey v. Hagerstown Bank*, 17 Md. 408; *Colvin v. Warford*, 17 Md. 433; *Wood v. Patterson*, 4 Md. Ch. 335; *Furlong v. Edwards*, 3 Md. 99; *Gibson v. Tilton*, 1 Bland (Md.) 352; *McKim v. Odom*, 3 Bland (Md.) 407; *Salmon v. Clagett*, 3 Bland (Md.) 125; *Jones v. McGill*, 1 Bland (Md.) 177; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Washington University v. Green*, 1 Md. Ch. 97; *Brown v. Stewart*, 1 Md. Ch. 87; *Hutchins v. Hope*, 12 Gill & J. (Md.) 244. Likewise see *Chapline v. Beatty*, *Williams v. Hall*, and *Diffenderfer v. Hillen*, which three cases are reported in a note to *Jones v. McGill*, 1 Bland (Md.) 177.

**Michigan.** — *Caulfield v. Curry*, 63 Mich. 594; *Atty.-Gen. v. Oakland County Bank, Walk.* (Mich.) 90.

**Minnesota.** — *Pineo v. Heffelfinger*, 29 Minn. 183; *Armstrong v. Sanford*, 7 Minn. 49; *Moss v. Pettingill*, 3 Minn. 217.

**Mississippi.** — The injunction should

which will be treated of hereinafter, and also because of the nice questions which arise as to the requisites and sufficiency of an answer when it is relied upon for this purpose.

be dissolved where the answer is responsive and denies every material allegation of the bill, and the denials of the answer are not overcome by proof. *Davis v. Hart*, 66 Miss. 642, in which case it was recognized that the parties have the right to read affidavits and depositions; *Richardson v. Lightcap*, 52 Miss. 508; *Foxworth v. Magee*, 48 Miss. 532; *Drane v. Winter*, 41 Miss. 517; *Shotwell v. Webb*, 23 Miss. 375; *Bolls v. Duncan*, Walk. (Miss.) 161; *Yeizer v. Burke*, 3 Smed. & M. (Miss.) 439; *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456; *Pass v. Dykes*, 8 Smed. & M. (Miss.) 92.

**Nevada.** — The injunction will be dissolved upon the coming in of the answer, in the absence of testimony establishing the material allegations of the complaint, unless good reasons appear for continuing it. *Magnet Min. Co. v. Page*, etc., *Silver Min. Co.*, 9 Nev. 346; *Rivers v. Burbank*, 13 Nev. 398; *Connery v. Swift*, 9 Nev. 39. In the last-mentioned case a restraining order was dissolved because for one reason an averment that the defendant was insolvent was denied in the answer.

**New Hampshire.** — *Hollister v. Barkley*, 9 N. H. 230.

**New Jersey.** — *Campbell v. Runyon*, 42 N. J. Eq. 483; *Stitt v. Hilton*, 31 N. J. Eq. 285; *Suffern v. Butler*, 18 N. J. Eq. 220; *Everly v. Rice*, 4 N. J. Eq. 553; *Boston Franklinite Co. v. New Jersey Zinc Co.*, 13 N. J. Eq. 215; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Screw Mower, etc., Co. v. Mettler*, 26 N. J. Eq. 264; *Keron v. Coon*, 26 N. J. Eq. 26; *Moies v. O'Neill*, 23 N. J. Eq. 207; *Murray v. Elston*, 23 N. J. Eq. 127; *Brewer v. Day*, 23 N. J. Eq. 418; *Winslow Tp. v. Hudson*, 21 N. J. Eq. 172; *Mitchell v. Mitchell*, 20 N. J. Eq. 234; *McMahon v. O'Donnell*, 20 N. J. Eq. 306; *Eaton v. Jenkins*, 19 N. J. Eq. 362; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Cross v. Morristown*, 18 N. J. Eq. 305; *Morris Canal, etc., Co. v. Fagan*, 18 N. J. Eq. 215; *Savage v. Ball*, 17 N. J. Eq. 142; *Thorpe v. Pettit*, 16 N. J. Eq. 488; *Price v. Armstrong*, 14 N. J. Eq. 41; *Brown v. Fuller*, 13 N. J. Eq. 271; *Brooks v. Lewis*, 13 N. J. Eq. 214; *Horner v. Jobs*, 13 N. J. Eq.

19; *East Newark Co. v. Gilbert*, 12 N. J. Eq. 78; *Kent v. De Baun*, 12 N. J. Eq. 220; *Society, etc. v. Butler*, 12 N. J. Eq. 498; *Scott v. Ames*, 11 N. J. Eq. 261; *Furman v. Clark*, 11 N. J. Eq. 135; *Masterton v. Barney*, 11 N. J. Eq. 26; *Adams v. Hudson County Bank*, 10 N. J. Eq. 535, 64 Am. Dec. 469; *Fleischman v. Young*, 9 N. J. Eq. 620; *Greenin v. Hoey*, 9 N. J. Eq. 137; *Endicott v. Mathis*, 9 N. J. Eq. 110; *Vervalen v. Older*, 8 N. J. Eq. 98; *Gregory v. Stillwell*, 6 N. J. Eq. 51; *Jones v. Sherwood*, 6 N. J. Eq. 210; *Cooper v. Cooper*, 5 N. J. Eq. 9; *Hatch v. Daniels*, 5 N. J. Eq. 14; *Washer v. Brown*, 5 N. J. Eq. 81; *Wyckoff v. Cochran*, 4 N. J. Eq. 420; *Kerlin v. West*, 4 N. J. Eq. 449; *Vanwinkle v. Curtis*, 3 N. J. Eq. 422; *Outcalt v. Disborough*, 3 N. J. Eq. 215; *Merwin v. Smith*, 2 N. J. Eq. 182; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476; *Youle v. Richards*, 1 N. J. Eq. 534; *Wooden v. Wooden*, 3 N. J. Eq. 429. See also *Marshman v. Conklin*, 17 N. J. Eq. 282; *Tainter v. Morristown*, 19 N. J. Eq. 46, in which cases the answers were supported by testimony and by documents and the injunctions were dissolved.

**New York.** — *Under the Code* affidavits may be read after the answer has been filed, but where the plaintiff's right to the ultimate relief sought by him is not clearly established, the injunction will be dissolved, and likewise where no affidavits are read by either party and the motion is based upon the complaint and answer only, the sworn answer will be taken as true, and the injunction will be dissolved. *Gould v. Jacobsohn*, 18 How. Pr. (N. Y. Supreme Ct.) 158, in which case it was said: "It is enough \* \* \* to say that the only ground on which the injunction could be sustained is denied by the defendants in their answers, and where that is the case the injunction cannot be retained." See also the following cases: *Fullan v. Hooper*, 66 How. Pr. (N. Y. Supreme Ct.) 75; *Brown v. Ashbough*, 40 How. Pr. (N. Y. Supreme Ct.) 233; *Ryckman v. Coleman*, 21 How. Pr. (N. Y. Supreme Ct.) 404; *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y. Supreme Ct.) 296; *Gentil v. Arnaud*.

**Injunction Granted on Order to Show Cause.** — The fact that the defendant has been heard on an order to show cause will not preclude

38 How. Pr. (N. Y. Super. Ct.) 94; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. (N. Y. Super. Ct.) 233; *Finnegan v. Lee*, 18 How. Pr. (N. Y. Supreme Ct.) 186; *American Grocer Pub. Assoc. v. Groc. Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402; *Secor v. Weed*, 7 Robt. (N. Y.) 67; *Blatchford v. New York, etc., R. Co.*, 7 Abb. Pr. (N. Y. Supreme Ct.) 322; *Middletown v. Rondout, etc., R. Co.*, 43 How. Pr. (N. Y. Supreme Ct.) 481; *Gould v. Jacobsohn*, 18 How. Pr. (N. Y. Supreme Ct.) 158; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225; *Steinberg v. O'Connor*, 42 How. Pr. (N. Y. C. Pl.) 52; *Warsaw Water Works Co. v. Warsaw*, 4 N. Y. App. Div. 509; *Dubois v. Budlong*, 10 Bosw. (N. Y.) 700; *Storer v. Coe*, 2 Bosw. (N. Y.) 661; *Grill v. Wiswall*, 82 Hun (N. Y.) 281; *Oppenheimer v. Hirsch*, 5 N. Y. App. Div. 232; *Kuntz v. C. C. White Co.*, (Supreme Ct.) 8 N. Y. Supp. 505.

*With or Without Answer.* — The defendant may move to dissolve the injunction upon affidavits with or without an answer. *Roome v. Webb*, 1 Code Rep. (N. Y.) 114, 3 How. Pr. (N. Y. Supreme Ct.) 327; *Hascall v. Madison University*, 8 Barb. (N. Y.) 174. See also *Schoonmaker v. Reformed Protestant Dutch Church*, 5 How. Pr. (N. Y. Supreme Ct.) 265; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225.

*In the Court of Chancery* it was the established practice "that the defendant might, on the coming in of the answer, move to dissolve the injunction, and the answer was a most important paper upon the motion, for, if it denied the whole equity of the bill, it was the general practice to dissolve the injunction." *Per Hogeboom, J.*, in *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y. Supreme Ct.) 296.

In *Skinner v. White*, 17 Johns. (N. Y.) 357, *Spencer, C. J.*, said: "It is a general and well settled principle that if the answer denies all the circumstances upon which the equity of the bill is founded, the universal practice is, as to the purpose of dissolving or not reviving the injunction, to give credit to the answer." See also the following cases: *Livingston v. Livingston*, 4 Paige (N. Y.) 111; *Wakeman v. Gillespy*, 5 Paige (N. Y.) 112; *Man-*

*chester v. Dey*, 6 Paige (N. Y.) 295; *Champlin v. New York*, 3 Paige (N. Y.) 573; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Crane v. Bunnell*, 10 Paige (N. Y.) 333; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Noble v. Wilson*, 1 Paige (N. Y.) 164; *Graham v. Stagg*, 2 Paige (N. Y.) 321; *Laurie v. Laurie*, 9 Paige (N. Y.) 234; *Jewett v. Belden*, 11 Paige (N. Y.) 618; *Fulton Bank v. New York, etc., Canal Co.*, 1 Paige (N. Y.) 311; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511; *Selden v. Vermilyea*, 1 Barb. (N. Y.) 58; *Lowry v. Chautauqua County Bank*, *Clarke Ch. (N. Y.)* 67; *Coleman v. Gage*, *Clarke Ch. (N. Y.)* 295; *Vermilya v. Christie*, 4 Sandf. Ch. (N. Y.) 376; *Couch v. Ulster, etc., Turnpike Co.*, 4 Johns. Ch. (N. Y.) 26; *Nichols v. Wilson*, 4 Johns. Ch. (N. Y.) 115; *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202.

**North Carolina.** — *Wright v. Grist*, *Busb. Eq. (N. Car.)* 203; *Lloyd v. Heath*, *Busb. Eq. (N. Car.)* 39; *Sharpe v. King*, 3 *Ired. Eq. (N. Car.)* 402; *Moore v. Hylton*, 1 *Dev. Eq. (N. Car.)* 434; *Miller v. Washburn*, 3 *Ired. Eq. (N. Car.)* 161.

**Pennsylvania.** — *McCartney v. Cassidy*, 141 *Pa. St.* 453.

**Rhode Island.** — The answer is construed as merely an affidavit, and counter affidavits may be read by the plaintiff, but unless the answer is overcome, the injunction will be dissolved. *Bradford v. Peckham*, 9 *R. I.* 250.

**South Dakota.** — In *Grant County v. Colonial, etc., Mortg. Co.*, 3 *S. Dak.* 394, neither side was supported by any affidavits or other evidence outside the pleadings, and the injunction was dissolved, the court saying: "The rule is general that where all the equities of the bill or complaint are fully and inevasively denied, a preliminary injunction ought not to stand." See also *Huron Water-works Co. v. Huron*, 3 *S. Dak.* 610.

**Texas.** — A sworn answer authorizes the dissolution of the injunction. *Love v. Powell*, 67 *Tex.* 15; *Blum v. Loggins*, 53 *Tex.* 121; *Baldrige v. Cook*, 27 *Tex.* 565; *Herron v. De Bard*, 28 *Tex.* 602; *Floyd v. Turner*, 23 *Tex.* 292; *Lively v. Bristow*, 12 *Tex.* 60;



him from making a motion to dissolve upon filing his answer and affidavits, where he resisted the granting of the injunction upon the matter of the bill and the moving affidavits alone.<sup>1</sup>

*Fulgham v. Chevallier*, 10 Tex. 519; *Hansborough v. Towns*, 1 Tex. 58; *Horton v. Jones*, Dall. (Tex.) 467.

**Virginia.** — The doctrine finds support in the following cases: *Ingles v. Straus*, 91 Va. 209; *Motley v. Frank*, 87 Va. 432; *Moore v. Steelman*, 80 Va. 331; *Spencer v. Jones*, 85 Va. 172; *Kahn v. Kerngood*, 80 Va. 342; *Hogan v. Duke*, 20 Gratt. (Va.) 244; *North v. Perrow*, 4 Rand. (Va.) 1; *Hudson v. Kline*, 9 Gratt. (Va.) 379; *Tate v. Vance*, 27 Gratt. (Va.) 571; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102; *Beckley v. Palmer*, 11 Gratt. (Va.) 625; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Radford v. Innes*, 1 Hen. & M. (Va.) 8; *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491; *Webster v. Couch*, 6 Rand. (Va.) 519.

**West Virginia.** — Where the answer fully, fairly, plainly, distinctly, and positively denies the allegations of the bill, and the allegations of the bill are unsupported by proof, the injunction should be dissolved. *Shonk v. Knight*, 12 W. Va. 667, citing *Hayzett v. McMillan*, 11 W. Va. 464.

**Wisconsin.** — *Schoeffler v. Schwarting*, 17 Wis. 31.

**United States.** — *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770, 25 Am. & Eng. R. Cas. 150; *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Goodyear v. Bourn*, 3 Blatchf. (U. S.) 266; *Orr v. Merrill*, 1 Woodb. & M. (U. S.) 376; *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135; *Coburn v. Cedar Valley Land, etc., Co.*, 25 Fed. Rep. 791; *Brammer v. Jones*, 2 Bond (U. S.) 100; *U. S. v. Parrott*, 1 McAll. (U. S.) 271; *Northern Pac. R. Co. v. Burlington, etc., R. Co.*, 2 McCrary (U. S.) 203, *per* Nelson, J.; *Nelson v. Robinson*, Hempst. (U. S.) 464.

But see *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13, in which case an injunction was sought against the infringement of a patent, and the court refused to dissolve the injunction as a matter of course on the coming in of the answer because the plaintiff had adduced auxiliary evidence of his right to the injunction.

**Answer of a Defendant Not Enjoined.** — On a motion to dissolve, regard can be had only to the answers of the defendants against whom the injunction

was issued. *Van Syckel v. Emery*, 18 N. J. Eq. 387.

**An Ancillary Injunction** should be dissolved where the allegations upon which the plaintiff bases his right to the main relief are denied. *Gariss v. Gariss*, 13 N. J. Eq. 320.

**Voluntary and Premature Answer.** — An answer voluntarily and prematurely filed before there has been any rule for answer is, nevertheless, to be treated as an answer and not as a mere affidavit, and may be used as the basis of a motion to dissolve. *Brooks v. Bicknell*, 3 McLean (U. S.) 250.

**Right of Plaintiff to Give Bond and Continue Injunction.** — After the defendant has put in a sworn answer to the bill fully denying the equities of the bill, the plaintiff, by giving the bond required to be given by statute upon the procurement of an injunction, does not entitle himself to a continuance of an injunction notwithstanding the answer, as the object of requiring the plaintiff to give a bond is not to enable him to retain his injunction after the equities of the bill have been sworn away, but to protect the rights of the defendant against an improper use of the process. *Manchester v. Dey*, 6 Paige (N. Y.) 295.

**Supplemental Answer.** — The defendant may put in a supplemental answer setting up facts that have occurred since the granting of the injunction, which render the continuance of the injunction useless, and may predicate a motion to modify or dissolve the injunction on such supplemental answer. *Steiner v. Scholze*, 105 Ala. 607.

1. *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y. Supreme Ct.) 296.

But it is otherwise where the injunction has been granted on notice and after hearing both parties read affidavits, and in such case the injunction will not be dissolved because of the denials in the answer. *Sinnickson v. Johnson*, 3 N. J. Eq. 374.

**Dissolution in Part.** — Where the injunction enjoins the performance of several acts, and the answer denies the allegations of the bill which entitle the plaintiff to an injunction against certain acts, the injunction should be dissolved as to such acts, but not as to the other

**Statutory Provisions** that on the coming in of the answer, on motion,\* the injunction may be dissolved if the equity of the bill is fully and completely denied, are merely declaratory of the general rule of practice.<sup>1</sup>

**Waiver of Answer under Oath.** — Although the plaintiff in an injunction bill waives an answer on oath, the defendant may nevertheless put in an answer on oath, which answer may be used in support of a motion to dissolve.<sup>2</sup>

**Consideration of Infirmities of Bill.** — *A fortiori* should the injunction be dissolved when the equity-giving allegations of the bill are stated weakly and are denied strongly.<sup>3</sup>

**Amendment of Bill After Answer.** — Where the bill is so amended as to make a new case, the defendant cannot ask a dissolution on the denials contained in his answer to the original bill, but must answer the bill as amended; but where the amendment presents no new case, and the equities of the bill remain the same, the answer to the original bill may be relied upon.<sup>4</sup>

**Bills for Discovery.** — When an injunction has been granted on a bill filed solely for discovery in aid of a defense at law, it will be dissolved as soon as the answer is perfected;<sup>5</sup> and, of course, the injunction falls when the answer denies the allegations of the bill and makes no discovery.<sup>6</sup>

acts complained of. *Edwards v. Perryman*, 18 Ga. 374. See also *Welch v. Parran*, 2 Gill (Md.) 320, holding that where an injunction issues to restrain proceedings at law, upon the ground of credits not allowed, and the defendant admits the credits in his answer and consents to allow them, the injunction should be dissolved as to the balance due.

1. *Bishop v. Wood*, 59 Ala. 253.

**Bill by More than One Plaintiff.** — It is immaterial how many plaintiffs there are. The answer of the defendant is entitled to the same credit as the bill regardless of the number of plaintiffs who have sworn to the bill. *Per* Chancellor Walworth, in *Manchester v. Dey*, 6 Paige (N. Y.) 295.

2. *Andrews v. Knox County*, 70 Ill. 65; *Gelston v. Rullman*, 15 Md. 260; *Dougrey v. Topping*, 4 Paige (N. Y.) 94; *Manchester v. Dey*, 6 Paige (N. Y.) 295.

**Sufficiency of Unverified Answer.** — Upon the question whether or not the injunction will be dissolved upon an unsworn answer where plaintiff waives an answer on oath. see *infra*, p. 1073.

3. *Williams v. Garrison*, 29 Ga. 503; *Loyless v. Howell*, 15 Ga. 554. See also, as to the dissolution of an injunction because of the insufficiency of the bill, *supra*, p. 1044.

4. *Mahone v. Central Bank*, 17 Ga. 111.

**Supplemental Bill After Answer.** — After a supplemental bill has been filed, a new answer swearing off the equities of the supplemental bill is necessary. *Rogers v. Solomons*, 17 Ga. 598.

5. *King v. Clark*, 3 Paige (N. Y.) 76, in which case it was declared that as the only object of the bill is to obtain the defendant's answer on oath, to be used on the trial at law, there can be no ground for restraining him after the discovery has been obtained, the sole purpose of the injunction being to delay the trial at law until the discovery has been obtained. See also *Crane v. Bunnell*, 10 Paige (N. Y.) 333; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Grafton v. Brady*, 7 N. J. Eq. 79.

6. *Grafton v. Brady*, 7 N. J. Eq. 79; *Webster v. Couch*, 6 Rand. (Va.) 519.

**Bill with Double Aspect.** — Where, however, the plaintiff insists that he has a good legal title, which, if he can establish it, will entitle him to a perpetual injunction, to which end he prays discovery, and claims in addition that, failing the legal title, he has a good equitable title in which, under the circumstances, he ought to be protected, the fact that a discovery has

**Dissolution Ipso Facto.** — The injunction is not dissolved by the coming in of the answer, *ipso facto*, but is a subsisting injunction until dissolved by the subsequent order of the chancellor.<sup>1</sup>

**b. EXCEPTIONS TO THE RULE** — (1) *In General.* — There are exceptions, however, to the rule that an injunction will be dissolved on the coming in of an answer denying all the equities of the bill, and whether or not the injunction will be dissolved depends in a large measure upon the nature and circumstances of the case.<sup>2</sup> The injunction will not be dissolved if any circum-

been made by the defendant will not entitle him to a dissolution. *Pater-son, etc., R. Co. v. Kamlah*, 42 N. J. Eq. 93.

1. *Turner v. Scott*, 5 Rand. (Va.) 332.

**Injunction Ordered to Stand Dissolved upon Coming in of Answer.** — It would seem that it is illegal and irregular to grant an injunction to continue in force until the coming in of the answer, and then to stand dissolved without a rule *nisi*, and that it is necessary that the injunction should be regularly dissolved on motion in open court. *Ross v. Woodville*, 4 Munf. (Va.) 324. But see *Beal v. Gibson*, 4 Hen. & M. (Va.) 481.

2. *Travers v. Stafford*, 2 Ves. 19, cited by Chancellor Kent in *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202. See also *Strathmore v. Bowes*, 2 Bro. C. C. 88; *Isaac v. Humpage*, 3 Bro. C. C. 463; *Gibbs v. Cole*, 3 P. Wms. 255; *Norway v. Rowe*, 19 Ves. Jr. 144; *Peacock v. Peacock*, 16 Ves. Jr. 49, which cases were cited in *Nelson v. Robinson*, *Hempst. (U. S.)* 464, and in *Swift v. Swift*, 13 Ga. 140. See, likewise, *Hanson v. Gardiner*, 7 Ves. Jr. 305, which case was cited by Burnett, J., in *Merced Min. Co. v. Fremont*, 7 Cal. 317. And see the following American cases:

*Alabama.* — *Rembert v. Brown*, 17 Ala. 671; *Turner v. Stephens*, 106 Ala. 546; *Miller v. Bates*, 35 Ala. 580; *Harrison v. Yerby*, 87 Ala. 185; *Weems v. Weems*, 73 Ala. 463; *Jackson v. Jackson*, 84 Ala. 343, 91 Ala. 292; *Moses v. Tompkins*, 84 Ala. 613; *Brooks v. Diaz*, 35 Ala. 599; *Elliott v. Sibley*, 101 Ala. 344.

*California.* — It is well settled that a dissolution of the injunction does not follow as a matter of course upon the filing of an answer denying the equity of the complaint. *Porter v. Jennings*, 89 Cal. 440.

*Florida.* — *Hayden v. Thrasher*, 20 Fla. 715, wherein it was said that there

are exceptions quite as important as the rule itself.

*Georgia.* — "A court of equity has discretion under peculiar circumstances to retain an injunction, even when the equity of the bill is sworn off." *Smith v. Bryan*, 34 Ga. 53. See also *Crutchfield v. Danilly*, 16 Ga. 432; *Holt v. Augusta Bank*, 9 Ga. 552; *Coffee v. Newsom*, 8 Ga. 444; *Field v. Howell*, 6 Ga. 423.

*Iowa.* — *Stevens v. Myers*, 11 Iowa 183; *Carrothers v. Newton Mineral Spring Co.*, 61 Iowa 681.

*Michigan.* — *Atty.-Gen. v. Oakland County Bank, Walk. (Mich.)* 90.

*Minnesota.* — *Pineo v. Hefelfinger*, 29 Minn. 183.

*New Hampshire.* — *Hollister v. Barkley*, 9 N. H. 230.

*New Jersey.* — In *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489, it was said: "Although the rule of the court is to dissolve an injunction founded upon the equity alleged in a bill, when that equity is fully denied by the answer, yet the rule is not imperative, but is subject to be modified according to the circumstances of each case, in the discretion of the court." See also *Stanton Mfg. Co. v. McFarland*, 52 N. J. Eq. 86; *Stitt v. Hilton*, 31 N. J. Eq. 285; *Firmstone v. De Camp*, 17 N. J. Eq. 309.

*New York.* — In *Monroe Bank v. Schermerhorn, Clarke Ch. (N. Y.)* 303, Vice-Chancellor Whittlesey said: "In such cases it is not of course to dissolve an injunction, even upon a full denial of the equity of the bill, if the court can see sufficient reason for retaining the property in the hands of the receiver." See also *Grill v. Wiswall*, 82 Hun (N. Y.) 281.

*Virginia.* — *Kahn v. Kerngood*, 80 Va. 342.

*West Virginia.* — *Shonk v. Knight*, 12 W. Va. 667.

*United States.* — *Poor v. Carleton*, 3 Sumn. (U. S.) 70.

stances are apparent which call for a departure from the general rule.<sup>1</sup>

(2) *Construction of Written Instrument.* — Where the answer denies the rights of the plaintiff as alleged in the bill to exist under a written instrument, the court will not be bound by the answer, but will itself construe the instrument and in its discretion, continue the injunction.<sup>2</sup>

(3) *Fraud.* — One of the most familiar exceptions to the rule is where the gravamen of the charge contained in the bill is fraud, and in such cases the chancellor may, in his discretion, and usually does, refuse to dissolve the injunction because of the denials in the answer.<sup>3</sup>

1. *Rembert v. Brown*, 17 Ala. 671; *Moses v. Tompkins*, 84 Ala. 613; *Holt v. Augusta Bank*, 9 Ga. 552; *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Sherrill v. Harrell*, 1 Ired. Eq. (N. Car.) 194.

**Auxiliary Evidence.** — In the exercise of its discretion the court will not dissolve an injunction where auxiliary evidence of complainant's right is before the court sufficient to sustain the bill, even though its material averments be denied by the answer. *Christie v. Griffing*, 24 N. J. Eq. 76; *Conover v. Ruckman*, 34 N. J. Eq. 293; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13.

**Burden of Proof Not on Plaintiff.** — Where a bill is filed by administrators to enjoin an action at law against them, for money had and received by them in their individual capacity, and the bill alleges that the money is the property of the decedent's estate, and that the defendant claims it under an alleged gift made by the decedent, and denies that such gift was made, the burden of disproving the alleged gift does not rest on the plaintiffs, and consequently an answer denying the allegation of the bill will not avail to dissolve the injunction. *Jackson v. Jackson*, 84 Ala. 343.

**Failure of Answer to Assert Any Right in the Defendant.** — It has been pointed out that the rule that an injunction should be dissolved upon the coming in of the answer is not applicable when the defendant does not assert any right to do the acts which he is restrained from doing. *Davis v. Zimmerman*, 91 Hun (N. Y.) 489, in which case an injunction had been granted preventing the defendants from intimidating the plaintiff's servants and persuading them to quit the plaintiff's service; the defendants in their answer denied the existence of the conspiracy and the acts of violence alleged, and it was held

that, as they did not assert that they had the right to intimidate by threats or by violence persons in the employment of the plaintiff or others seeking his employment, the answer was insufficient to justify the dissolution of the injunction.

2. *Morris Canal, etc., Co. v. Matthiesen*, 17 N. J. Eq. 385. See also *Clum v. Brewer*, 2 Curt. (U. S.) 506, in which case *Curtis, J.*, said: "In general, I apprehend that if the title to a temporary injunction depends on the construction of a deed, the court will construe it and act accordingly, whatever view of that question the answer may have presented."

3. *Dent v. Summerlin*, 12 Ga. 5; *Johnston v. Chicago, etc., R. Co.*, 58 Iowa 537; *Sinnett v. Moles*, 38 Iowa 25; *Stewart v. Johnston*, 44 Iowa 435; *Brigham v. White*, 44 Iowa 677; *Joseph v. McGill*, 52 Iowa 127; *Carrothers v. Newton Mineral Spring Co.*, 61 Iowa 681; *Dubuque, etc., R. Co. v. Cedar Falls, etc., R. Co.*, 76 Iowa 702; *Smith v. Short*, 11 Iowa 523; *Walker v. Stone*, 70 Iowa 103; *Jackson v. Darcy*, 1 N. J. Eq. 194; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Leigh v. Clark*, 11 N. J. Eq. 110; *Friedlander v. Ehrenworth*, 58 Tex. 350. See also *Henwood v. Jarvis*, 27 N. J. Eq. 247, and *Scott v. Hartman*, 26 N. J. Eq. 89, in which cases it was held that the injunction should be retained where the answer is not so full and unequivocal as to leave the matter free from doubt, and to satisfy the court that injustice will not be done the plaintiff by the dissolution of the injunction.

**The Reason for the Exception.** — "Fraud is usually established, if at all, by an aggregation of circumstances which, separately considered, may seem to be of slight importance, and which may

(4) *Continuance of Injunction to Prevent Irreparable Injury.* — When a motion is made to dissolve the injunction because of the denials in the answer, if the chancellor can see that the dissolution of the injunction may involve irreparable mischief to the plaintiff, or that, in the event of the plaintiff maintaining the truth of his version of the matter in controversy, he will have been subjected to greater injustice or inconvenience by the dissolution of the injunction before the final hearing than the defendant could be exposed to by a continuance of the injunction, or that there is a special propriety, under the peculiar circumstances of the case, in maintaining the *status quo* between the parties until the dispute between them can be finally determined on the evidence, he may, and often will, in the exercise of the discretion with which he is vested, retain the injunction until a final hearing can be had on the merits.<sup>1</sup>

become satisfactory only by the light which they throw upon each other. These circumstances are oftentimes shown by a cross-examination of the defendant's witnesses. As the petition and answer would not ordinarily sufficiently reveal the case to the court, however full and satisfactory the denials of the answer might be, it is deemed proper that the preliminary injunction should be continued to the hearing." *Per* Adams, J., in *Stewart v. Johnston*, 44 Iowa 435.

**Claimant of Benefits Under Fraudulent Acts.** — The rule that an injunction will not be dissolved where fraud is the gravamen of the bill applies when the denial is by a party claiming benefits under fraudulent acts, who, though not a party thereto, is charged with notice thereof. *Sinnett v. Moles*, 38 Iowa 25.

**Denials in Answer Supported by Facts Stated in Bill.** — Although the gravamen of the bill is fraud, the injunction will be denied upon the denials contained in the answer where there are facts stated in the bill which give support to such denials. *East Newark Co. v. Gilbert*, 12 N. J. Eq. 78.

**Unconscionable Acts of the Plaintiff.** — Although fraud is charged in the bill, the injunction will be dissolved upon the coming in of an answer fully denying the equity of the bill, where the bill presents a case which will not bear scrutiny *in foro conscientia* or where the plaintiff does not come into equity with clean hands. *Leigh v. Clark*, 11 N. J. Eq. 110.

1. *Alabama.* — *Scholze v. Steiner*, 100 Ala. 148; *Harrison v. Yerby*, 87 Ala.

10 Encyc. Pl. & Pr. — 67.

185; *Columbus, etc., R. Co. v. Withers*, 82 Ala. 190; *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 275; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Planters', etc., Bank v. Lauchheimer*, 102 Ala. 454; *Kinney v. Ensminger*, 87 Ala. 341; *Whitley v. Dunham Lumber Co.*, 89 Ala. 497; *Weems v. Roberts*, 96 Ala. 378; *Birmingham Min., etc., Co. v. Mutual Loan, etc., Co.*, 96 Ala. 364; *Davis v. Sowell*, 77 Ala. 262; *Jackson v. Jackson*, 91 Ala. 292; *Rice v. Tobias*, 83 Ala. 348; *Miller v. Bates*, 35 Ala. 580; *Rembert v. Brown*, 17 Ala. 667; *Satterfield v. John*, 53 Ala. 127.

*California.* — *Porter v. Jennings*, 89 Cal. 440; *Hunt v. Steese*, 75 Cal. 624; *Beaudry v. Felch*, 47 Cal. 183; *De Godey v. Godey*, 39 Cal. 166.

*Delaware.* — *Kersey v. Rash*, 3 Del. Ch. 321.

*Florida.* — *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; *Fuller v. Cason*, 26 Fla. 476; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *Linton v. Denham*, 6 Fla. 533; *Carter v. Bennett*, 6 Fla. 217; *Allen v. Hawley*, 6 Fla. 142.

*Georgia.* — *Edwards v. Banksmith*, 35 Ga. 213; *Horn v. Thomas*, 19 Ga. 270; *Shellman v. Scott*, R. M. Charl. (Ga.) 380; *Upson County R. Co. v. Sharman*, 37 Ga. 644.

*Iowa.* — *Walker v. Stone*, 70 Iowa 103, cited in *Huron Water-works Co. v. Huron*, 3 S. Dak. 610; *Carrothers v. Newton Mineral Spring Co.*, 61 Iowa 681; *Sinnett v. Moles*, 38 Iowa 25; *Fargo v. Ames*, 45 Iowa 404; *Stewart v. Johnston*, 44 Iowa 435; *Stevens v. Myers*, 11 Iowa 183; *Rice v. Smith*, 9

(5) *Insolvency of the Defendant.*—An allegation that the defendant is insolvent will sometimes influence the court to retain

Iowa 570; *Shricker v. Field*, 9 Iowa 366.

*Kansas.*—*St. Joseph, etc., R. Co. v. Dryden*, 11 Kan. 186.

*Louisiana.*—Where the facts alleged in the petition show that irreparable injury will ensue from the acts of the defendant, the denials in the answer will not be of any avail, and the court is without authority and discretion to dissolve the injunction even on bond *New Orleans Water-works Co. v. Oser*, 36 La. Ann. 918.

*Michigan.*—*Atty.-Gen. v. Oakland County Bank, Walk.* (Mich.) 90.

*Minnesota.*—*Pineo v. Heffelfinger*, 29 Minn. 183.

*Mississippi.*—In *Jones v. Brandon*, 60 Miss. 556, Cooper, J., said: "This case, we think, falls within that exception to this rule, which is, that when a serious or irreparable injury would be done to the complainant by a dissolution of the injunction, while that to the defendant by its retention would be slight and easily recompensed, the injunction should be retained until final hearing, even though the answer denies the equity of the bill."

To the same effect are *Stewart v. Belt*, (Miss. 1896) 19 So. Rep. 957; *Alcorn v. Sadler*, 66 Miss. 221; *Madison County v. Paxton*, 56 Miss. 679; *Bowen v. Hoskins*, 45 Miss. 189; *Richardson v. Lightcap*, 52 Miss. 508; *Coleman v. Hudspeth*, 49 Miss. 562.

*New Hampshire.*—*Hollister v. Barkley*, 9 N. H. 230, which case was cited in *Rembert v. Brown*, 17 Ala. 667, and in *Bibb v. Shackelford*, 38 Ala. 611.

*Nevada.*—*Magnet Min. Co. v. Page, etc., Silver Min. Co.*, 9 Nev. 346, *per* Belknap, J., *obiter*, citing *Monroe Bank v. Schermerhorn, Clarke Ch.* (N. Y.) 303.

*New Jersey.*—*Salomon v. Hertz*, 40 N. J. Eq. 400; *Pope v. Bell*, 35 N. J. Eq. 1; *Cregar v. Creamer*, 27 N. J. Eq. 281; *Simon v. Townsend*, 27 N. J. Eq. 302; *Mosser v. Pequest Min. Co.*, 26 N. J. Eq. 200; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Johnston v. Corey*, 25 N. J. Eq. 311; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Dey v. Dey*, 23 N. J. Eq. 88; *Shotwell v. Struble*, 21 N. J. Eq. 31; *Carr v. Weld*, 18 N. J. Eq. 41; *Irick v. Black*, 17 N. J. Eq. 189; *Morris Canal, etc., Co. v. Matthiesen*, 17 N. J. Eq. 385; *Firmstone v. De Camp*, 17 N. J.

Eq. 309; *Hoagland v. Titus*, 14 N. J. Eq. 81; *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 N. J. Eq. 302; *Morris Canal, etc., Co. v. Jersey City*, 11 N. J. Eq. 13; *Furman v. Clark*, 11 N. J. Eq. 135; *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Fleischman v. Young*, 9 N. J. Eq. 622; *Van Mater v. Holmes*, 6 N. J. Eq. 593; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Merwin v. Smith*, 2 N. J. Eq. 182. See also *Tainter v. Morristown*, 19 N. J. Eq. 46; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Hilles v. Parry*, 14 N. J. Eq. 380; *Murray v. Elston*, 23 N. J. Eq. 129; *Vansyckle v. Rorbach*, 6 N. J. Eq. 234; *Manko v. Chambersburgh*, 25 N. J. Eq. 168; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *French v. Snell*, 29 N. J. Eq. 95; *Stanton Mfg. Co. v. McFarland*, 52 N. J. Eq. 86.

*New York.*—*Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Monroe Bank v. Schermerhorn, Clarke Ch.* (N. Y.) 303; *Caldwell v. Commercial Warehouse Co.*, 4 Thomp. & C. (N. Y.) 179; *Sixth Ave. R. Co. v. Kerr*, 28 How. Pr. (N. Y. Supreme Ct.) 382.

*North Carolina.*—In *Lloyd v. Heath, Busb. Eq.* (N. Car.) 39, it was said: "In the forcible words of one of the chancellors, 'a tree that is cut down cannot be made to grow again.'" See also *McBrayer v. Hardin*, 7 Ired. Eq. (N. Car.) 1, 53 Am. Dec. 389; *Purnell v. Daniel*, 8 Ired. Eq. (N. Car.) 9; *Swindall v. Bradley*, 3 Jones Eq. (N. Car.) 353; *James v. Lemly*, 2 Ired. Eq. (N. Car.) 278; *Troy v. Norment*, 2 Jones Eq. (N. Car.) 318; *McNeely v. Steele, Busb. Eq.* (N. Car.) 240; *Capehart v. Mhoon, Busb. Eq.* (N. Car.) 30; *Wright v. Grist, Busb. Eq.* (N. Car.) 203; *Sherrill v. Harrell*, 1 Ired. Eq. (N. Car.) 194.

*South Dakota.*—*Huron Water-works Co. v. Huron*, 3 S. Dak. 610.

*Texas.*—*Friedlander v. Ehrenworth*, 58 Tex. 350. See also *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79, which case was cited in *Kinney v. Ensminger*, 87 Ala. 340.

*Virginia.*—*Kahn v. Kerngood*, 80 Va. 342, which case was cited with approval in *Huron Water-works Co. v. Huron*, 3 S. Dak. 610. See also the following cases: *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Jenkins v. Waller*, 80 Va.

the injunction in a case where the court is in doubt as to whether or not to dissolve the injunction.<sup>1</sup>

(6) *Harmlessness of Injunction.* — Where, from the very nature of the case, the injunction cannot possibly do the defendant any harm, the injunction may be retained notwithstanding his denial under oath of the equities of the bill.<sup>2</sup>

c. DISCRETION OF COURT. — The chancellor is invested with wide latitude in acting upon motions to dissolve injunctions on the denials of the answer.<sup>3</sup> But, nevertheless, he should exer-

668; Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. (Va.) 58; Beale v. Digges, 6 Gratt. (Va.) 582; Nelson v. Armstrong, 5 Gratt. (Va.) 354. See further 1 Bart. Ch. Pr. 467; and Sands' Suits in Equity, § 366.

*West Virginia.* — Shonk v. Knight, 12 W. Va. 667.

*United States.* — Orr v. Littlefield, 1 Woodb. & M. (U. S.) 13; Poor v. Carleton, 3 Sumn. (U. S.) 75.

*Illustrations of the Rule.* — In a *Suit for an Accounting*, and for the cancellation of a mortgage on the ground that the debt secured thereby has been paid, where the defendant speaks doubtfully of the amount claimed due and the security is worth at least double the largest sum claimed to be due, the safe rule is to retain the injunction until the accounting has been taken. Hinson v. Brooks, 67 Ala. 491.

*Adequate Remedy on Injunction Bond.* — Where the continuance of an injunction against interference with the flow of a stream and against the pollution of a stream, will merely preserve the existing state of things, and cannot work an injury to the defendant for which he may not obtain adequate compensation in damages by an action on the injunction bond, if finally it shall be ascertained that his dam will not endanger the health of the neighborhood, or, if it will, that it will not be of special injury to the plaintiff, the injunction should not be dissolved. Ogletree v. McQuaggs, 67 Ala. 580.

*Interests of the Public.* — In St. Joseph, etc., R. Co. v. Dryden, 11 Kan. 186, a temporary injunction was granted restraining the defendant from cutting down telegraph poles, forming part of a line along a railroad, and it was held that in view of the fact that the railroad company was in possession and was operating a great public highway in the interest of the public, the injunction should not have been dissolved on affidavits which were evenly balanced as

to whether the plaintiff had the right of way, but should have been continued until the rights of the parties had been determined upon a final hearing.

*Conflicting Evidence.* — Where the motion is based on the bill, answer, and affidavits, and the evidence is conflicting but tends strongly to show that the plaintiff is entitled to an injunction, the dissolution of the injunction in advance of a hearing and before the expiration of the time allowed for taking testimony is improper. Alcorn v. Sadler, 66 Miss. 221.

1. Turner v. Stephens, 106 Ala. 546.

*Nonresidence and Insolvency.* — In Murray v. Elston, 23 N. J. Eq. 127, it was held that the defendant's nonresidence and his want of assets within the jurisdiction of the court were circumstances which would influence the court to retain the injunction, notwithstanding the denials of the answer.

2. Hammond v. Hammond, Clarke Ch. (N. Y.) 151, in which case Vice-Chancellor Whittlesey refused to dissolve an injunction granted in a divorce suit against the husband's disposal of his property, although he denied any intention of disposing of his property, because if he had no such intention, the injunction would not annoy him. See also New v. Bame, 10 Paige (N. Y.) 502, where the defendant in an ordinary creditor's bill denied that he had property or choses in action or any interest in any property. Chancellor Walworth refused to dissolve the injunction, remarking that if the defendant "had no property which could be affected by the injunction, the retaining of that process could not possibly injure him; and that if he had property notwithstanding the denial in the answer, it was of importance to the complainant to retain the injunction, to protect such property from being disposed of by the defendant."

3. Whitley v. Dunham Lumber Co., 89 Ala. 493.

cise a sound legal discretion, and should not arbitrarily refuse to dissolve the injunction; and as a general rule, if no irreparable mischief can ensue to the plaintiff and the chancellor has any grave doubts as to the propriety of dissolving the injunction, it is improper to deny the defendant's motion.<sup>1</sup>

*d.* REQUISITES AND SUFFICIENCY OF THE ANSWER.—(1) *General Rules Applied.*—The answer in a suit for injunction is governed largely by the ordinary rules of equity pleading, as is illustrated in the notes, in which will be found applications of such rules; and the only topics which merit particular and extended discussion in this article are the requisites and sufficiency of an answer for the purposes of procuring the dissolution of the injunction.<sup>2</sup>

1. In *Pineo v. Heffelfinger*, 29 Minn. 183, it was said: "The circumstances of the case must appear to demand a refusal to dissolve, as at least a probable necessity to prevent great injustice to the plaintiff."

In *Greenin v. Hoey*, 9 N. J. Eq. 137, it was said: "If no irreparable mischief can ensue, nor any serious injury to the party, the court ought to have grave doubts as to the propriety of dissolving the injunction before they will deny to the defendant the benefit of his answer." See further the following cases: *Turner v. Stephens*, 106 Ala. 546; *Satterfield v. John*, 53 Ala. 127; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Scott v. Ames*, 11 N. J. Eq. 261; *Chetwood v. Brittan*, 2 N. J. Eq. 438.

**Power to Reinstate Injunction.**— "When a motion is made to dissolve an injunction, the court of chancery never continues it unless from some great necessity, because the court is always open to grant, and of course to reinstate an injunction whenever it shall appear proper to do so." *Ingles v. Straus*, 91 Va. 209, *quoting* 1 *Barton Ch. Pr.* 467.

**Test to Be Applied.**—It has been said that the test which should be applied is: Ought the party complaining to be protected or required to submit until the facts have been ascertained and experience has shown whether he will be subject to the injury apprehended? *Ogletree v. McQuaggs*, 67 Ala. 580, in which case an injunction was sought against a nuisance.

2. In the following cases familiar rules of equity pleading were applied to the answers in suits for injunctions:

**Coercion of Answer.**—The plaintiff

has a right to an answer to his bill, as the mere taking of the bill *pro confesso* may not, in all cases, serve that purpose, and the defendant may, if he is in reach of the court, be compelled to answer by coercive process. *McKim v. Odom*, 3 Bland (Md.) 407.

**Necessity for Answer.**—Although the plaintiff has waived discovery from the defendant, an answer is necessary as a pleading, and cannot be dispensed with. See also *Robinson v. Jefferson*, 1 Del. Ch. 244; *Gregory v. Nelson*, 41 Cal. 278; *Marriner v. Smith*, 27 Cal. 649.

**Accomplishment of Acts Complained of.**—The defendant may set up in his answer that the acts sought to be enjoined have already been accomplished. *Highway Com'rs v. Deboe*, 43 Ill. App. 25.

**Adoption of Codefendant's Answer.**—An answer simply averring that the facts stated in a paper purporting to be the answer of another defendant in the case "are substantially correct as far as these defendants are concerned," is formally and substantially defective. *Carr v. Weld*, 18 N. J. Eq. 41.

**Affirmative Defense.**—The defendant cannot give evidence of an affirmative defense of estoppel, unless he has pleaded it. *Delphi v. Startzman*, 104 Ind. 343. See also *Jordan v. Dobson*, 2 Abb. (U. S.) 398, holding that a patentee who complains of an infringement has a right, when his patent is to be assailed for want of novelty in the invention, to be informed distinctly, by the answer to his bill, that such a ground of defense will be taken.

**Argumentativeness.**—It is insufficient to meet the charges of the bill by argument and inference. *Spier v. Lambdin*, 45 Ga. 319.



**Affidavit in Lieu of Answer.** — Where the bill is sworn to, the injunction will not be dissolved upon a simple affidavit contradicting the facts upon which the plaintiff relies, but the defendant must put in his answer denying such material allegations and then move to dissolve on bill and answer.<sup>1</sup>

**Conclusions of Law.** — The answer must not set up mere conclusions of law. *McKinne v. Dickenson*, 24 Fla. 366; *Chase v. Manhardt*, 1 Bland (Md.) 333.

**Discovery.** — Where the plaintiff files a bill for discovery, the defendant, if he attempts to make his defense by answer instead of pleading or demurring to the bill, must answer the whole of the statements and charges contained in the bill, and all the interrogations legitimately founded on them, so far as is necessary to enable the plaintiff to have a complete decree against him. *Utica Bank v. Messereau*, 7 Paige (N. Y.) 517. Citing the ancient cases of *Stevens v. Stevens*, *Edwards v. Freemann*, and *Richardson v. Mitchell*, reported in *Sel. Cas. in Ch.* 51; and the more modern cases of *Rowe v. Teed*, 15 Ves. Jr. 372; *Somerville v. Mackay*, 16 Ves. Jr. 382, and *Mazarredo v. Maitland*, 3 Madd. 70; also *Story Eq. Pl.*, p. 465, §§ 606 and 607; *Hare on Discovery* 247; and 2 *Daniell's Ch. Pr.* 45, 248.

**Exculpatory Matters.** — One against whom an injunction is brought may, in his answer, set up that he did the acts complained of as agent for another, and this is no cause for striking his answer. *Cobb v. Hogue*, 87 Ga. 450.

**Fulness.** — If the defendant undertakes to answer, his answer must be full and perfect as to the material allegations of the bill. *Chappell v. Funk*, 57 Md. 465; *Keighler v. Savage Mfg. Co.*, 12 Md. 383.

In *California*, under *Civ. Prac. Act*, § 4865, where the complaint is verified, and the answer contains only general denials instead of a specific denial of each allegation of the complaint, the allegations of the complaint are to be taken as true. *Rupley v. Welch*, 23 Cal. 453.

**Impertinence.** — The answer must not go beyond the allegations of the bill and state matters which are not material to the case and do not constitute a defense. *Highway Com'rs v. Deboe*, 43 Ill. App. 25.

**Not Guilty.** — Where no discovery is sought, an answer that the defendant is not guilty of the grievances charged

in the manner and form alleged is sufficient. *Parkinson v. Trousdale*, 4 Ill. 367.

**Scandalous Matter.** — A positive denial in the answer is sufficient without resorting to imputations of dishonesty, falsehood, and perjury on the part of the plaintiff. *Burr v. Burton*, 18 Ark. 214.

**Waiver of Answer under Oath.** — In *Alabama* by statute the plaintiff may, if he chooses, waive an answer under oath, but an unsworn answer is "entitled to no more weight as evidence than the bill." *Lockhart v. Troy*, 48 Ala. 579.

**Plea to the Jurisdiction.** — The court cannot grant a perpetual injunction or hear an argument upon it pending a plea to the jurisdiction. *Fremont v. Merced Min. Co.*, 1 McAll. (U. S.) 267.

**Method of Pleading Contract.** — In *California* it is insufficient for the defendant to set up in his answer that he is doing and is about to do the acts complained of pursuant to a contract between the plaintiff and himself, but he should set forth the contract either *in hac verba* or according to its legal intentment and effect. *Wheeler v. West*, 71 Cal. 126.

In *Maryland* it has been held that where an answer refers to a paper as showing the dates and amounts of receipts from certain collaterals in the defendant's hands, to a correct and detailed statement of which the plaintiff was entitled, and such paper does not appear on the record, an exception for insufficiency in this particular must be sustained. *Keighler v. Savage Mfg. Co.*, 12 Md. 383.

**Answer by Corporation.** — A corporation is called upon and is compellable to answer all the allegations of the bill, but can do so under no higher sanction than its common seal. *Per Washington, J.*, in *Haight v. Morris Aqueduct*, 4 Wash. (U. S.) 601.

**Denial of Matters Conjunctively.** — The denial of two allegations conjunctively is not a denial of each, and is insufficient. *Pierson v. Ryerson*, 5 N. J. Eq. 196.

1. *Strange v. Longley*, 3 Barb. Ch. (N. Y.) 650.

(2) *Particularity and Clearness.* — The denials of the answer must be plain and distinct, and where the answer is vague and indefinite and does not deny the allegations of the bill in specific terms, the injunction will not be dissolved.<sup>1</sup> Nor should the answer be argumentative and inferential.<sup>2</sup> The material allegations of the bill must be denied with the same clearness and certainty as they are charged;<sup>3</sup> but where the charges in the bill are general and indefinite, great strictness will not be required in the answer.<sup>4</sup> The court will not excuse defects in the answer because they arose from the haste so usual in the preparation of answers to injunction bills.<sup>5</sup>

**In Case of Doubt** as to the sufficiency of the answer, the court may, in its discretion, refuse to dissolve the injunction.<sup>6</sup>

**General Denial.** — Where there is a particular charge it must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charge.<sup>7</sup>

1. *Holt v. Augusta Bank*, 9 Ga. 552; *Thomas v. Horn*, 24 Ga. 481; *Horn v. Thomas*, 19 Ga. 270; *Gates v. Ballou*, 54 Iowa 485.

In *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387, it was held that there must be such a negation of the equities of the bill as to be a specific denial of the circumstances upon which they are based.

2. *Coleman v. Hudspeth*, 49 Miss. 562.

3. *Buckner v. Bierne*, 9 Smed. & M. (Miss.) 304; *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190.

4. *Wingo v. Hardy*, 94 Ala. 184.

**Denial of Allegations Neither Admitted Nor Denied.** — An answer alleging that "the defendant denies each and every allegation in the complaint contained, and not hereinbefore specifically admitted or denied, or not hereinbefore specifically admitted or avoided," is neither general nor specific, but is a form of denial in no way provided for by the code system of pleading. *McEncroe v. Decker*, 58 How. Pr. (N. Y. Supreme Ct.) 250. *Citing People v. Snyder*, 41 N. Y. 397, and *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98, 42 N. Y. 217.

5. *McKinne v. Dickenson*, 24 Fla. 366.

6. *McKinne v. Dickenson*, 24 Fla. 366. *Citing James v. Lemly*, 2 Ired. Eq. (N. Car.) 278; *Miller v. Washburn*, 3 Ired. Eq. (N. Car.) 161; *Monroe v. McIntyre*, 6 Ired. Eq. (N. Car.) 65.

In *Sinnett v. Moles*, 38 Iowa 25, it was said: "If the statements of the

answer are such as to leave the mind of the court in reasonable doubt whether the equities are sufficiently answered, the injunction ought not to be dissolved."

7. *Everly v. Rice*, 4 N. J. Eq. 553. See also *Horner v. Jobs*, 13 N. J. Eq. 19, wherein it was said that "a mere formal or technical denial of the charges of the bill is not as of course sufficient to dissolve the injunction." Likewise see the following cases: *Wright v. Phillips*, 56 Ala. 69, holding that an answer denying in vague terms the correctness of an account, without designating anything in such account as incorrect, is insufficient to require the dissolution of an injunction; *Field v. Howell*, 6 Ga. 423; *Brown v. Fuller*, 13 N. J. Eq. 271; *Vreeland v. New Jersey Stone Co.*, 25 N. J. Eq. 140, in which case it was held, on the authority of *Story Eq. Pl.*, § 806, that where a combination and conspiracy among individual defendants are charged, a particular answer must be given and not a general denial; *Hughes v. Tinsley*, 80 Va. 259.

But in *Quackenbush v. Van Riper*, 1 N. J. Eq. 476, the rule was applied that where there are no specific charges in the bill requiring a specific answer, the general answer is sufficient. In that case the bill charged that an agreement had been made between the plaintiff and the defendant, and the defendant denied that he ever made any such bargain as was set forth in the bill. It was held that, although

**Conclusions of Law.** — It is insufficient for the answer to state mere conclusions of law; unless the facts upon which such conclusions are based are alleged, the answer will have no weight on a motion to dissolve.<sup>1</sup>

**Matters of Opinion.** — Where the answer consists of mere allegations of opinion founded upon belief only, it is insufficient to authorize the dissolution of the injunction.<sup>2</sup>

**Denial in Phraseology of Bill.** — It frequently happens that a denial in the precise phraseology of the bill is merely verbal and technical and is open to the objection of evasiveness.<sup>3</sup> The denial must not be made in such form as to leave it in doubt whether the denial is of the facts alleged or only of the facts in the form and manner and at the time alleged.<sup>4</sup>

the answer might have been more precise, it denied the one distinct fact contained in the charge, and was not open to the objection that it amounted to nothing more than a denial that the defendant had made a bargain to the like effect.

1. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; *Atty.-Gen. v. Oakland County Bank, Walk. (Mich.)* 90. See likewise *Trotter v. Paunley*, 39 Iowa 203. See also *Metropolitan El. R. Co. v. Manhattan R. Co.*, 65 How. Pr. (N. Y. Supreme Ct.) 277, holding that an affidavit upon which an order to show cause why an injunction should not be vacated should not state merely that the injury complained of "would not be irreparable and would be capable of being adequately compensated for in money," but should furnish the court with facts which will enable it to determine whether or not the injury will be irreparable.

**Validity of Patent.** — Where an answer is intended to form an issue to try the validity of a patent because it is not original, it ought to set out the names of places and persons where and by whom a like machine had been used before. *Orr v. Merrill*, 1 Woodb. & M. (U. S.) 376.

**Denial of Title.** — It would seem that an answer denying the plaintiff's ownership of land as charged in the bill should aver facts showing ownership in some other person. *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190, in which case the answer denied that the plaintiff owned the ultimate fee to the centre of an avenue, and alleged that it remained in the original grantor, without averring facts showing this to

be true. It was considered insufficient because it contained nothing more than a naked denial of a legal conclusion.

2. *Callaway v. Jones*, 19 Ga. 277. See also *Catlin v. Valentine*, 9 Paige (N. Y.) 575, 38 Am. Dec. 567, wherein it was held that "the answer of the defendant that a slaughter house would not be offensive to the complainants is matter of opinion merely, and is not such a denial of the whole equity of the bill as to entitle the defendant to a dissolution of the injunction as a matter of course." See further *infra*, XV. 11. *d. (g) Answer on Information and Belief.*

3. *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y. Supreme Ct.) 296; *Everly v. Rice*, 4 N. J. Eq. 553.

In *De Godey v. Godey*, 39 Cal. 157, it was charged that the defendant "fraudulently transported plaintiff into said K. county for the purpose of having her served with a copy of the summons and complaint" in an action to obtain a divorce; and the defendant alleged that it was not true that he "fraudulently transported the said plaintiff into the said K. county for the purpose of having her served with a copy of the summons and complaint in said action aforesaid." The answer was considered a palpable evasion of the substance of the charge which it pretended to answer, and utterly insufficient.

4. *McMahon v. O'Donnell*, 20 N. J. Eq. 306; *Tibbetts v. Burster*, 76 Iowa 176. See also *Halfman v. Spreen*, 75 Iowa 309.

In *Henry v. Watson*, 109 Ala. 335, it was charged that certain parties were engaged in cutting and removing timber, and an answer filed two weeks after the filing of the bill adopted the

(3) *Positiveness*. — A motion to dissolve an injunction upon bill and answer will not be sustained unless the answer is positive in its denials.<sup>1</sup> The denial must be of the same positive character as the averments upon which the plaintiff's equities rest.<sup>2</sup>

(4) *Denial of Plaintiff's Legal Conclusions*. — A mere denial of legal conclusions properly deducible from the facts stated in the bill is not sufficient, and on a motion to dissolve will not avail anything. The denial must be of material facts alleged in the bill, and must be full, clear, and complete, and without ambiguity or equivocation.<sup>3</sup>

(5) *Evasive Answers*. — The defendant must answer directly, without evasion, and must not merely answer the several charges literally, but he must traverse the substance of each charge. If the answer is deficient in frankness, candor, or precision, or is illusory, it will not entitle the defendant to a dissolution of the injunction.<sup>4</sup>

precise language of the bill and denied that the facts were true at the time of filing the answer. The answer was considered insufficient, the court saying: "It is well settled that a respondent must confess or traverse the substance of the averments of a bill, and that a literal denial is not enough, nor can he shelter himself by the use of equivocal, evasive, or doubtful terms."

1. Calhoun v. Cozens, 3 Ala. 498; Thompson v. Adams, 2 Ind. 151; Atty.-Gen. v. Oakland County Bank, Walk. (Mich.) 90; Hooker v. Austin, 41 Miss. 717; Richardson v. Lightcap, 52 Miss. 508; Miller v. McDougall, 44 Miss. 689; Buckner v. Bierne, 9 Smed. & M. (Miss.) 304; Ward v. Van Bokkelen, 1 Paige (N. Y.) 100; Huron Water-works Co. v. Huron, 3 S. Dak. 616; Mason City Salt, etc., Co. v. Mason, 23 W. Va. 211; Nelson v. Robinson, Hempst. (U. S.) 464; Poor v. Carleton, 3 Sumn. (U. S.) 70.

2. Huron Water-works Co. v. Huron, 3 S. Dak. 616.

3. Forney v. Calhoun County, 84 Ala. 215; Columbus, etc., R. Co. v. Witherow, 82 Ala. 190; Judd v. Hatch, 31 Iowa 491; Hanlon v. Westchester County, 8 Abb. Pr. N. S. (N. Y. Supreme Ct.) 261, in which case on a motion to continue the injunction it was held that a general denial that the plaintiff would suffer irreparable injury, without denying specific grounds set forth by the plaintiff, was insufficient; Robinson v. Cathcart, 2 Cranch (C. C.) 590.

**Construction of Contract.** — An answer admitting material allegations of the bill as to the existence of a contract,

and denying only the construction put upon the contract by the plaintiff, is insufficient to authorize the dissolution of the injunction. Hughes v. Tinsley, 80 Va. 259. See also Van Kuren v. Trenton Locomotive, etc., Mfg. Co., 13 N. J. Eq. 302, in which case the bill set forth a contract and alleged that the same constituted a partnership. It was held that an answer denying, as a matter of opinion and belief, that the agreement did constitute a partnership, set up a mere inference and conclusion of law and not a matter of fact, and was not therefore properly a denial of the equity of the bill.

4. *Alabama*. — Rembert v. Brown, 17 Ala. 667; Forney v. Calhoun County, 84 Ala. 215; Barnard v. Davis, 54 Ala. 565; Henry v. Watson, 109 Ala. 335; Grady v. Robinson, 28 Ala. 289; Savage v. Benham, 17 Ala. 119.

*California*. — Fuhn v. Weber, 38 Cal. 636.

*Georgia*. — Swift v. Swift, 13 Ga. 140; Upson County R. Co. v. Sharman, 37 Ga. 644.

*Idaho*. — Oro Fino, etc., Min. Co. v. Cullen, 1 Idaho 115.

*Maryland*. — Salmon v. Claggett, 3 Bland (Md.) 125; Williams v. Hall, reported in Jones v. Magill, 1 Bland (Md.) 177, note i.

*New Hampshire*. — Hollister v. Barkley, 9 N. H. 230.

*New Jersey*. — Scott v. Hartman, 26 N. J. Eq. 89; Richardson v. Peacock, 26 N. J. Eq. 40; Teasey v. Baker, 19 N. J. Eq. 61; Smith v. Loomis, 5 N. J. Eq. 60; Scull v. Reeves, 3 N. J. Eq. 84.

*New York*. — American Grocer Pub.

(6) *Fulness*. — The answer must be a full and satisfactory denial, and must controvert directly every material allegation of the bill, otherwise the injunction will not be dissolved; and all the interrogatories founded upon and incidental to the charges contained in the bill must be fully answered.<sup>1</sup>

**Defendant's Right to Answer Fully.** — The defendant, in denying a charge against himself, has a right to state the whole transaction.<sup>2</sup>

**Denial of Fraud.** — As fraud is a proper and familiar head of equity jurisdiction, where it is relied upon as a ground for injunction, unless the answer be full and satisfactory, the injunc-

*Assoc. v. Grocer Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402.

*North Carolina*. — *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 434; *Sherrill v. Harrell*, 1 Ired. Eq. (N. Car.) 194; *Little v. Marsh*, 2 Ired. Eq. (N. Car.) 18.

*United States*. — *Poor v. Carleton*, 3 Sumn. (U. S.) 75.

See also *Consolidated Electric Light Co. v. People's Electric Light, etc., Co.*, 94 Ala. 372, holding that where it is averred in the bill that the defendant is about to place electric wires in a street which will interfere with the wires of plaintiff, an answer which does not deny the acts done and intention entertained by the defendant, as charged in the bill, but denies the danger that will ensue "with a reasonably prudent management of complainant's system of wires," is insufficient to authorize the dissolution of the injunction.

**Denial of Fraud.** — Where, in a creditor's bill, it is charged that the demand 'upon which' an attachment has been issued is fraudulent, the attaching creditors should meet the charge fairly and without evasion, and should not only deny that it is feigned, and assert that there was a valuable consideration, but should also state fully the nature of the consideration, whether it was for money loaned, labor done, for goods or other property sold or otherwise, and the particular nature and kind of service or property if any. *Cartwright v. Bamberger*, 90 Ala. 405.

1. *Florida*. — *McKinne v. Dickenson*, 24 Fla. 366; *Linton v. Denham*, 6 Fla. 533.

*Georgia*. — *Grubbs v. McGlawn*, 39 Ga. 672; *Moody v. Metcalf*, 51 Ga. 128; *Thomas v. Horn*, 24 Ga. 481; *Farmers', etc., Bank v. Ruse*, 27 Ga. 391; *Lawrence v. Philpot*, 27 Ga. 585; *Field v. Howell*, 6 Ga. 423.

*Idaho*. — *Oro Fino, etc., Min. Co. v. Cullen*, 1 Idaho 113.

*Iowa*. — *Sinnett v. Moles*, 38 Iowa 25.

*Maryland*. — *Salmon v. Claggett*, 3 Bland (Md.) 128.

*Minnesota*. — *Pineo v. Heffelfinger*, 29 Minn. 183.

*New Jersey*. — *Miller v. Ford*, 1 N. J. Eq. 358; *Everly v. Rice*, 4 N. J. Eq. 553; *Gibby v. Hall*, 27 N. J. Eq. 282; *Robert v. Hodges*, 16 N. J. Eq. 299; *Scull v. Reeves*, 3 N. J. Eq. 84; *Perkins v. Collins*, 3 N. J. Eq. 482, *per* Chancellor Vroom; *Vreeland v. New Jersey Stone Co.*, 25 N. J. Eq. 140; *Shotwell v. Struble*, 21 N. J. Eq. 31.

*United States*. — *Northern Pac. R. Co. v. Burlington, etc., R. Co.*, 2 McCrary (U. S.) 203, 1 Am. & Eng. R. Cas. 8; *Robinson v. Cathcart*, 2 Cranch (C. C.) 590.

**Insufficiency of Answer as Respects Matters Not Relied Upon for Injunction.**

— Where the answer fully denies the equity upon which the injunction is based, it is no reason for denying the motion to dissolve, that the answer in other respects is not full and that some of the exceptions are well taken, as the dissolution depends upon the full denial of the facts which constitute the equity upon which the injunction is founded. *Mitchell v. Mitchell*, 20 N. J. Eq. 234.

2. *Youle v. Richards*, 1 N. J. Eq. 534. See also *Quackenbush v. Van Riper*, 1 N. J. Eq. 476, holding that a defendant may deny a fact alleged in the bill, and after denying it charge what the facts are.

**Discovery.** — Where a bill of discovery is filed in aid of a defense at law and an injunction is asked, nothing in the answer can be deemed impertinent which tends to disprove the existence of such a defense as is stated in the bill of discovery. *Jewett v. Belden*, 11 Paige (N. Y.) 618.

tion ought to be retained until the final hearing, and, if an injunction will be dissolved at all upon an answer denying fraud, the court will hold the defendant to a strict rule in answering.<sup>1</sup>

(7) *Admissions in the Answer.* — All matters which are well pleaded in the bill and which are not denied in the answer will be taken as true, and as having been admitted, and likewise allegations in the bill which are expressly admitted will be taken as true; and where, taking the matters not denied and those expressly admitted as true, sufficient equity remains in the bill to support the injunction, it is an invariable rule to retain the injunction.<sup>2</sup>

1. *Barnard v. Davis*, 54 Ala. 565; *Smith v. Loomis*, 5 N. J. Eq. 60; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 204. See also *Mechanics' Bank v. Levy*, 1 Edw. Ch. (N. Y.) 316; *Vreeland v. New Jersey Stone Co.*, 25 N. J. Eq. 140; *Scull v. Reeves*, 3 N. J. Eq. 84; and *Hastings v. Palmer, Clarke Ch.* (N. Y.) 52.

In *Litchfield v. Pelton*, 6 Barb. (N. Y.) 187, it was declared that "a general denial of fraud cannot be urged successfully against the order for an injunction where facts are admitted from which the court or a jury may properly infer a fraudulent intent."

2. *Alabama.* — *Miller v. Bates*, 35 Ala. 580; *Moses v. Johnson*, 88 Ala. 517; *Forney v. Calhoun County*, 84 Ala. 215; *Moses v. Tompkins*, 84 Ala. 616; *Columbus, etc., R. Co. v. Withers*, 82 Ala. 190; *Garrett v. Lynch*, 44 Ala. 683.

*Florida.* — *Linton v. Denham*, 6 Fla. 533.

*Georgia.* — In *Coffee v. Newsom*, 8 Ga. 444, it was said: "It is always a good answer to an application to dissolve an injunction upon bill and answer, that the equity of the bill upon which the injunction rests is not denied by the defendant, whether from ignorance of the facts or any other cause." See also *Hargraves v. Jones*, 27 Ga. 233; *Wooten v. Smith*, 27 Ga. 216; *Pledger v. McCauley*, 25 Ga. 46; *Jackson v. Jones*, 25 Ga. 93; *Crutchfield v. Danilly*, 16 Ga. 432; *Lewis v. Leak*, 9 Ga. 95; *Hammett v. Christie*, 21 Ga. 251; *McGinnis v. Justices*, 30 Ga. 47; *Smith v. Bryan*, 34 Ga. 53; *Justices v. Griffin, etc., Plank Road Co.*, 11 Ga. 246.

*Idaho.* — *Oro Fino, etc., Min. Co. v. Cullen*, 1 Idaho 113, citing 1 *Whittaker Pr.* 479.

*Iowa.* — *Fargo v. Ames*, 45 Iowa 494.

*Maryland.* — *Crowe v. Wilson*, 65 Md. 479; *Sisk v. Garey*, 27 Md. 401; *State v. Northern Cent. R. Co.*, 18 Md. 213; *Hamilton v. Whitridge*, 11 Md. 128; *McClellan v. Crook*, 4 Md. Ch. 398; *Iglehart v. Lee*, 4 Md. Ch. 514; *Washington University v. Green*, 1 Md. Ch. 97; *Brown v. Stewart*, 1 Md. Ch. 87; *Chase v. Manhardt*, 1 Bland (Md.) 333; *Salmon v. Clagett*, 3 Bland (Md.) 125; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Hardy v. Summers*, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; *Hutchins v. Hope*, 12 Gill & J. (Md.) 256.

*Michigan.* — *Atty.-Gen. v. Oakland County Bank, Walk.* (Mich.) 90.

*Mississippi.* — *Coleman v. Hudspeth*, 49 Miss. 567; *Richardson v. Lightcap*, 52 Miss. 508. See also *Craft v. Bullard, Smed. & M. Ch.* (Miss.) 366, to the effect that where the bill fails to show facts entitling the plaintiff to an injunction, but the defendant discloses such facts by his answer, the court should deny a motion to dissolve the injunction.

*New Hampshire.* — *Hollister v. Barkley*, 9 N. H. 230, cited in *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511.

*New Jersey.* — *Conover v. Ruckman*, 34 N. J. Eq. 293; *Woodruff v. Ritter*, 26 N. J. Eq. 86; *Kuhl v. Martin*, 26 N. J. Eq. 60; *Johnston v. Corey*, 25 N. J. Eq. 311; *Sutro v. Wagner*, 23 N. J. Eq. 388; *Irick v. Black*, 17 N. J. Eq. 189; *Robert v. Hodges*, 16 N. J. Eq. 299; *Central R. Co. v. Bunn*, 11 N. J. Eq. 336; *Merwin v. Smith*, 2 N. J. Eq. 182.

*New York.* — *Davis v. Zimmerman*, 91 Hun (N. Y.) 489; *Grill v. Wiswall*, 82 Hun (N. Y.) 281; *Knox v. McDonald*, 25 Hun (N. Y.) 270; *Storer v. Coe*, 2 Bosw. (N. Y.) 661; *McEncroe v. Decker*, 58 How. Pr. (N. Y. Supreme Ct.) 250; *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511; *Litchfield v. Pelton*,

**Failure to Deny Immaterial Allegations.** — Where the defendant so far denies the allegations of the bill as to leave it without equity as respects the remaining facts not denied by the answer, the injunction will be dissolved notwithstanding the failure of the defendant to deny such matters as constitute no ground for sustaining the injunction.<sup>1</sup> Likewise, although the answer contains admissions, yet if averments in the bill are denied which if taken from the bill would divest it of every equity on which relief can be based, the injunction should be dissolved.<sup>2</sup>

**Admissions of One Codefendant.** — The answer of one codefendant is not, on a motion to dissolve, evidence against the other defendants, and admissions can be used only against the defendant who makes them.<sup>3</sup>

(8) **Improbability of Answer.** — Where the answer is improbable and unworthy of belief, the injunction will not be dissolved. Any extreme improbability in the statement of the defendant, or any circumstances which excite the chancellor's suspicion as to the truth of the answer, will justify the retention of the injunction notwithstanding technical denials in the answer.<sup>4</sup>

6 Barb. (N. Y.) 187; *Wakeman v. Gillespie*, 5 Paige (N. Y.) 112; Atty.-Gen. v. Cohoes Co., 6 Paige (N. Y.) 133; *Hills v. Miller*, 3 Paige (N. Y.) 254; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Fulton Bank v. New York, etc., Canal Co.*, 3 Paige (N. Y.) 31; *Manchester v. Dey*, 6 Paige (N. Y.) 296; *Grimstone v. Carter*, 3 Paige (N. Y.) 421; *Skinner v. White*, 17 Johns. (N. Y.) 357; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202.

*Virginia.* — *Vaught v. Rider*, 83 Va. 659; *Hughes v. Tinsley*, 80 Va. 259; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Shirley v. Long*, 6 Rand. (Va.) 764; *Skipwith v. Strother*, 3 Rand. (Va.) 214.

*West Virginia.* — *Mason City Salt, etc., Co. v. Mason*, 23 W. Va. 211, 7 Am. & Eng. Corp. Cas. 426.

*United States.* — *Robinson v. Cathcart*, 2 Cranch (C. C.) 590; *Young v. Grundy*, 6 Cranch (U. S.) 51; *Northern Pac. R. Co. v. Burlington, etc., R. Co.*, 2 McCrary (U. S.) 203, 1 Am. & Eng. R. Cas. 8.

1. *Rogers v. Bradford*, 29 Ala. 474; *Rice v. Tobias*, 83 Ala. 348; *Moore v. Barclay*, 23 Ala. 739; *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 N. J. Eq. 302. See also *Stitt v. Hilton*, 31 N. J. Eq. 285, in which case it was stated as a general rule that if the answer fully denies the equity which

moves the court to grant the injunction it will be dissolved, though there are other parts of the bill which remain unanswered.

2. *Clark v. American Coal Co.*, 86 Iowa 451.

**Facts Admitted Overcome Denials.** — In *Miller v. Bates*, 35 Ala. 580, it was held that facts in the answer showing that a charge of usury upon which the bill rested was true sustain the bill, notwithstanding any express denial of usury.

3. *Hudson v. Crutchfield*, 12 Ala. 433; *Brawner v. Franklin*, 4 Gill (Md.) 463.

4. In *Morris Canal, etc., Co. v. Jersey City*, 11 N. J. Eq. 13, Chancellor Williamson said: "It is not the mere denial of the facts on which a plaintiff's equity is founded that amounts, in every case, to such a denial of the equity of the bill as to entitle the defendant to a dissolution of an injunction. The facts must be of a character to entitle the denial of them by the answer to as much credit, at least, as their affirmation by the complainant is entitled to." See also *Hammett v. Christie*, 21 Ga. 251; *Pineo v. Heffelfinger*, 29 Minn. 183; *Magnet Min. Co. v. Page, etc., Silver Min. Co.*, 9 Nev. 346, *per* Belknap, J., *obiter*; *Williams v. Kingsley*, 5 N. J. Eq. 119, in which case the defendant did not produce writings which the circumstances led

(9) *Answer on Information and Belief*. — The settled rule is that where the allegations of facts in the bill are positive, and they are not charged to be within the knowledge of the defendant, the denial of them upon information and belief in the answer will not warrant the dissolution of the injunction.<sup>1</sup> Where some

the chancellor to expect that he would produce; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Fleischman v. Young*, 9 N. J. Eq. 620; *Dey v. Dey*, 23 N. J. Eq. 88; *Caldwell v. Commercial Warehouse Co.*, 4 Thomp. & C. (N. Y.) 179, 1 Hun (N. Y.) 718; *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 51 How. Pr. (N. Y. Supreme Ct.) 402; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.) 434; *Skipwith v. Strother*, 3 Rand. (Va.) 214.

**Answer Overcome by Exhibits.** — Where books and papers exhibited in compliance with the prayer of the bill show that the facts are different from what the defendant conceives and represents them to be, it is proper to continue the injunction. *Williams v. Hall*, reported in *Jones v. Magill*, 1 Bland (Md.) 177, note *i*. See also *Camden, etc., R. Co. v. Atlantic City Pass. R. Co.*, 26 N. J. Eq. 69, holding that where a written agreement referred to in the answer and produced and used in the argument gives color to the plaintiff's claim, the injunction should not be dissolved.

1. *Alabama*. — *Calhoun v. Cozens*, 3 Ala. 498; *Casey v. Holmes*, 10 Ala. 776, in which it was held that the opinion of a defendant generally expressed that a matter was transacted pursuant to the law cannot outweigh the positive declarations in the bill stating facts specially which show that the law was disregarded.

*California*. — *Porter v. Jennings*, 89 Cal. 444.

*Florida*. — *Hunter v. Bradford*, 3 Fla. 269.

*Georgia*. — *Holmes v. George*, 24 Ga. 636; *Callaway v. Jones*, 19 Ga. 277; *Ketchens v. Howard*, 30 Ga. 931; *Beckham v. Newton*, 21 Ga. 187, in which case it was said that "unless there is enough in the answer, sworn to positively, to displace complainant's equity, the injunction ought to be retained;" *Coffee v. Newsom*, 8 Ga. 444; *Read v. Dews*, R. M. Charl. (Ga.) 358.

*Iowa*. — *Sinnett v. Moles*, 38 Iowa 25, in which case it was said: "The answer must be of such a character as to entitle

it to as much credit as the affirmation of the bill in order to authorize the dissolution of an injunction thereon."

*Maryland*. — *Kent v. Ricards*, 3 Md. Ch. 392; *Iglehart v. Lee*, 4 Md. Ch. 514; *Doub v. Barnes*, 4 Gill (Md.) 1, 1 Md. Ch. 127; *Alexander v. Ghiselin*, 5 Gill (Md.) 138.

*Michigan*. — *Atty.-Gen. v. Oakland County Bank*, Walk. (Mich.) 90.

*Mississippi*. — *Richardson v. Lightcap*, 52 Miss. 508, *per Simrall*, C. J.; *Miller v. McDougall*, 44 Miss. 682; *Hooker v. Austin*, 41 Miss. 717; *Buckner v. Bierne*, 9 Smed. & M. (Miss.) 304; *McGuffie v. Planters' Bank*, Freem. (Miss.) 383.

*Nevada*. — *Magnet Min. Co. v. Page, etc.*, *Silver Min. Co.*, 9 Nev. 346, *per Belknap, J., obiter*.

*New Jersey*. — *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Miller v. Ford*, 1 N. J. Eq. 358; *Everly v. Rice*, 4 N. J. Eq. 553; *Robert v. Hodges*, 16 N. J. Eq. 299; *Williams v. Kingsley*, 5 N. J. Eq. 119; *Pierson v. Ryerson*, 5 N. J. Eq. 196; *Higbee v. Camden, etc., R. Co.*, 19 N. J. Eq. 276; *De Groot v. Wright*, 7 N. J. Eq. 516; *Lines v. Spear*, 8 N. J. Eq. 154; *Morris Canal, etc., Co. v. Jersey City*, 11 N. J. Eq. 13.

*New York*. — *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Norton v. Woods*, 5 Paige (N. Y.) 249; *Grimstone v. Carter*, 3 Paige (N. Y.) 421; *Fulton Bank v. New York, etc., Canal Co.*, 1 Paige (N. Y.) 311; *Rodgers v. Rodgers*, 1 Paige (N. Y.) 426; *Frost v. Myrick*, 1 Barb. (N. Y.) 362; *Apthorpe v. Comstock*, *Hopk. (N. Y.)* 143; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202.

*North Carolina*. — *Christmas v. Campbell*, 1 Hayw. (N. Car.) 123.

*United States*. — *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Nelson v. Robinson*, *Hempst. (U. S.)* 464; *U. S. v. Sampereyac*, *Hempst. (U. S.)* 118; *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685; *U. S. v. Parrott*, 1 McAll. (U. S.) 300.

**A Statute Allowing Denials on Information and Belief** (Cal. Code Civ. Pro., § 437) makes such a denial sufficient as a pleading and sufficient to raise an issue; but notwithstanding the statute



of the denials are made positively and others on information and belief, the answer should distinguish what is denied on personal knowledge from that which is denied on information and belief.<sup>1</sup>

**Reason of the Rule.** — A denial on information and belief is not sufficient to authorize the dissolution of the injunction, because it is not entitled to the same weight as sworn statements contained in the bill made positively by the plaintiff.<sup>2</sup>

**Disclaimer of Knowledge.** — A disclaimer in the answer of personal knowledge, or a denial of all knowledge and belief, is insufficient to justify the dissolution of the injunction.<sup>3</sup>

**Inability of Defendant to Answer Positively.** — The defendant is required to answer the bill directly and of his own personal knowledge, and if his personal knowledge is not sufficient, he cannot make up the deficiency by affidavits, but must submit until a hearing can be had upon the merits.<sup>4</sup>

**Matters Charged in the Bill on Information and Belief.** — Where a charge is

such denial will not serve as the basis of a motion to dissolve the injunction. *Porter v. Jennings*, 89 Cal. 445.

1. *Miller v. McDougal*, 44 Miss. 682.

2. *Nelson v. Robinson*, Hempst. (U. S.) 464.

**Fraud.** — A denial of fraud on information and belief is not sufficient to justify the dissolution of the injunction. *Kinnaman v. Henry*, N. J. Ch. 1817, in which case Chancellor Williamson said: "I do not consider the fraud in this case as sufficiently denied to entitle the defendants to a dissolution of the injunction upon the ground of the whole equity of the bill being denied. The defendants are not charged as being parties or privies to the fraud, and therefore it is impossible, in the nature of things, if they were not privy to it, that they should be able positively to deny the fraud," *quoted in* *Everly v. Rice*, 4 N. J. Eq. 553. See likewise *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202, in which case Chancellor Kent said: "It is true, the defendants may have given all the denial in their power, but the fraud may exist notwithstanding, and consistently with their ignorance or the sincerity of their belief. \* \* \* The case does not fall within the reason of the general rule, that the injunction is to be dissolved when an answer comes in and denies all the equity of the bill."

3. *Richardson v. Lightcap*, 52 Miss. 508; *Buckner v. Bierne*, 9 Smed. & M. (Miss.) 304; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Rodgers v. Rodgers*, 1 Paige (N. Y.) 424; *Fulton Bank v. New*

*York, etc., Canal Co.*, 1 Paige (N. Y.) 311; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476; *Gates v. Ballou*, 54 Iowa 485.

In *Coffee v. Newsom*, 8 Ga. 444, it was said: "Where the equity of an injunction bill is not charged to be within the knowledge of the defendant, as is the case before us, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone."

"A declaration by the defendant that he does not know or admit any particular allegation of the bill to be true is not a denial, although it is sufficient to put the plaintiff to the proof of the fact, upon the hearing." *Per* Green, J., in *Randolph v. Randolph*, 6 Rand. (Va.) 194. See also *Young v. Grundy*, 6 Cranch (U. S.) 51; *Robinson v. Cathcart*, 2 Cranch (C. C.) 590. See also *Hunter v. Bradford*, 3 Fla. 269, holding that matters which the defendant declares that he "cannot admit or deny" are not to be deemed as sufficiently denied to authorize the dissolution of the injunction; *citing* *Apthorpe v. Comstock*, Hopk. (N. Y.) 148, and *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202.

4. *Per* Chancellor Vroom, in *Perkins v. Collins*, 3 N. J. Eq. 482. See also *Bell v. Romaine*, 30 N. J. Eq. 24; *Morris Canal, etc., Co. v. Jersey City*, 11 N. J. Eq. 13; *Lines v. Spear*, 8 N. J. Eq. 154; *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 685; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 204.

made in the bill on information and belief only, and the affidavit annexed thereto is entirely silent as to any knowledge or information possessed by the plaintiff as to the matter so charged, an answer denying such charge on information and belief is a sufficient denial of the bill to entitle the defendant to a dissolution of the injunction.<sup>1</sup>

**Defendant's Apparent Want of Knowledge.** — Regardless of the positive statements of the answer and the oath thereto, where the facts alleged in the bill are such that the defendant can only deny the equity of the bill upon information and belief, the injunction will be retained.<sup>2</sup>

**Sufficiency of Answer as Pleading.** — Although an answer founded upon hearsay denying the plaintiff's equity is not sufficient to entitle the defendant to a dissolution on the bill and answer, yet such answer on the final hearing is sufficient to put the plaintiff upon the proof of the averments contained in his bill.<sup>3</sup>

1. *Kaighn v. Fuller*, 14 N. J. Eq. 419.

**Failure to Make Person Having Knowledge Defendant.** — Where the plaintiff knows that an answer on information and belief is all the answer the defendant can make, and has omitted to make a defendant one who should have been made a defendant, and who can answer from his own knowledge to the existence or non-existence of the matters charged in the bill, an answer on information and belief is sufficient to authorize the dissolution of the injunction. *DeGroot v. Wright*, 7 N. J. Eq. 516.

**Two Defendants One of Whom Only Has Knowledge.** — Where there are two defendants, and the only one who has knowledge of the facts denies the equity of the bill, the injunction will be dissolved, although it has been issued only against the other defendant, and such other defendant answers on information and belief only. *Rockwell v. Lawrence*, 5 N. J. Eq. 20, in which case the bill was brought for specific performance and an ancillary injunction against a purchaser from the defendant against whom specific performance was sought, and the injunction was dissolved upon the denials of the last-mentioned defendant, although the defendant enjoined denied the facts only on information and belief.

2. *Astie v. Leeming*, 53 How. Pr. (N. Y. Supreme Ct.) 397; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *McGuffie v. Planters' Bank*, *Freem.* (Miss.) 383. See also *Fulton Bank v. New York, etc., Canal Co.*, 1 Paige (N. Y.)

311, in which case Chancellor Walworth said: "It is not, however, a matter of course to dissolve the injunction where the defendant acts in a representative character, and founds his denial of the equity of the bill upon information and belief only." But see *Campbell v. Runyon*, 42 N. J. Eq. 483, in which case the bill alleged matters within the knowledge of the defendant's agent, and the plaintiff obtained an injunction upon his own affidavit alone. The injunction was dissolved upon the answer of the defendant, although the matter in question was not within the defendant's knowledge, an affidavit of his agent denying the matters alleged in the bill being appended to the answer. *Citing Merwin v. Smith*, 2 N. J. Eq. 182; *Coale v. Chase*, 1 Bland (Md.) 136, in which case it was held that to obtain the dissolution of an injunction it is sufficient that an executor or administrator, in stating facts which from the nature of the case could only have been personally known to his testator or intestate, constitutes them upon information and belief; and *Clayton v. Lyle*, 2 Jones Eq. (N. Car.) 188, in which case an administrator stated in his answer that he was ignorant of the facts alleged in the bill, but did understand and believe the facts of the case to be totally different from those stated in the bill, and the injunction was dissolved because the answer was strengthened by some of the allegations in the bill and appeared to be probable and consistent.

3. *Doub v. Barnes*, 1 Md. Ch. 127.

(10) *Allegations Not Responsive to the Bill.* — It is well settled that on the coming in of the answer the defendant can ask for a dissolution of the injunction upon so much of his answer only as is responsive to the bill, and that matters in avoidance cannot be relied upon in support of the motion to dissolve.<sup>1</sup> The fact that

See also Philadelphia Trust, etc., Co. v. Scott, 45 Md. 451. *Citing* Hughes v. Garner, 2 Y. & Coll. 328; Waters v. Creagh, 4 Stew. & P. (Ala.) 410; Drury v. Conner, 6 Har. & J. (Md.) 289; Knickerbacker v. Harris, 1 Paige (N. Y.) 209. See further Davis v. Hart, 66 Miss. 642, *citing* M'Gehee v. White, 31 Miss. 41.

**Degree of Proof Required by the Plaintiff.** — An answer wherein the plaintiff denies having any personal knowledge of the matters charged in the bill amounts only to such a formal denial of the bill as puts the plaintiff to the necessity of making ordinary proof only, and does not require the proof of two witnesses, or of one witness with corroborating circumstances, to overcome the force of such a denial in an answer as this. Paulding v. Watson, 21 Ala. 279.

In *Idaho* an allegation of the bill denied on information and belief only must, on the final hearing, be taken as unanswered. Gilpin v. Sierra Nevada Consol. Min. Co., 2 Idaho 662, in which case an allegation that the defendant was insolvent was denied on information and belief only. The court said: "There was no evidence given on the subject at the hearing. Hence, that allegation of a fact in the case, except for the purposes of pleading only, must be taken as unanswered."

1. *Alabama.* — Nathan v. Tompkins, 82 Ala. 437; Jackson v. Jackson, 91 Ala. 292; Farris v. Houston, 78 Ala. 250; Bolling v. Roman, 95 Ala. 518; Jones v. Ewing, 56 Ala. 360; Rembert v. Brown, 17 Ala. 667; Columbus, etc., R. Co. v. Witherow, 82 Ala. 190; Consolidated Electric Light Co. v. People's Electric Light, etc., Co., 94 Ala. 372; Jackson v. Jackson, 84 Ala. 343; Miller v. Bates, 35 Ala. 580; Parsons v. Joseph, 92 Ala. 403; Moses v. Tompkins, 84 Ala. 613; Wright v. Phillips, 56 Ala. 69; Buchanan v. Buchanan, 72 Ala. 55; Steiner v. Scholze, 105 Ala. 607; Birmingham Mineral R. Co. v. Bessemer, 98 Ala. 274, *citing* 10 Am. and Eng. Encyc. of Law (1st ed.) 1018.

*Delaware.* — Maclary v. Reznor, 3 Del. Ch. 445, *citing* Adams Equity, 196.

*Florida.* — Linton v. Denham, 6 Fla. 533; Yonge v. McCormack, 6 Fla. 368; Indian River Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387; McKinne v. Dickenson, 24 Fla. 366.

*Georgia.* — Lewis v. Leak, 9 Ga. 95; Laub v. Burnett, 31 Ga. 304; Wooten v. Smith, 27 Ga. 216; Field v. Howell, 6 Ga. 423; Moore v. Ferrell, 1 Ga. 7.

*Idaho.* — Oro Fino, etc., Min. Co. v. Cullen, 1 Idaho 113.

*Iowa.* — Judd v. Hatch, 31 Iowa 491; Fargo v. Ames, 45 Iowa 494; Small v. Somerville, 58 Iowa 362; Huskins v. McElroy, 62 Iowa 508; Shricker v. Field, 9 Iowa 366.

*Maryland.* — Bellona Co.'s Case, 3 Bland (Md.) 442; White v. Flannigan, 1 Md. 525; Hutchins v. Hope, 7 Gill (Md.) 119; Drury v. Roberts, 2 Md. Ch. 157; Salmon v. Clagett, 3 Bland (Md.) 125; Dougherty v. Piet, 52 Md. 425; Hardy v. Summers, 10 Gill & J. (Md.) 317.

*Michigan.* — Atty.-Gen. v. Oakland County Bank, Walk. (Mich.) 90.

*Mississippi.* — Hooker v. Austin, 41 Miss. 717, *per* Peyton, J.; Ferriday v. Selcer, Freem. (Miss.) 258; Boone v. Poindexter, 12 Smed. & M. (Miss.) 640; Richardson v. Lightcap, 52 Miss. 508; Brooks v. Gillis, 12 Smed. & M. (Miss.) 538.

*New Jersey.* — Johnston v. Corey, 25 N. J. Eq. 311; Huffman v. Hummer, 17 N. J. Eq. 263; Society, etc., v. Low, 17 N. J. Eq. 19; Vreeland v. New Jersey Stone Co., 25 N. J. Eq. 140; Ettenborough v. Bishop, 26 N. J. Eq. 262; Carson v. Coleman, 11 N. J. Eq. 106; Brewster v. Newark, 11 N. J. Eq. 114; West Jersey R. Co. v. Thomas, 21 N. J. Eq. 205; Cornelius v. Post, 9 N. J. Eq. 196; Holmes v. Jersey City, 12 N. J. Eq. 299; Green v. Pallas, 12 N. J. Eq. 267; Morris Canal, etc., Co. v. Jersey City, 12 N. J. Eq. 227; Armstrong v. Potts, 23 N. J. Eq. 92; Youle v. Richards, 1 N. J. Eq. 534; Butler v. Society, etc., 12 N. J. Eq. 264, 507; West Jersey R. Co. v. Thomas, 21 N. J. Eq. 205.

*New York.* — Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 497, in which case the general principle was laid down

the plaintiff had not replied at the time the motion was made is not to be taken as an admission of the truth of matters set up in the answer which are not responsive to the bill.<sup>1</sup> Where, however, the answer denies the whole equity of the bill, the defendant's right to a dissolution is not affected by the fact that he has set up new matters by way of avoidance.<sup>2</sup>

**Explanatory Matters.** — It frequently happens that the defendant, in making his denial, is under the necessity of stating fully facts and circumstances going to show the falsity of the plaintiff's averments, and such an answer is not obnoxious to the objection that it sets up new matter.<sup>3</sup>

(II) *Verification of Answer* — **Necessity to Answer Under Oath.** — In order that an answer may serve the purpose of procuring the dissolution of the injunction, it must be sworn to.<sup>4</sup> The answer, however, is not for the want of an oath to be regarded as a nul-

that where a defendant, in answer to an injunction bill, admits the equity of the bill, but sets up new matters of defense on which he relies, the injunction will be continued to the hearing. This case has been often cited, and among the many cases in which it has been relied upon are the following: *Ferriday v. Selcer*, *Freem.* (Miss.) 258; *Robinson v. Cathcart*, 2 *Cranch* (C. C.) 590; *West Jersey R. Co. v. Thomas*, 21 *N. J. Eq.* 205; *Holmes v. Jersey City*, 12 *N. J. Eq.* 299; *Armstrong v. Potts*, 23 *N. J. Eq.* 92; *Huffman v. Hummer*, 17 *N. J. Eq.* 263; *Society, etc., v. Low*, 17 *N. J. Eq.* 19. See also *Hart v. Ten Eyck*, 2 *Johns. Ch.* (N. Y.) 62; *Atty.-Gen. v. Cohoes Co.*, 6 *Paige* (N. Y.) 133; *Skinner v. White*, 17 *Johns.* (N. Y.) 366.

*North Carolina.* — *Moore v. Hylton*, 1 *Dev. Eq.* (N. Car.) 434; *Lyrely v. Wheeler*, 3 *Ired. Eq.* (N. Car.) 170.

*United States.* — *Robinson v. Cathcart*, 2 *Cranch* (C. C.) 590; *Leeds v. Marine Ins. Co.*, 2 *Wheat.* (U. S.) 383; *Young v. Grundy*, 6 *Cranch* (U. S.) 51.

1. *Robinson v. Cathcart*, 2 *Cranch* (C. C.) 590.

2. *Shricker v. Field*, 9 *Iowa* 366. See also *Society, etc., v. Butler*, 12 *N. J. Eq.* 498, wherein it was declared that where the equity of the bill is fully denied there is no room for the application of the principle that an injunction will not be dissolved because of matters set up in the answer which are not responsive to the bill.

**If the Plaintiff Has Full Knowledge of the Defense upon Which the Defendant Relies,** and it is the substantial matter in controversy between the parties, the

plaintiff cannot, by purposely keeping such matter out of view in stating his case, and in order to deprive the defendant of the benefit of a denial, subject the defendant to the application of the rule in question. *Per* Chancellor *Williamson* in *Holmes v. Jersey City*, 12 *N. J. Eq.* 299.

3. *Youle v. Richards*, 1 *N. J. Eq.* 534, in which case it was held that where the bill charges fraud the defendant, in denying the charge, has a right to state the whole transaction; *Cammack v. Johnson*, 2 *N. J. Eq.* 163, in which case it was held that where the bill charges the existence of partnership between the plaintiff and a named person, the defendant may state that the business was conducted in the name of such named person, and that the partnership was dormant, and so unknown to the defendant; *Cornelius v. Post*, 9 *N. J. Eq.* 196, in which case it was held that where the bill charges that the defendant entered upon land under a pretended survey the answer may set up the defendant's title and possession, and all the facts and circumstances going to show how his possession was asserted and maintained. See also *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 *N. J. Eq.* 302.

4. *Alabama.* — *Louisville, etc., R. Co. v. Bessemer*, 108 *Ala.* 238; *Hart v. Clark*, 54 *Ala.* 490; *Griffin v. State Bank*, 17 *Ala.* 258; *Calhoun v. Cozens*, 3 *Ala.* 498.

*Illinois.* — *Gray v. M'Cance*, 11 *Ill.* 325.

*Maryland.* — *Salmon v. Clagett*, 3 *Bland* (Md.) 125; *Binney's Case*, 2 *Bland* (Md.) 99; *Billingslea v. Gilbert*,

lity, but is to be esteemed sufficient for the purpose of admitting proof on the final hearing.<sup>1</sup>

**Waiver of Answer Under Oath.** — An answer which is not verified is, it would seem, to be treated on a motion to dissolve as an answer under oath where the plaintiff has waived in his bill an answer under oath; but upon this question the cases are not in harmony.<sup>2</sup>

<sup>1</sup> Bland (Md.) 566; Bouldin v. Baltimore, 15 Md. 18; Mahaney v. Lazier, 16 Md. 69.

*Mississippi.* — Miller v. McDougall, 44 Miss. 682.

*New Jersey.* — Manhattan Mfg., etc., Co. v. New Jersey Stock Yard, etc., Co., 23 N. J. Eq. 161.

*New York.* — Hascell v. Madison University, 8 Barb. (N. Y.) 174; Fulton Bank v. New York, etc., Canal Co., 1 Paige (N. Y.) 311.

*Texas.* — Eccles v. Daniels, 16 Tex. 136.

*Virginia.* — Ingles v. Straus, 91 Va. 209. See also Stotesbury v. Vail, 13 N. J. Eq. 390, in which case Chancellor Green said: "I am aware of no case where an answer not sworn to by the defendant himself has been received after objection."

In *Alabama*, by statute (Code, p. 817) and by a rule of court, it is required that the answer shall be verified in order to enable the court to consider its denials on a motion to dissolve. Louisville, etc., R. Co. v. Bessemer, 108 Ala. 238; Hart v. Clark, 54 Ala. 490.

In *Maryland*, under Code, art. 16, § 103, it is not necessary for the defendant to make oath to his answer unless he is asked to do so by the plaintiff, and where he is not so required by the plaintiff a bill which is not sworn to is sufficient for the purpose of putting the case at issue; but to sustain a motion to dissolve, the answer must be sworn to whether the defendant is required to answer under oath or not. Mahaney v. Lazier, 16 Md. 69.

In *New York*, under the Code, unless the answer has been duly verified, it cannot be made the ground of a motion to dissolve, and if verified it can be used only in the character of an affidavit. Hascell v. Madison University, 8 Barb. (N. Y.) 174.

In *Texas* it is required by statute that the answer for the purpose of procuring a dissolution shall be sworn to. Eccles v. Daniels, 16 Tex. 136.

<sup>2</sup> Eccles v. Daniels, 16 Tex. 136, in which case it was held that an unverified

answer was good as a pleading, although by a statute it was required that the answer should be sworn to for the purpose of procuring a dissolution of the injunction.

<sup>2</sup> Lockhart v. Troy, 48 Ala. 579, in which case it was held, under a statute permitting the defendant to waive an answer under oath, that the sole effect of such waiver was to dispense with the necessity, which would otherwise exist, of requiring two witnesses to overcome the answer. The court said: "If, then, the complainants elect to waive the answers being made upon oath, it should not prejudice the defendant's rights beyond the limitation of the statute; that is, it leaves the answers in every other respect sufficient, except as testimony. \* \* \* To treat them otherwise would be to go beyond the purpose of the statute, and put it in the power of the complainants to use a privilege granted to them as a serious injury to the defendant beyond the purpose of the law." The learned court, however, seems not to have considered the fact that the waiver of an answer under oath did not deprive the defendant of the right to answer under oath, but merely gave him the privilege of doing so or not, at his election. The court's reasoning is not satisfactory, because the statute permitting the plaintiff to waive an answer and the defendant to answer without an oath seems to have been intended merely to affect the rules of evidence on the final hearing. The case, however, was cited with approval in Ingles v. Straus, 91 Va. 209.

In Dougrey v. Topping, 4 Paige (N. Y.) 94, it was held by Chancellor Walworth that the answer should be under oath in order to entitle the defendant to a dissolution of the injunction, notwithstanding the plaintiff's waiver of an answer under oath; but the fact should be regarded that a rule of court required an answer under oath. See also Manchester v. Dey, 6 Paige (N. Y.) 295, wherein the same learned chancellor said that, notwithstanding

**By Whom the Affidavit Should Be Made.** — The answer must, by whomsoever it is verified, be verified by some one who has knowledge of the facts;<sup>1</sup> and the invariable rule is to require that the verification shall be made by the defendant, except, however, where the answer is made by a corporation, as will be seen hereafter.<sup>2</sup>

**Information and Belief.** — Where the allegations of the bill are made positively, an affidavit denying the equities of the bill upon information and belief is not sufficient to authorize a dissolution of the injunction.<sup>3</sup> Where, however, allegations of the bill are

the waiver, the defendant may put in an answer under oath for the purpose of obtaining a dissolution of the injunction. See further *Coleman v. Gage*, Clarke Ch. (N. Y.) 295, in which case Vice-Chancellor Whittlesey said: "I apprehend \* \* \* the rule is no different, whether the bill calls for an answer upon oath or waives an answer under such sanction. In either case, before the injunction can be dissolved upon answer, the complainant has a right to insist that the answer of all the defendants having a personal knowledge in relation to the gravamen of the charge in the bill shall be put in upon oath." It is to be noted, however, that so much of the vice-chancellor's language as was directed to the necessity of an answer under oath was *obiter*, as the sole question before him was the necessity for all the defendants to answer. See likewise *Metropolitan Grain, etc., Exch. v. Chicago Board of Trade*, 15 Fed. Rep. 847, wherein it was held that because the plaintiff had waived an answer under oath the answer was no more than a mere pleading.

1. *Manhattan Mfg., etc., Co. v. New Jersey Stock Yard, etc., Co.*, 23 N. J. Eq. 161. See in general the article VERIFICATION. See also *Miller v. McDougall*, 44 Miss. 682, holding that an affidavit made by the solicitor of the defendant, who does not claim to have any knowledge or even information of the facts, is merely the oath of a stranger without knowledge, and is insufficient.

2. In *McGuffie v. Planters' Bank, Freem.* (Miss.) 383, it was said that there is no instance where an injunction has been dissolved by affidavit or answer of a person not a party to the bill; citing *Thompson v. Allen*, 2 Hayw. (N. Car.) 150. See also *Salmon v. Claggett*, 3 Bland (Md.) 125.

**Where the Defendant Is Infamous** and is an incompetent witness in ordinary cases, nevertheless he may swear to the

answer to an injunction bill and have the injunction dissolved upon his sworn answer. *Per* Chancellor Bland, in *Salmon v. Claggett*, 3 Bland (Md.) 125.

**Where the Defendant is Abroad** the plaintiff is nevertheless entitled to an answer under the defendant's own oath, and it may be taken under a commission. An answer verified by the affidavits of his agents or friends is not sufficient. *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Citing Trumbull v. Gibbon*, Halst. Dig. 225; *Read v. Consequa*, 4 Wash. (U. S.) 335; and 2 Dan. Ch. Pr. 844, 857.

**Plurality of Defendants.** — Where there is more than one defendant each should swear to his answer, and when an answer purports to be the answer of two or more it must be sworn to by all the defendants whose answer it purports to be. *Binney's Case*, 2 Bland (Md.) 99.

3. *Hart v. Clark*, 54 Ala. 490, in which case an answer verified by an affidavit "that the facts therein stated were true to the best of her knowledge, information, and belief," was not considered sufficient. *Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133.

Where, however, the answer contains denials which are statements upon knowledge of matters of fact, an affidavit that "the facts stated in the foregoing answer are true" amounts to an explicit statement that the denials express the truth of the matter, and there is no merit in the objection that the affidavit does not sufficiently show that the responsive allegations of the answer are sworn to as true. *Weems v. Roberts*, 96 Ala. 378. See also *Quackenbush v. Van Riper*, 1 N. J. Eq. 476, wherein the court said: "If a man in his answer charge certain facts or matters to exist, on which he intends to rely for his defense, and swears to the answer in the ordinary form, he swears to the truth of the facts, and not to the fact of the charge; and if the facts as

made on information and belief, an oath which affirms the truth of the denials in the answer according to the defendant's information and belief is sufficient.<sup>1</sup>

**Affidavit Made in Foreign State.** — An affidavit verifying the truth of an answer, made before a magistrate duly authorized to administer an oath in the country where the defendant resides, is a sufficient verification.<sup>2</sup>

**Answer by Corporation.** — Corporations answer under their seal and without oath, consequently they are at liberty to deny everything contained in the bill, whether true or false; but according to the weight of authority no dissolution of an injunction against a corporation can be obtained upon the answer of a corporation unless it is duly verified by the oath of some officer of the corporation, or of some other person who is acquainted with the facts contained in the answer.<sup>3</sup>

stated or charged are material, and not true, perjury may be assigned upon it."

**Identification of Affiant.** — In *Illinois* the affidavit should show who the affiant is, where he lives, and how he knows the facts stated in the answer. *Prout v. Lomer*, 79 Ill. 331.

**Ex Parte Affidavit.** — It is not necessary that the affidavits annexed to and filed with the answer should be taken upon notice, or that copies should be served upon the adverse party. *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Gariss v. Gariss*, 13 N. J. Eq. 320. But see *Coale v. Chase*, 1 Bland (Md.) 137, in which case an affidavit "that the several matters and facts set forth and stated in the within and foregoing answer are just and true as they are therein stated, according to the best of her knowledge, belief, and recollection," was considered sufficient, because the chancellor was of the opinion that "if a man swears he believes that to be true which he knows to be false, he swears as absolutely \* \* \* as if he had made a positive assertion." *Cited with approval in* *Triebert v. Burgess*, 11 Md. 452.

1. *Hogan v. Branch Bank*, 10 Ala. 485. See also *Van Rensselaer v. Kidd*, 4 Barb. (N. Y.) 17, *citing* *Campbell v. Morrison*, 7 Paige (N. Y.) 157.

2. *Gibson v. Tilton*, 1 Bland (Md.) 352, in which case it was declared that although, as it would seem, no prosecution can be sustained in the state where the answer is filed, upon a false oath taken in another state, yet the defendant, should the answer turn out to be false or the affidavit be ascertained to

be spurious, may be punished for practicing an imposition on the court. *Citing* *Omealy v. Newell*, 8 East 364. See also *Vermilya v. Christie*, 4 Sandf. Ch. (N. Y.) 376, wherein it was held that if the plaintiff considers that an answer sworn to in a foreign country was irregularly sworn to he should move to take it from the files of the court, and that objections that it was served by a master instead of the clerk of the court, and that the seal was impressed on the paper instead of on a wafer or wax, will not be regarded.

3. *Fulton Bank v. New York, etc., Canal Co.*, 1 Paige (N. Y.) 311. See also *Champlin v. New York*, 3 Paige (N. Y.) 573, in which case the answer of a corporation was filed under its seal, and its presiding officer swore that it was true so far as his own acts were concerned, and that he believed it to be true in all other respects, and it was verified by the oath of another individual who knew the facts which were not known to the presiding officer, and it was held that the verification was sufficient to entitle the corporation to a dissolution of the injunction. See further *Griffin v. State Bank*, 17 Ala. 258, *citing* *Fulton Bank v. New York, etc., Canal Co.*, 1 Paige (N. Y.) 311, and *disapproving* the *obiter dictum* in *Hogan v. Branch Bank*, 10 Ala. 485. Likewise see *Bouldin v. Baltimore*, 15 Md. 18; *Maryland, etc., Coal, etc., Co. v. Wingert*, 8 Gill (Md.) 174; *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371; *Union Bank v. Geary*, 5 Pet. (U. S.) 111.

**Contra.** — In some cases, however, it has been held that a corporation is en-

**Waiver of Objections.** — If the answer is not properly verified, the objection may be waived by the defendant by permitting the motion to dissolve to be disposed of without making the objection.<sup>1</sup>

(12) *Exceptions to the Answer.* — The American Rule is that the filing by the plaintiff of exceptions to the answer will never, *per se*, prevent the hearing of a motion to dissolve; but the court will always, at the hearing of the motion, look into the exceptions and give them such weight as they are entitled to in determining the sufficiency of the answer to authorize the dissolution of the injunction, because, as has been said, the motion to dissolve, of itself, in its very nature, is founded upon the correctness and sufficiency of the answer in every particular.<sup>2</sup>

titled to the dissolution of an injunction upon an answer under its common seal without any verification. *Haight v. Morris Aqueduct*, 4 Wash. (U. S.) 601; *Hogan v. Branch Bank*, 10 Ala. 485. See also *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40, in which case it was said: "The answer of a corporation, not being verified by affidavit, is no evidence for the defendant, though responsive to the bill. But it at least has the effect of putting the allegation to which it responds in issue, and of imposing on the plaintiff the burden of proving it. This is undoubtedly its effect on the hearing of the cause; and it is not perceived why the same effect does not exist on a motion to dissolve."

**Officer's Knowledge of Facts.** — Where the answer of the corporation is sworn to by an agent, he must show that he has knowledge of the matters sworn to. *Atty.-Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133.

1. *Yeizer v. Burke*, 3 Smed. & M. (Miss.) 439. See also *Steiner v. Scholze*, 105 Ala. 607, holding that defects in the affidavit will be considered as waived where the plaintiff makes no response to the motion to dissolve and by his silence consents to the submission and trial of the motion to dissolve on bill and answer.

**Waiver of Defective Jurat.** — In *Graham v. Stagg*, 2 Paige (N. Y.) 321, it was held that the plaintiff had waived the objection that the jurat to the answer was not in the precise form required by the rules of court, by keeping it in his possession for five months without objection.

**Omission of Seal.** — The objection that there is no seal affixed to the jurat to

the verification of the answer cannot be raised for the first time on appeal. *Moses v. Risdon*, 46 Iowa 251.

2. *O'Conner v. Starke*, 59 Miss. 481; *Gibson v. Tilton*, 1 Bland (Md.) 352. In the latter case it was declared that the plaintiff may, on the very day upon which the motion to dissolve is heard, file exceptions to the answer; citing *Alexander v. Alexander*, MSS. Dec. 13, 1817. See also *Belt v. Blackburn*, 28 Md. 227; *Salmon v. Clagett*, 3 Bland (Md.) 126; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Bradford v. Peckham*, 9 R. I. 250; *Barney v. Earle*, 13 Ala. 106; *Orr v. Merrill*, 1 Woodb. & M. (U. S.) 376, holding that it is proper to look at the answer and exceptions before deciding to dissolve the injunction; *Lewis v. Leak*, 9 Ga. 95; *Mitchell v. Mitchell*, 20 N. J. Eq. 234; *Wyckoff v. Cochran*, 4 N. J. Eq. 420; *Deklyn v. Davis*, *Hopk.* (N. Y.) 135.

In *Capehart v. Mhoon*, *Busb. Eq.* (N. Car.) 30, it was said: "It grew into a practice not to dissolve an injunction, when exceptions were filed, or might have been filed, for insufficiency of the answer, either because it did not respond to the allegations within the knowledge of the defendant, or gave an unfair, equivocal, or evasive answer, which would be good cause for exceptions." Citing *Smith v. Thomas*, 2 Dev. & B. Eq. (N. Car.) 126, and *Edney v. Motz*, 5 Ired. Eq. (N. Car.) 234.

**Scope of Exceptions.** — With respect to the sufficiency of the answer, the proper question is not whether it makes such full discovery of all matters as is necessary for the purpose of a hearing, but whether it shows cause for dissolving the preliminary injunction. *Marvel v. Ortlip*, 3 Del. Ch. 9.



In the English Chancery Practice, however, the rule obtained that the defendant could not move to dissolve an injunction after exceptions filed until the exceptions had been disposed of, but this was so only where the exceptions were filed before the motion to dissolve was made.<sup>1</sup>

**Objections Considered Without Exceptions.** — The uniform practice of the court is to refuse to dissolve an injunction unless the answer

As it was expressed in *Salmon v. Clagett*, 3 Bland (Md.) 125, "an answer may be only exceptionable in those parts which are not necessarily connected with so much of the case as gives rise to the equity upon which the injunction rests; and therefore, as in such cases a decision upon the motion [to dissolve] does not involve a consideration of the other defective and exceptionable portions of the answer, exceptions to those parts of it may, without needless repetitions of the same argument, be separately considered and determined." See also *Stitt v. Hilton*, 31 N. J. Eq. 285, wherein it was said: "Exceptions to the answer cannot \* \* \* avail the complainant on motion to dissolve an injunction on bill and answer, unless such exceptions point out a failure to answer the ground of equity on which the injunction was allowed." Citing *Wyckoff v. Cochran*, 4 N. J. Eq. 421; *Robert v. Hodges*, 16 N. J. Eq. 299; *McGee v. Smith*, 16 N. J. Eq. 462; *Mitchell v. Mitchell*, 20 N. J. Eq. 234.

**Frivolous Exceptions** will furnish no obstacle to a motion to dissolve. *Barney v. Earle*, 13 Ala. 106, in which case the court said: "If, allowing the exceptions, the answers still deny all the equity of complainant's bill, the injunction should be dissolved." Citing *Doe v. Roe*, *Hopk.* (N. Y.) 276, 1 Barb. Ch. Pr. 642; and 1 Hoffm. Pr. 357, note 1.

In *Delaware* it has been held that under the rules the plaintiff's right to file exceptions must be secured by exceptions filed and acted on before the hearing, because at the hearing no objection can be made founded on the insufficiency of the answer. *Marvel v. Ortlip*, 3 Del. Ch. 9.

In *Illinois* it was held, under Code Ch., § 22, that, instead of sustaining exceptions to the answer and giving leave to amend, the proper practice was to take a rule upon the defendant to file a further answer within such time as the court should direct, and that on

failure thereof the bill should be taken as confessed. *Craig v. People*, 47 Ill. 487.

In *Mississippi* it has been provided by statute (Code 1880, § 1915), that "a motion to dissolve an injunction upon bill and answer shall not be entertained pending exceptions to the answer for insufficiency, unless the chancellor shall be of the opinion that the matters of exception would not affect the motion, even if they are well taken;" and this provision is intended to incorporate the American rule into the statutory law. If the chancellor finds that the exceptions in no point of view are well taken, or that even if they are well taken they in no way affect the merits of the motion to dissolve, he should disregard the exceptions. *O'Conner v. Starke*, 59 Miss. 481.

In *Virginia* it is required by statute that exceptions to the answer shall be set down for argument. *Goddin v. Vaughn*, 14 Gratt. (Va.) 102.

**On the Final Hearing** the plaintiff cannot file exceptions to the answer after both parties have taken proof pursuant to statute, because at that stage of the case technical objections to the answer are to be taken to have been waived. *Belt v. Blackburn*, 28 Md. 227.

1. *Joseph v. Doubleday*, 1 Ves. & B. 497; *Howes v. Howes*, 1 Beav. 197; *Williams v. Davis*, 1 Sim. & S. 262; *Vipan v. Mortlock*, 2 Meriv. 476. See also the following American cases in which the English rule has been adverted to: *Marvel v. Ortlip*, 3 Del. Ch. 9; *Salmon v. Clagett*, 3 Bland (Md.) 125; *O'Conner v. Starke*, 59 Miss. 481; *Mitchell v. Mitchell*, 20 N. J. Eq. 234. See further 3 Dan. Ch. Pr. 1181.

**The Reason**, it would seem, why the American rule is different from the English rule, is that the English rule applies to "common" injunctions, which are those which issue of course without notice, while in this country common injunctions are not known. *Marvel v. Ortlip*, 3 Del. Ch. 9.

denies fully and explicitly all the equities of the bill, although no exceptions are taken to the answer.<sup>1</sup>

*e. WHERE THERE ARE SEVERAL DEFENDANTS* — (1) *The General Rule.* — It is an ancient and well-settled rule that where there are several defendants, all of whom are implicated in the same charge, no motion to dissolve the injunction on the ground that the equity of the bill has been denied by the answer can be made until all the defendants have answered.<sup>2</sup>

1. *Robinson v. Cathcart*, 2 Cranch (C. C.) 590; *Marvel v. Ortlip*, 3 Del. Ch. 9. See also *Barney v. Earle*, 13 Ala. 108, wherein Chilton, J., said: "He [the chancellor] is not in the first instance to hear the exceptions, but whether exceptions are filed or not he is, upon such motion, equally bound to look into the answers, and to determine whether they deny the equities of the bill."

**Defective Verification.** — Where the answer is defectively authenticated, the plaintiff's course is to have it taken from the files by motion, and not to except to it, because exceptions to the answer for insufficiency necessarily assume that the answer is valid and properly before the court. *Vermilya v. Christie*, 4 Sandf. Ch. (N. Y.) 376.

**Impertinence.** — If the whole equity of the bill is denied, it is no answer to an application to dissolve the injunction that the defendant has gone further and incorporated in his pleading other matters which are scandalous or otherwise irrelevant. *Livingston v. Livingston*, 4 Paige (N. Y.) 111, wherein it was said by Chancellor Walworth: "By the English practice, as sanctioned by modern decisions, the reference of an answer for impertinence was sufficient cause to be shown in answer to an application to dissolve the common injunction. But that arose from the fact that no exceptions for insufficiency could be filed until after the exceptions for impertinence were disposed of." *Citing Hunt v. Thomas*, 2 Anstr. 591, and *Fisher v. Bayley*, 12 Ves. Jr. 19. See also *Jewett v. Belden*, 11 Paige (N. Y.) 618, wherein Chancellor Walworth, in following *Livingston v. Livingston*, 4 Paige (N. Y.) 111, said: "I can see no good reason for applying a different rule to the case of a bill of discovery in aid of a defense at law. It is true, the answer must be used together as an entirety, if it is read as evidence in the action at law, before the exceptions are disposed of and the imperti-

nent matter, if any, has been expunged. But the complainant, in a bill of discovery, is not entitled to call for the discovery of a mere insulated fact in aid of his defense, and to deprive his adversary of the benefit of a full answer, showing that in reality no valid defense to the action at law exists."

2. *Arkansas.* — *Johnston v. Alexander*, 6 Ark. 302; *Fowler v. Williams*, 20 Ark. 641.

*Florida.* — *Douglass v. Baker County*, 23 Fla. 419.

*Georgia.* — *Dennis v. Green*, 8 Ga. 197; *Cook v. Smith*, 39 Ga. 335.

*Iowa.* — *Rice v. Smith*, 9 Iowa 570.

*Maryland.* — *Jones v. Magill*, 1 Bland (Md.) 177; *Binney's Case*, 2 Bland (Md.) 99; *Cape Sable Co.'s Case*, 3 Bland (Md.) 606; *Heck v. Vollmer*, 29 Md. 507.

*New Jersey.* — *Adams v. Hudson County Bank*, 10 N. J. Eq. 535, 64 Am. Dec. 469; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Gregory v. Stillwell*, 6 N. J. Eq. 51; *Smith v. Loomis*, 5 N. J. Eq. 60; *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Jewett v. Bowman*, 27 N. J. Eq. 171; *Dey v. Dey*, 23 N. J. Eq. 88; *Robinson v. Davis*, 11 N. J. Eq. 302, 69 Am. Dec. 591; *Vliet v. Lowmason*, 2 N. J. Eq. 404; *Wisham v. Lippincott*, 9 N. J. Eq. 353; *Prickett v. Tuller*, 29 N. J. Eq. 154; *Price v. Clevenger*, 3 N. J. Eq. 207; *Lines v. Spear*, 8 N. J. Eq. 154.

*New York.* — *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Vandervoort v. Williams*, Clarke Ch. (N. Y.) 377; *Noble v. Wilson*, 1 Paige (N. Y.) 164; *Coleman v. Gage*, Clarke Ch. (N. Y.) 295; *Depeyster v. Graves*, 2 Johns. Ch. (N. Y.) 148; *Fulton Bank v. Beach*, 2 Paige (N. Y.) 307.

*South Carolina.* — *Goodwyn v. State Bank*, 4 Desaus. (S. Car.) 389, which case was cited in *Dennis v. Green*, 8 Ga. 197.

*Tennessee.* — *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257, which case was cited in *Dennis v. Green*, 8 Ga. 197.

*Virginia.* — *Baltimore, etc., R. Co.*

The Reason why the answer of all the defendants is usually required is that the plaintiff is entitled to have the consciences of all the defendants probed, and the silence of the defendants who have not answered gives color to the plaintiff's charge, especially where they are interested in procuring the dissolution of the injunction, and it is reasonable to suppose that if the charges against them were unfounded they would promptly answer the bill.<sup>1</sup>

(2) *Waiver of Answer Under Oath.* — If the plaintiff waives an answer upon oath, and one of the defendants answers on oath denying the whole equity of the bill, he may move to dissolve the injunction upon his answer, notwithstanding his codefendant has put in an answer without oath.<sup>2</sup>

(3) *Answer as to Fraud.* — Where the bill charges fraud it is not sufficient that some of the defendants deny all fraud as to themselves, if their title or rights may be affected by the fraud charged against the other defendants.<sup>3</sup>

(4) *Exceptions to the General Rule.* — The rule requiring that all the defendants must have answered before the injunction will be dissolved is not inflexible. It has its limitations and qualifi-

*v. Wheeling*, 13 Gratt. (Va.) 40; *Kahn v. Kerngood*, 80 Va. 342.

*United States.* — *Robinson v. Cathcart*, 2 Cranch (C. C.) 590.

*England.* — *Joseph v. Doubleday*, 1 Ves. & B. 497; *Glasscott v. Copper Miners' Co.*, 11 Sim. 314; *Done v. Read*, 2 Ves. & B. 310; *Cooke v. Westall*, 1 Madd. 264; 3 Dan. Ch. Pr. 1824; *Newland's Ch.* 98; 3 Bacon's Abr. 658; *Eden on Injunctions*, 66, 116; *Wyatt's Pr. Vic. Reg.* 234-236.

1. *Per Vice-Chancellor Whittlesey*, in *Vandervoort v. Williams*, Clarke Ch. (N. Y.) 377; *per Vice-Chancellor Whittlesey*, in *Coleman v. Gage*, Clarke Ch. (N. Y.) 295; *per Chancellor Williamson*, in *Wisham v. Lippincott*, 9 N. J. Eq. 353. See also *Douglass v. Baker County*, 23 Fla. 419.

**Contradictory Answers.** — Where the answers are contradictory and show that one or the other of the defendants is mistaken, the court will be influenced to retain the injunction. *Robert v. Hodges*, 16 N. J. Eq. 299.

**Admissions in the Answer.** — As a general rule, the answer of one defendant cannot affect the rights of his codefendants. *Miller v. Maddox*, 21 Ga. 327.

But it has been held that where all the defendants are interested in the subject-matter, and the defendant having the greatest interest admits the

equity of the bill, the court will refuse to dissolve the injunction, notwithstanding the denials contained in the answers of the other defendants. *Zabriskie v. Vreeland*, 12 N. J. Eq. 179.

2. In *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511, Hand, J., said: "If the rule were otherwise, a complainant, by waiving a sworn answer would put it out of the power of a defendant to procure the dissolution of an injunction on bill and answer, although all the equity of the bill was denied by his answer." But see, *contra*, *Coleman v. Gage*, Clarke Ch. (N. Y.) 295.

In *Woolfolk v. Rumph*, 37 Ga. 684, it was held that where answer is waived by the bill the injunction may be dissolved upon the coming in of the answer of only one of the defendants.

3. *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 511, citing *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202. In the first mentioned case Hand, J., said: "Where the answer of a defendant answering under oath, from his own knowledge, denies the whole equity of the bill, and makes a clear title in himself in such a way that it cannot, if the answer be true, be affected by the fraud charged in the bill and not denied, his case is severed from that of his codefendants, and is perfect; and he stands upon his own merits."

cations and is subject to discretion and modification.<sup>1</sup> It is enough if those defendants answer upon whom the gravamen of the charge rests.<sup>2</sup> The chancellor will not await the answer of one who is not interested in the event of the suit, and who is a mere formal party.<sup>3</sup>

**Nonresident Defendants.** — Where one of the defendants is out of the jurisdiction of the court and cannot be compelled to answer, the chancellor may, in his discretion, dissolve the injunction without awaiting his answer.<sup>4</sup>

**Bill Wanting in Equity.** — Another qualification of the rule is that it is applicable only to an injunction properly granted, and if the bill discloses that the plaintiff has an adequate remedy at law it is immaterial who declines to answer.<sup>5</sup>

1. *Heck v. Vollmer*, 29 Md. 507, *per* Alvey, J.; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Douglass v. Baker County*, 23 Fla. 419.

2. *Joseph v. Doubleday*, 1 Ves. & B. 497, which case was *cited* in *Dennis v. Green*, 8 Ga. 197, and in *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Johnston v. Alexander*, 6 Ark. 302; *Marvel v. Ortilp*, 3 Del. Ch. 9; *Semmes v. Columbus*, 19 Ga. 471; *Heck v. Vollmer*, 29 Md. 507; *Adams v. Hudson County Bank*, 10 N. J. Eq. 535, 64 Am. Dec. 469; *Price v. Clevenger*, 3 N. J. Eq. 207; *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Vliet v. Lowmason*, 2 N. J. Eq. 404; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Depeyster v. Graves*, 2 Johns. Ch. (N. Y.) 148; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

In *Dennis v. Green*, 8 Ga. 197, the court said: "The principle seems to be well established, that whenever the party against whom the injunction operates fully answers the bill denying the equity, it is competent for such party to move at any time for a dissolution of the injunction without waiting for the answers of the other defendants." *Citing* 3 Dan. Ch. Pr. 1824; *Newland's Ch.* 98; *Joseph v. Doubleday*, 1 Ves. & B. 497; *Glasscott v. Copper-Miners' Co.*, 11 Sim. 314; *Breedlove v. Stump*, 3 Verg. (Tenn.) 257; and *Goodwyn v. State Bank*, 4 Desaus. (S. Car.) 389. See also the following cases: *Douglass v. Baker County*, 23 Fla. 419; *Hartley v. Matthews*, 96 Ala. 224; *Gregory v. Stillwell*, 6 N. J. Eq. 51; *Binney's Case*, 2 Bland (Md.) 99; *Long v. Brown*, 4 Ala. 622.

In *Coleman v. Gage*, Clarke Ch. (N. Y.) 295, Vice-Chancellor Whittlesey

said: "If it appears \* \* \* that all the defendants who personally know of the transactions brought in question have answered, and that the defendant not answering was not in a situation to know, and did not in point of fact know, anything in relation to the transactions, it is worse than idle to say that the injunction should be retained until the answer of the other defendant should come in."

3. *Per* Oldham, J., in *Johnston v. Alexander*, 6 Ark. 302; *Colton v. Price*, 50 Ala. 424; *Dunlap v. Clements*, 7 Ala. 539; *Yonge v. Shepperd*, 44 Ala. 315; *Shricker v. Field*, 9 Iowa 366; *Heck v. Vollmer*, 29 Md. 507; *Annapolis v. Harwood*, 32 Md. 471; *Cook v. Smith*, 39 Ga. 335, *per* McCay, J.; *Dennis v. Green*, 8 Ga. 197; *Williams v. Hall*, which last case is reported in *Jones v. Magill*, 1 Bland (Md.) 177, note *i*.

**Officer Armed with Process.** — Where the object of the bill is to restrain the execution of process or the performance of official acts, and the officer is made a party defendant, he is at liberty to answer, and in some cases it may be proper for him to do so, but it is not necessary nor usually expedient for him to answer. *Brooks v. Lewis*, 13 N. J. Eq. 214.

**An Agent of the Defendant** who is a mere nominal party need not answer. *Annapolis v. Harwood*, 32 Md. 471.

4. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Goodwyn v. State Bank*, 4 Desaus. (S. Car.) 389; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Heck v. Vollmer*, 29 Md. 507, *per* Alvey, J. See also *Lines v. Spear*, 8 N. J. Eq. 154.

5. *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217.

**Duty of the Plaintiff to Speed the Cause.** — If the plaintiff has neglected to take the requisite steps with all diligence to compel answers, he cannot set up the want of an answer against those defendants who have answered, and have no power to compel their codefendants to answer.<sup>1</sup>

**12. The Motion, Movant, and Moving Papers** — *a.* **NECESSITY FOR MOTION.** — There must be a formal motion to dissolve, and notice of a motion to dissolve, without a motion, is a serious irregularity.<sup>2</sup>

*b.* **THE MOVANT** — (1) *The Defendant.* — The motion to dissolve must be made by a party defendant;<sup>3</sup> and not by counsel in behalf of any defendant who has never entered his appearance or been brought into court by process.<sup>4</sup>

(2) *Defendant in Contempt.* — As a general rule, a defendant who is in contempt will not be heard on a motion to dissolve the injunction, until he has purged himself of the contempt.<sup>5</sup> But

1. *Stoutenburgh v. Peck*, 4 N. J. Eq. 446; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Seebor v. Hess*, 5 Paige (N. Y.) 85; *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Depeyster v. Graves*, 2 Johns. Ch. (N. Y.) 148; *Johnston v. Alexander*, 6 Ark. 302, *per* Oldham, J.; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

In *Jones v. Magill*, 1 Bland (Md.) 177, it was held that it is the duty of the defendant who has answered and who seeks the dissolution of the injunction to require the plaintiff by a rule to prosecute his suit without delay, and that unless he takes this step he cannot justly complain of the injunction being continued.

**Affidavit Denying Collusion.** — Where the plaintiff wishes to rely upon the objection that one of the defendants has not answered, and the other defendants suggest collusion, the plaintiff should produce an affidavit denying the collusion and showing why he did not compel an answer. *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100.

2. *Richardson v. Lightcap*, 52 Miss. 508; *Martin v. O'Brien*, 34 Miss. 21, in which later case it was held that it is not proper to file another and separate bill seeking to get rid of an injunction.

In *Manhattan Mfg., etc., Co. v. Van Keuren*, 23 N. J. Eq. 251, it was held that where an injunction is granted to a certain extent and a rule is directed to show cause why an injunction should not issue pursuant to the prayer of the bill, the question whether the injunction as granted should not be removed cannot be con-

sidered on the rule to show cause, as the existing injunction can be removed only upon notice and motion to dissolve.

3. *Linn v. Wheeler*, 21 N. J. Eq. 231, in which case Chancellor Zabriskie said: "No one but a party to a suit can make any motion in it, except for the purpose of being made a party. The defendants only are enjoined. If they do not wish to be free from the injunction no one else can ask it for them."

4. *Duncan v. State Bank*, 2 Ill. 262.

5. *Jacoby v. Goetter*, 74 Ala. 427; *Crabtree v. Baker*, 75 Ala. 91; *Mason v. Jones*, 7 D. C. 247; *Andrews v. Knox County*, 70 Ill. 65; *Endicott v. Mathis*, 9 N. J. Eq. 110; *Clark v. Wood*, 6 N. J. Eq. 458; *Michel v. O'Brien*, 6 Misc. Rep. (N. Y. Supreme Ct.) 408; *Evans v. Van Hall, Clarke Ch. (N. Y.)* 22; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225; *Field v. Chapman*, 13 Abb. Pr. (N. Y. Supreme Ct.) 320; *Turpin v. Jefferson*, 4 Hen. & M. (Va.) 483; *Swinburn v. Smith*, 15 W. Va. 483.

**Discretion of Court.** — The court will, however, sometimes in its discretion dissolve an injunction, on the motion of the defendant, even if he be in contempt for violating the injunction. *Swinburn v. Smith*, 15 W. Va. 483; *Crabtree v. Baker*, 75 Ala. 91, in which later case the court cited *Endicott v. Mathis*, 9 N. J. Eq. 110.

In *Smith v. Reno*, 6 How. Pr. (N. Y. Supreme Ct.) 124, it was said by Harris, J., that even if the defendant has been actually adjudged to be in con-

where the extent and nature of the punishment to be imposed for the contempt depend upon the determination of the question whether the injunction shall be continued or not, a motion to dissolve may be entertained.<sup>1</sup>

*c. THE MOVING PAPERS.* — Where a defendant relies upon anything except want of equity in the bill, or that the equity of the bill has been answered, he must specify the grounds upon which he rests for dissolution.<sup>2</sup> Other grounds than those specified will be regarded as waived.<sup>3</sup>

**13. The Evidence** — *a. BURDEN OF PROOF.* — On a motion to dissolve, where it is permissible to read affidavits, the burden of proof is on the defendant; but it is well settled that evidence which would prevent the allowance of an injunction will be sufficient to dissolve it.<sup>4</sup> But where affidavits are introduced to

tempt, he has a right to be heard upon any matters of strict right, as the rule applies to matters of favor only. As to the extent of the general rule of equity practice just mentioned, see the exhaustive discussion and citation of authorities by Justice White in *Hovey v. Elliott*, 167 U. S. 409.

1. *Crabtree v. Baker*, 75 Ala. 91; *Williamson v. Carnan*, 1 Gill & J. (Md.) 184; *Endicott v. Mathis*, 9 N. J. Eq. 110.

**Defendant Need Not Be Adjudged Guilty of Contempt.** — The court may consider the fact that the defendant is in contempt, as disclosed by affidavit, although the defendant has not been formally put in contempt by a direct proceeding for that purpose. *Michel v. O'Brien*, 6 Misc. Rep. (N. Y. Supreme Ct.) 408; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225. See, *contra*, *Smith v. Reno*, 6 How. Pr. (N. Y. Supreme Ct.) 124. See likewise *Evans v. Van Hall*, Clarke Ch. (N. Y.) 22, in which case the plaintiff presented affidavits showing *prima facie* a breach of the injunction, and an attachment was awarded and issued against the defendant, and the court refused to hear his motion to dissolve, although he had not been taken on the attachment.

**Violation of Void Order.** — It would seem that the rule has no application, where the injunction order is one which the court had no jurisdiction to make, as it is not contempt of court to violate such order. *Swinburn v. Smith*, 15 W. Va. 483.

2. *Brown v. Winans*, 11 N. J. Eq. 267; *Morris Canal, etc., Co. v. Bart-*

*lett*, 3 N. J. Eq. 9; *Miller v. Traphagan*, 6 N. J. Eq. 200.

**Insufficiency of Bond.** — Where the insufficiency of the undertaking is intended to be relied upon, the particular defects should be specified, and it is insufficient to characterize it merely as "no such undertaking as is required by law." *Lee v. Watson*, 15 Mont. 228.

In Iowa, it has been held, under Rev. 1860, § 2864, that a motion to dissolve which specifies no cause or causes upon which the same is founded should not be entertained. *Hall v. Crouse*, 14 Iowa 487.

**Necessity to Demur to Bill.** — A motion to dissolve made on the filing of the answer, without any demurrer to the bill, sufficiently raises the question of jurisdiction to award the injunction. *Welde v. Scotten*, 59 Md. 72.

**Motion Based on Pleadings, Papers, and Affidavits.** — A notice of motion to dissolve, stating that the motion will be based upon the papers, pleadings, and records, and upon affidavits afterwards to be filed, does not confine the defendant to the use, as evidence, of such pleadings only as were on file at the time the notice was given. *Younglove v. Steinman*, 80 Cal. 375.

3. *Brigham v. White*, 44 Iowa 677; *Cattel v. Nelson*, 7 N. J. Eq. 122; *Smith v. Loomis*, 5 N. J. Eq. 60.

**Copies of the Pleadings** need not be served where the motion is to be heard on the pleadings. *Newbury v. Newbury*, 6 How. Pr. (N. Y. Supreme Ct.) 182.

4. *Cary v. Domestic Spring-Bed Co.*, 26 Fed. Rep. 38; *Ingles v. Straus*, 91

overcome the effect of the sworn answer in a jurisdiction in which the rule prevails that the injunction may be dissolved on the coming in of the answer, the testimony of one witness in behalf of the plaintiff is not sufficient.<sup>1</sup>

*b. ADMISSIBILITY OF EVIDENCE*—(1). *The General Rule of Equity*.—It is difficult to express a rule which will infallibly inform the practitioner when he may or may not introduce affidavits, when the motion to dissolve is based on the denials of the answer.<sup>2</sup>

*The English Practice*.—It is well settled both in England and in this country that under the rules and usages which belong to courts of equity generally, except when it is otherwise provided by statute or by rules of court, on a motion to dissolve on the coming in of the answer the court is confined absolutely to the bill and answer, and no *ex parte* affidavits or other proofs are ever admitted at that stage of the case in support of either the bill or answer.<sup>3</sup>

Va. 209, in which case Cardwell, J., said that such full and positive proof is not exacted as would be necessary upon a final hearing of the cause; *Edison Electric Light Co. v. Buckeye Electric Co.*, 59 Fed. Rep. 691; *Sparkman v. Higgins*, 1 Blatchf. (U. S.) 205.

In *North v. Perrow*, 4 Rand. (Va.) 1, it was said: "On a motion to dissolve it ought not to be required of the defendant to invalidate by full proof the allegations in the bill. The burden of proof lies on the plaintiff to support them. Having obtained the injunction on the *prima facie* evidence of his oath, or other proofs, all that is expected of the defendant is, to show that it is entitled to no credit. To wait for full proof before the injunction is dissolved, would produce great delay and much mischief."

**Conflicting Affidavits**.—The court may refuse to dissolve the injunction on conflicting *ex parte* affidavits. *Koeffler v. Milwaukee*, 85 Wis. 397.

1. *Oldham v. Cooper*, 5 Del. Ch. 151, in which case it was held that the answer must be disproved by the testimony of at least two witnesses, or of one witness and the proof of corroborating circumstances amounting in effect to the positive testimony of an additional witness. See also, to the same effect, *Gelston v. Rullman*, 15 Md. 260.

2. *Per Stone*, J., in *Barnard v. Davis*, 54 Ala. 565.

3. In *Clapham v. White*, 8 Ves. Jr. 36, Lord Eldon declared that the prac-

tice of dissolving an injunction if the answer denies all the circumstances upon which the equity of the bill is founded, "is carried so far that except in the few excepted cases, though five hundred affidavits were filed, not only by the plaintiff but by many witnesses, not one could be read as to this purpose." This case was cited in *Long v. Brown*, 4 Ala. 622, and in *Poor v. Carleton*, 3 Sumn. (U. S.) 70. See also *Berkely v. Brymer*, 9 Ves. Jr. 355, which case was cited by Chancellor Kent in *Eastburn v. Kirk*, 1 Johns. Ch. (N. Y.) 444, and in *Lewis v. Leak*, 9 Ga. 95.

See likewise the following cases in support of the English practice of refusing to hear affidavits in support of either the bill or answer; but these cases are not to be taken as stating the rule which prevails in the several states to-day without consulting the cases hereinafter cited.

*Alabama*.—*Barnard v. Davis*, 54 Ala. 565; *Long v. Brown*, 4 Ala. 631; *Calhoun v. Cozens*, 3 Ala. 498; *Withers v. Dickey*, 1 Stew. (Ala.) 190.

*California*.—*Falkinburg v. Lucy*, 35 Cal. 52.

*Delaware*.—*Kersey v. Rash*, 3 Del. Ch. 321.

*Florida*.—*Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387.

*Georgia*.—*Lewis v. Leak*, 9 Ga. 95.

*Maryland*.—*Salmon v. Clagett*, 3 Bland (Md.) 125; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 7; *Bellona Co.'s Case*,

**Affidavits Annexed to Bill and Answer.** — Where the rule prevails that the motion must be based upon the bill and the denials contained in the answer, affidavits of persons who are not parties cannot be read, even though they be annexed to the bill and answer respectively.<sup>1</sup>

**Failure to Serve Defendant with Subpœna.** — Where the plaintiff has not had the defendant served with subpœna, he will be considered as having waived his right to an answer, and the defendant will be permitted to move a dissolution of the injunction upon the merits disclosed by affidavits.<sup>2</sup>

(2) **Exceptions to the Rule.** — The plaintiff under some circumstances is entitled to read affidavits to overcome the answer, the exceptions being for the most part "fairly resolvable into the principle of irreparable mischief, such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights or of patent rights;" the affidavits being introduced in such cases merely to enlighten the mind and conscience of the chancellor.<sup>3</sup>

3 Bland (Md.) 442; *Washington University v. Green*, 1 Md. Ch. 97; *Belt v. Blackburn*, 28 Md. 227; *State v. Northern Cent. R. Co.*, 18 Md. 213.

*New Jersey.* — *Miller v. English*, 6 N. J. Eq. 304; *Merwin v. Smith*, 2 N. J. Eq. 182.

*New York.* — *Eastburn v. Kirk*, 1 Johns. Ch. (N. Y.) 444; *Seneca Falls v. Matthews*, 9 Paige (N. Y.) 504; *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202.

*North Carolina.* — *Capehart v. Mhoon*, Busb. Eq. (N. Car.) 30.

*United States.* — *Poor v. Carleton*, 3 Sumn. (U. S.) 70.

1. *Haight v. Case*, 4 Paige (N. Y.) 525; *Mulock v. Mulock*, 26 N. J. Eq. 461; *Gariss v. Gariss*, 13 N. J. Eq. 320; *Christmas v. Campbell*, 1 Hayw. (N. Car.) 123, in which last mentioned case it was sought to read affidavits in denial of facts which were not negatived in the answer. See also *Withers v. Dickey*, 1 Stew. (Ala.) 190, *per Saffold, J.*

2. *Atty.-Gen. v. Nichol*, 16 Ves. Jr. 338.

**Failure to Expedite the Cause.** — Where the ground of the application to dissolve is the negligence of the plaintiff in not expediting his cause, he should have an opportunity of being heard by affidavits. *Brown v. Winans*, 11 N. J. Eq. 267.

**Grounds Not Set Up by Answer.** — After the proofs are closed and the case is

ready for final hearing, the defendant cannot make a motion to dissolve on affidavits setting up matters for which no foundation is laid in the answer. *Union Paper Bag Mach. Co. v. Newell*, 11 Blatchf. (U. S.) 549.

**On Motion to Dissolve for Want of Equity in the Bill.** — A motion to dissolve an injunction for want of equity in the bill operates in the same way as a demurrer to the bill, and hence no affidavit showing extraneous matter can be read by the defendant on such motion. *Wangelin v. Goe*, 50 Ill. 459, *citing Titus v. Mabey*, 25 Ill. 257.

In Louisiana the court will not allow issues to be made, and admit evidence, to do which would be virtually to try the case on the merits. *New Orleans Water-works Co. v. Oser*, 36 La. Ann. 918.

3. *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Henry v. Watson*, 109 Ala. 335; *Isaac v. Humpage*, 1 Ves. Jr. 427, 3 Bro. C. C. 463. See also 2 Dan. Ch. Pr. 668, which was *cited* in *Henry v. Watson*, 109 Ala. 335. See also *Long v. Brown*, 4 Ala. 622; *Barnard v. Davis*, 54 Ala. 565; *Kersey v. Rash*, 3 Del. Ch. 321; *Lewis v. Leak*, 9 Ga. 95; *Merwin v. Smith*, 2 N. J. Eq. 182; *Eastburn v. Kirk*, 1 Johns. Ch. (N. Y.) 445.

**Bill Charging Fraud.** — In *Isaac v. Humpage*, 3 Bro. C. C. 463, 1 Ves. Jr. 427, it was said: "The plaintiff proceeds wholly upon the fraud; and there is no instance in which the court



(3) *The Modern Practice.* — The rule in regard to the admission of *ex parte* evidence upon the hearing of an interlocutory motion to dissolve is not so strict as it was formerly; and in some cases the courts have, in late years, allowed affidavits to be read for the purpose of enlightening their consciences.<sup>1</sup> In the *United States* it will be found, upon inspection of the statutes and rules of many of the states, that the answer of the defendant is to be treated as no more than an affidavit, and that the court will permit both the plaintiff and defendant to read affidavits.<sup>2</sup> The

has refused to go into evidence in that case. Therefore let the affidavits be read."

**New Matter in the Answer.** — In *New Jersey* where the answer contains new matter not responsive to the bill, which is relied upon in any way as a foundation for setting aside the injunction, the plaintiff may read affidavits in contradiction of such new matter. *Merwin v. Smith*, 2 N. J. Eq. 182; *Holmes v. Jersey City*, 12 N. J. Eq. 299, *per* Chancellor Williamson.

1. *Henry v. Watson*, 109 Ala. 335, *per* Coleman, J.; *Brooks v. Bicknell*, 3 McLean (U. S.) 250.

In *Poor v. Carleton*, 3 Sumn. (U. S.) 70, Story, J., said: "I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that without it irreparable mischiefs would arise."

2. **California.** — If the defendant makes a counter-showing by affidavit with or without an answer, the plaintiff may meet it with a further showing on his part; but if the defendant rests his motion upon the papers on which the injunction was granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavit, as the case may be. *Falkinburg v. Lucy*, 35 Cal. 52; *Delger v. Johnson*, 44 Cal. 182; *Hiller v. Collins*, 63 Cal. 235; *Hicks v. Compton*, 18 Cal. 206.

**Delaware.** — Leave may be granted to exhibit at the hearing of the motion depositions in support of the bill and answer respectively, the same to be taken upon notice to the adverse party with opportunity for cross-examination, and to be confined to the matters set forth in the bill and answer respectively. *Marvel v. Ortlip*, 3 Del. Ch. 9.

**Florida.** — Rev. Stat., c. 1098, provides that either party may introduce

evidence in support or denial of the bill, and that the chancellor shall dissolve or continue the injunction according to the weight of the evidence. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; 29 Am. St. Rep. 258; *Sullivan v. Morena*, 19 Fla. 200; *Fuller v. Cason*, 26 Fla. 476.

**Georgia.** — In the exercise of its discretion, the court may listen to affidavits filed by the plaintiff in support of the statements in the bill and refuse to dissolve the injunction. *Cox v. Griffin*, 18 Ga. 728.

**Illinois.** — The motion is decided by the court on the weight of the testimony without taking the answer as absolutely true. *Wangelin v. Goe*, 50 Ill. 459.

**Indiana.** — Each party may read affidavits, and where affidavits have been read it does not follow necessarily that the defendant is entitled to have the injunction dissolved because the bill has been answered under oath. *Spicer v. Hoop*, 51 Ind. 365.

**Iowa.** — Code, § 3400, provides that where the application to dissolve is founded upon the answer and affidavits, the plaintiff may read counter affidavits. *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74.

**Kentucky.** — Under Code, § 291, any competent evidence may be heard, and the court is not bound to take the answer as true. *Simrall v. Grant*, 79 Ky. 435.

**Maryland.** — Acts 1835, c. 346 and c. 380, authorize the introduction of proof. *Belt v. Blackburn*, 28 Md. 227.

**Massachusetts.** — It is permissible to read affidavits on both sides. *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

**New York.** — In New York, under the Code, the plaintiff is at liberty to oppose the motion by affidavits or other proofs in addition to those on which the injunction was granted. *Hascall v. Madison University*, 8 Barb. (N. Y.)

intention of the framers of the *New York* Code was to relieve the plaintiff from the necessity of anticipating the defendant's case, and to adopt the more ordinary and logical practice of requiring the plaintiff in the first instance to make a *prima facie* case only, and of giving him an opportunity to meet the defendant's case after it had been presented.<sup>1</sup>

**Counter-Affidavits.** — In all cases where the plaintiff is entitled to introduce affidavits to overcome the denials of the answer, the defendant may introduce counter-affidavits.<sup>2</sup>

**14. The Order of Dissolution** — *a.* GENERAL PROPOSITIONS. — No particular form of order is necessary, and it would seem that the chancellor need not state in the order the grounds for dissolving the injunction, and that it is immaterial that the reasons for dissolving the injunction are not correctly stated, if, in fact, the dissolution of the injunction is proper.<sup>3</sup> No affirmative relief should be granted the defendant which is not asked for by a cross-bill or warranted by the pleadings.<sup>4</sup> The prayer of the motion should not be exceeded, nor should conditions be annexed which are not contemplated in the motion, especially when the plaintiff makes no response to the motion, and con-

174; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225; *Roome v. Webb*, 1 Code Rep. (N. Y.) 114, 3 How. Pr. (N. Y. Supreme Ct.) 327.

In *Hollins v. Mallard*, 10 How. Pr. (N. Y. Supreme Ct.) 540, Roosevelt, J., said: "Some difference of opinion, I am aware, has existed on this point, but the practice now is \* \* \* that where a defendant moves, not upon 'affidavits' as distinguished from an 'answer,' but upon affidavits with or without answer, 'on his part,' as distinguished from the original papers solely on the part of the plaintiff, in such case the plaintiff may introduce 'additional' affidavits to oppose the motion and to sustain the injunction." See also *Society, etc., v. Diers*, 60 Barb. (N. Y.) 152, holding that the plaintiff may read affidavits in answer to those presented on the part of the defendant setting up new matter.

**North Carolina.** — Code Civ. Pro., § 344, provides that a verified answer has the effect only of an affidavit. *Heilig v. Stokes*, 63 N. Car. 612; *Rigsbee v. Dunham*, 98 N. Car. 81; *Perry v. Michaux*, 79 N. Car. 94.

1. *Falkinburg v. Lucy*, 35 Cal. 52.

2. *Barnard v. Davis*, 54 Ala. 565.

**When Affidavits Need Be Filed.** — Where by statute "affidavits filed with the bill and answer" are authorized to

be read, the affidavits need not be filed at the same time as the filing of the bill and answer respectively. *Hummert v. Schwab*, 54 Ill. 142.

**Leave to Take Further Proof.** — Where a motion is made to dissolve upon the bill, answer, and proof, a motion asking leave to take further proof is addressed to the discretion of the court. *Hill v. Reifsnider*, 39 Md. 429.

3. *Cave v. Webb*, 22 Ala. 583; *Mack v. De Bardeleben Coal, etc., Co.*, 90 Ala. 396.

**An Order Striking the Case from the Docket**, in which the plaintiff acquiesces by making no attempt to reinstate the case, is a virtual dissolution of the injunction. *Gold v. Johnson*, 59 Ill. 62.

4. *Earle v. Hale*, 31 Ark. 473.

**Without in Terms Dissolving the Injunction**, the court may in effect dissolve it by decreeing the performance of the acts enjoined. *Cocks v. Simmons*, 57 Miss. 183.

**Without Prejudice to Action on Injunction Bond.** — A provision that the dissolution shall be "without prejudice to defendant's right to sue for damages on the injunction bond" affords no ground for complaint, as it simply furnishes evidence that the court did not adjudicate the matter of damages sustained by the defendant. *Davis v. Hart*, 66 Miss. 642.

sents that it shall be submitted and tried on the bill and answer.<sup>1</sup>

**b. IMPOSITION OF TERMS.** — The court may, in its discretion, impose terms upon the defendant upon the dissolution of an injunction, and in some states this course has the sanction of statutes.<sup>2</sup>

1. *Steiner v. Scholze*, 105 Ala. 607, in which case the plaintiff made no objection to a modification of the injunction by discharging it to a certain extent, but the court annexed certain conditions which resulted in the entire dissolution of the injunction unless the plaintiff should within fifteen days comply with certain terms.

2. In *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 2 McCrary (U. S.) 260, 1 Am. & Eng. R. Cas. 15, an injunction against the passage of one railroad over another was dissolved upon condition that the defendant should give bond for the damages which might be awarded against the plaintiff; the court said: "It is not necessary to cite authority to show that to accept such a bond is within the ordinary powers of a court of chancery when proceeding according to the general principles of equity. It is a mode of proceeding not only authorized by the general principles of equity jurisprudence, but it is in common use in courts of chancery, and especially in federal courts. In patent cases, for example, where it is supposed that an injunction to restrain the use of a patented article may operate injuriously, the complainant is protected by a bond to account for profits and pay damages, instead of an injunction." See also the following cases: *Fouche v. Rome St. R. Co.*, 84 Ga. 233; *Cook v. Jenkins*, 35 Ga. 113; *Nichols v. Wilson*, 4 Johns. Ch. (N. Y.) 115; *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448, 20 Am. & Eng. R. Cas. 157. See likewise *McMahon v. Spangler*, 4 Rand. (Va.) 51, in support of the authority of the court to dissolve an injunction upon terms imposed upon the defendant, and in that case it was held that where a deed is required to be tendered to the plaintiff or filed with the papers, it is proper to order that the injunction shall be dissolved without providing that the deed shall be approved by the court. The court was of opinion that no mischief could result to the plaintiff, because he could instantly apply to the chancellor by peti-

tion and make any objections that he might have to the deed when tendered.

**Alabama Statute.** — Code Ala. 1886, § 3531, provides that where a suit is instituted to enjoin and stay proceedings on a judgment at law, the chancellor on dissolving the injunction shall require of the defendant a refunding bond. *Dexter v. Ohlander*, 95 Ala. 467; *Rogers v. Haines*, 96 Ala. 586; *Robertson v. Walker*, 51 Ala. 484; *Barnard v. Davis*, 54 Ala. 565; *McLaughlin v. McLaughlin*, 36 Ala. 145.

**Louisiana Statute.** — Code Prac. La., art. 307, provides that when the act prohibited by an injunction is not such as will work irreparable injury, the court may, in its discretion, dissolve the injunction upon the execution of bond by the defendant. In determining whether the defendant should be permitted to bond the injunction the question is whether the act complained of involves "a change of any one of the parties' position, or a change of their respective positions, as they existed at the date of, and immediately preceding, the issuance of the injunction." *De La Croix v. Villere*, 11 La. Ann. 39; *State v. Judge*, 12 La. Ann. 455; *Marion v. Johnson*, 22 La. Ann. 512; *State v. Judge*, 23 La. Ann. 51; *State v. New Orleans*, 26 La. Ann. 304; *State v. Judge*, 29 La. Ann. 360; *New Orleans, etc., R. Co. v. Mississippi, etc., R. Co.*, 36 La. Ann. 561; *State v. Debailon*, 37 La. Ann. 110; *Cameron v. Godchaux*, 48 La. Ann. 1345; *White v. Cazenave*, 14 La. Ann. 57; *Jefferson, etc., R. Co. v. New Orleans*, 30 La. Ann. 970; *Osgood v. Black*, 33 La. Ann. 493; *Torres v. Falgoust*, 33 La. Ann. 560; *Levine v. Michell*, 34 La. Ann. 1181; *New Orleans Waterworks Co. v. Oser*, 36 La. Ann. 918.

**Allegations as to Irreparable Injury.** — A sworn allegation in the petition that the acts apprehended will cause irreparable injury is not conclusive, and will not deprive the judge of all discretion in the matter of dissolving the injunction on bond. *Crescent City Live Stock Landing, etc., Co. v. Butchers' Union Slaughter-House, etc., Co.*, 33

**Imposition of Terms upon the Plaintiff.** — When it is a close question whether or not the injunction should be dissolved, the chancellor may, in his discretion, instead of dissolving the injunction continue it and impose terms upon the plaintiff.<sup>1</sup>

**c. FINALITY OF THE DECISION.** — On a motion to dissolve the court will not commit itself on points or questions that may arise on the final hearing, and will not consider or decide the merits of the controversy with a view to a final decision.<sup>2</sup> The

La. Ann. 930; *Cameron v. Godchaux*, 48 La. Ann. 1345; *Koehl v. Judge*, 45 La. Ann. 1488; *Crescent City Live Stock Landing, etc., Co. v. Police Jury*, 32 La. Ann. 1192.

**Facts Taken as True.** — The facts alleged in the petition, showing that the acts complained of will cause irreparable injury, are to be taken as true. *State v. Judge*, 23 La. Ann. 51; *Marion v. Johnson*, 22 La. Ann. 512.

**Amount of Bond.** — The bond must be given for a sum commensurate with the damages which the plaintiff will sustain if the acts of the defendant shall be permitted. *Baldwin v. Bellocq*, 35 La. Ann. 982.

**New York Statute.** — Code Civ. Pro. N. Y., § 629, provides that "the court or judge may, where the alleged wrong or injury is not irreparable, and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order." *Chamberlin v. Buffalo, etc., R. Co.*, 31 Hun (N. Y.) 339; *Hessler v. Schafer*, 82 Hun (N. Y.) 199; *Wynkoop v. Van Beuren*, (Supreme Ct.) 11 N. Y. Supp. 379.

**Texas Statute.** — Rev. Stat. Tex. 1895, art. 3008, provides that upon the dissolution of any injunction restraining the collection of money by an interlocutory order, it shall be the duty of the court or judge to require a refunding bond. See *Horton v. Jones*, Dall. (Tex.) 467.

**Discharge of Indemnity Bond.** — An order made without notice to the plaintiff discharging an indemnity bond given by the defendant is absolutely void. *Kleeb v. Bard*, 12 Wash. 140, in which case the court remarked: "The bond did more than to take the place of the restraining order. By virtue of its execution the defendants were put in a

situation which enabled them to dispose of the property against which relief in the original action was sought. And this being so, it must be held that the bond took the place of such property. Hence the court could make no order in reference thereto which would be binding upon the plaintiff, except in the proper progress of the cause."

1. *Chetwood v. Brittan*, 2 N. J. Eq. 438.

2. *Delaware.* — *Plunkett v. Dillon*, 3 Del. Ch. 496.

*Florida.* — *McKinne v. Dickenson*, 24 Fla. 366; *Linton v. Denham*, 6 Fla. 533; *Yonge v. McCormack*, 6 Fla. 368.

*Illinois.* — *Ottawa v. Walker*, 21 Ill. 605; *Pentecost v. Magahee*, 5 Ill. 326.

*Maryland.* — *Paul v. Nixon*, which case is reported in *Jones v. Magill*, 1 Bland (Md.) 177, note 1.

*Nebraska.* — *Browne v. Edwards, etc.*, *Lumber Co.*, 44 Neb. 361.

*New Jersey.* — *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 N. J. Eq. 302; *Dellett v. Kemble*, 23 N. J. Eq. 58.

*New York.* — *Warsaw Water-works Co. v. Warsaw*, 4 N. Y. App. Div. 509; *Gardner v. Gardner*, 87 N. Y. 14; *Watson v. Scammell*, (Supreme Ct.) 1 N. Y. Supp. 845.

*Tennessee.* — *Owen v. Brien*, 2 Tenn. Ch. 295.

*Texas.* — *Washington County v. Schulz*, 63 Tex. 32.

*Virginia.* — *Sanderlin v. Baxter*, 76 Va. 299.

*Wisconsin.* — *Koeffler v. Milwaukee*, 85 Wis. 397.

*United States.* — *Matter of Metzler*, 1 Ben. (U. S.) 356, Bank. Reg. Supp. 9; *Porter v. U. S.*, 2 Paine (U. S.) 313; *New Memphis Gas, etc., Co. v. Memphis*, 72 Fed. Rep. 952; *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 2 McCrary (U. S.) 260; *Young v. Grundy*, 6 Cranch (U. S.) 51.

See also *Great Western R. Co. v. Birmingham, etc., R. Co.*, 2 Phil. 602;

court, on overruling a motion to dissolve when the cause is not ripe for final hearing, should not make the injunction perpetual, as the defendant has the right to be heard on the merits.<sup>1</sup>

**Res Judicata.** — The order made on a motion to dissolve is interlocutory merely, and is not a final decree; and whether the injunction be dissolved or not, the order in no way affects the substantial rights of the parties, and does not dispose of the main cause in any manner or in any degree, nor preclude the court from considering the rights of the parties on the final hearing and rendering a final decree.<sup>2</sup>

The Dissolution of the Injunction restores the status existing prior to the issuance of the injunction, and secures to the defendant the right to do and continue the acts sought to be enjoined, and the cause proceeds as if there had never been any injunction.<sup>3</sup>

**d. WHETHER THE BILL SHOULD BE DISMISSED.** — It does not follow as a matter of course that the bill will be dismissed upon the dissolution of the injunction.<sup>4</sup> Upon the dissolution of an injunction because of denials in the answer, the bill should

Glascott v. Lang, 3 Myl. & C. 455; Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co., 1 Sim. N. S. 426; Ballard v. Fuller, 32 Barb. (N. Y.) 68; which cases were cited in Owen v. Brien, 2 Tenn. Ch. 295.

1. Ottawa v. Walker, 21 Ill. 605, in which case Walker, J., said: "The court can only render a decree making the injunction perpetual on a bill *pro confesso*, on overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits, and proofs." See also, to the same effect, Smith v. Price, 39 Ill. 28.

2. Hiller v. Collins, 63 Cal. 235; Carson Min. Co. v. Hill, 7 Colo. App. 141; Randall v. Jacksonville St. R. Co., 19 Fla. 409; Clark v. Herring, 43 Ga. 228; Chamberlain v. Sutherland, 4 Ill. App. 494; Pentecost v. Magahee, 5 Ill. 326; Woerishoffer v. Lake Erie, etc., R. Co., 25 Ill. App. 84; Keel v. Bentley, 15 Ill. 228; Terry v. Hamilton Primary School, 72 Ill. 476; Fisher v. Beard, 40 Iowa 625; Russell v. Wilson, 37 Iowa 377; Simrall v. Grant, 79 Ky. 435; Peters v. Fralinghouse, 20 La. Ann. 85; Smith v. Sahler, 1 Neb. 310; Bartram v. Sherman, 46 Neb. 713; Scofield v. State Nat. Bank, 8 Neb. 16; Browne v. Edwards, etc., Lumber Co., 44 Neb. 361; Paul v. Munger, 47 N. Y. 469; People v. Schoonmaker, 50 N. Y. 499; Basche v. Pringle, 21 Oregon 24; Bradford v. Peckham, 9 R. I. 251; Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. (Va.) 40.

**In Another Action Between the Parties,** an order dissolving an injunction is not *res judicata* as to the rights of the parties. Peters v. Fralinghouse, 20 La. Ann. 85.

3. State v. Duffel, 41 La. Ann. 516; State v. Houston, 36 La. Ann. 886; Robertson v. Robertson, 58 Ala. 68. See also Foote v. Forbes, 25 Kan. 359.

4. Parkinson v. Trousdale, 4 Ill. 367; Brown v. Galena Min., etc., Co., 32 Kan. 528; Hale v. Bozeman, 60 Miss. 965; Strong v. Harrison, 62 Miss. 61; Maury v. Smith, 46 Miss. 81; Scofield v. State Nat. Bank, 8 Neb. 16.

**Insufficiency of Bond.** — Upon the dissolution of an injunction because of the insufficiency of the bond, the suit should not be dismissed. Massie v. Mann, 17 Iowa 131; Pillow v. Thompson, 20 Tex. 206.

**Dissolution for Want of Notice.** — Upon the dissolution of an injunction because it was issued without notice, the bill should not be dismissed. Gray v. Baldwin, 8 Blackf. (Ind.) 164.

**Want of Insufficiency of Affidavit.** — Where an injunction is dissolved because the bill is not sworn to, or because the affidavit is insufficient, and the bill contains equity, the bill should not be dismissed; as the plaintiff is nevertheless entitled on the final hearing to such relief as his evidence establishes. Porter v. Moffett, 1 Morr. (Iowa) 108; Pullen v. Baker, 41 Tex. 419.

not be dismissed;<sup>1</sup> nor should the bill be dismissed where it is not framed wholly with a view to obtaining an injunction, and the plaintiff sets up other grounds of equitable interposition.<sup>2</sup> Where the bill is without equity, and the injunction is dissolved on that ground, the court ordinarily will not dismiss the bill, unless the plaintiff refuses to amend.<sup>3</sup> But the court is authorized to dismiss the bill where it is apparent that there is no reason for retaining it, or where the plaintiff does not proffer an amendment.<sup>4</sup>

**15. Successive Motions to Dissolve.** — A defendant who has once moved unsuccessfully for the dissolution of an injunction cannot make a second motion for the same object upon the same papers, without leave of the court first obtained.<sup>5</sup> But where a motion

1. *Arkansas*. — *Herndon v. Higgs*, 15 Ark. 389.

*Florida*. — *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387.

*Georgia*. — *Harper v. Whitehead*, 33 Ga. 139; *Smith v. Bryan*, 34 Ga. 53.

*Illinois*. — *Beams v. Denham*, 3 Ill. 58.

*Indiana*. — *Thompson v. Adams*, 2 Ind. 151; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164; *Cain v. Foote*, 8 Blackf. (Ind.) 454.

*Iowa*. — *Russell v. Wilson*, 37 Iowa 377; *Walters v. Fredericks*, 11 Iowa 181.

*Maryland*. — *Dorsey v. Hagerstown Bank*, 17 Md. 408; *Paul v. Nixon*, which case is reported in *Jones v. Magill*, 1 *Blond* (Md.) 177, note 1.

*Mississippi*. — *Hooker v. Austin*, 41 Miss. 717; *Drane v. Winter*, 41 Miss. 517.

*Texas*. — *Floyd v. Turner*, 23 Tex. 292; *Blum v. Schram*, 58 Tex. 524; *Gaskins v. Peebles*, 44 Tex. 390; *Sims v. Redding*, 20 Tex. 386; *Lively v. Bristol*, 12 Tex. 60; *Pullen v. Baker*, 41 Tex. 419; *Fulgham v. Chevallier*, 10 Tex. 518; *Burnley v. Cook*, 13 Tex. 586; *Dearborn v. Phillips*, 21 Tex. 449; *Texas Land Co. v. Turman*, 53 Tex. 623; *Love v. Powell*, 67 Tex. 15; *Washington County v. Schulz*, 63 Tex. 32; *Horton v. Jones*, *Dall.* (Tex.) 466.

*Virginia*. — *Blow v. Taylor*, 4 Hen. & M. (Va.) 159.

2. *Attalla Min., etc., Co. v. Winchester*, 102 Ala. 184; *Parkinson v. Trousdale*, 4 Ill. 367; *Wilson v. Weber*, 3 Ill. App. 125; *Hummert v. Schwab*, 54 Ill. 142; *Laupheimer v. Rusenbaum*, 25 Md. 219; *Kelly v. Baltimore*, 53 Md. 139; *Pulliam v. Winston*, 5 Leigh (Va.) 324; *Hough v. Shreeve*, 4

*Munf.* (Va.) 490; *Singleton v. Lewis*, 6 *Munf.* (Va.) 397; *Adkins v. Edwards*, 83 Va. 300; *Ruffners v. Barrett*, 6 *Munf.* (Va.) 207.

3. *Cobb v. Gardner*, 105 Ala. 467; *Gullatt v. Thrasher*, 42 Ga. 429; *Beard v. Geran*, *Hard.* (Ky.) 14; *Washington County v. Schulz*, 63 Tex. 32.

4. *San Juan, etc., Min., etc., Co. v. Finch*, 6 Colo. 214; *Edwards v. Pope*, 4 Ill. 465; *Small v. Somerville*, 58 Iowa 362; *Hale v. McComas*, 59 Tex. 484; *Western v. Woods*, 1 Tex. 1; *Taylor v. Gillelan*, 23 Tex. 508; *Gaskins v. Peebles*, 44 Tex. 390; *Love v. Powell*, 67 Tex. 15. See also *Kelly v. Baltimore*, 53 Md. 139; *Bass v. Nelms*, 56 Miss. 502.

In *Virginia* it has been provided by statute (Code 1887, § 3446) that when an injunction is wholly dissolved the bill shall stand dismissed of course, unless sufficient cause be shown against such admission at the next term. *Adkins v. Edwards*, 83 Va. 300; *Muller v. Bayly*, 21 Gratt. (Va.) 521; *Gallego v. Quesnall*, 1 Hen. & M. (Va.) 205; *Byrne v. Lyle*, 1 Hen. & M. (Va.) 7.

5. *Lowry v. Chautauqua County Bank*, *Clarke Ch.* (N. Y.) 67.

In *Thomas v. Horn*, 21 Ga. 177, it was said: "There can be no doubt that a court of equity would refuse to entertain a second motion to dissolve an injunction if both motions were placed on precisely the same foundation." See also *Hoffman v. Livingston*, 1 Johns. Ch. (N. Y.) 211; *Ford v. Buchanan*, 31 Ga. 386; *Carrington v. Florida R. Co.*, 9 Blatchf. (U. S.) 468.

**After Removal into United States Court.** — Where the cause is removed into a United States Circuit Court after a motion to dissolve has been made in the state court, the United States Cir-

to dissolve is denied, with an express reservation that the motion may be renewed, it is regular to submit the motion a second time.<sup>1</sup> A second motion may be entertained, however, where it is based on different grounds, and in such a case the doctrine of *res judicata* does not apply.<sup>2</sup>

**XVI. MODIFICATION OR DISSOLUTION IN PART — 1. Power of the Court to Modify Injunction.** — The court has power to totally or partially dissolve an injunction according to the exigencies of the case, and will modify it or dissolve it in part so as to do exact justice to both parties, where the peculiar equities of the case, as disclosed by the bill and answer, or by affidavits in those states where it is permissible to read affidavits, warrant such modification; *e. g.*, where the injunction is too broad or has not the requisite certainty, or where the answer removes some of the equities of the bill and leaves the plaintiff without any right to a continuance of the injunction in its original scope.<sup>3</sup>

cuit Court will not entertain a motion to dissolve on the same record until the trial term. *Texas, etc., R. Co. v. Rust*, 5 McCrary (U. S.) 348, *citing* Hot Springs Cases, MS.

**Statutory Provisions.** — In *Kentucky* it is provided by statute (Code, § 290) that but one motion shall be made to dissolve on the whole case. *Simrall v. Grant*, 79 Ky. 435.

In *Iowa* it is provided by statute (Code, § 3402) that only one motion to dissolve upon the whole case shall be allowed; but this provision does not prevent the defendant from making a motion to dissolve the injunction so issued after notice, and an opportunity to be heard being given to the defendant. *Hinkle v. Saddler*, (Iowa 1896) 66 N. W. Rep. 765. See also *Carrothers v. Newton Mineral Spring Co.* 61 Iowa 681.

1. *Hudson v. Crutchfield*, 12 Ala. 433.

2. *Thomas v. Horn*, 21 Ga. 177; *Erie R. Co. v. Ramsey*, 45 N. Y. 937, 57 Barb. (N. Y.) 449. In the last mentioned case the court *cited* *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

**Motion Based on Bill.** — The making of a motion to dissolve upon the papers upon which the injunction was granted is without prejudice to the defendant's right to make a second motion to dissolve upon the coming in of the answer. *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. (N. Y. Supreme Ct.) 296.

3. *Alabama*. — *Miller v. Bates*, 35 Ala. 580; *Moses v. Tompkins*, 84 Ala. 613; *Columbus, etc., R. Co. v. Withers*, 82 Ala. 190.

*California* Practice Act, § 334, authorizes the modification of an order granting an injunction. *Fremont v. Merced Min. Co.*, 9 Cal. 18; *McMenomy v. Baud*, 87 Cal. 138.

*Delaware*. — *Plunkett v. Dillon*, 3 Del. Ch. 496, holding that where the injunction has not the requisite certainty the court may, on a motion to dissolve it, amend it by striking out the clause which renders it uncertain.

*Georgia*. — *Ketchens v. Howard*, 30 Ga. 931; *Savannah, etc., R. Co. v. Fort*, 84 Ga. 300; *Hill v. Sledge*, 51 Ga. 539; *Blood v. Martin*, 21 Ga. 127; *Carter v. Hallahan*, 59 Ga. 67; *Colley v. Duncan*, 47 Ga. 668; *Howard v. Lowell Mach. Co.*, 75 Ga. 325; *Lake v. Smith*, 76 Ga. 524; *Gunn v. Thornton*, 49 Ga. 380; *Fillingin v. Thornton*, 49 Ga. 384.

*Iowa*. — *Walker v. Ayres*, 1 Iowa 449.

*Louisiana*. — *New Orleans, etc., R. Co. v. Mississippi, etc., R. Co.*, 36 La. Ann. 561, holding that the injunction may be dissolved so far as it is mandatory, and continued so far as it is prohibitory.

*Maryland*. — *Allegany County v. Union Min. Co.*, 61 Md. 545; *Meyer v. Devries*, 64 Md. 532.

*Mississippi*. — *Hill v. Billingsly*, 53 Miss. 111; *Hale v. Bozeman*, 60 Miss. 965; *Wildy v. Bonney*, 35 Miss. 77.

*New Jersey*. — *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Hugg v. Fath*, 37 N. J. Eq. 46; *Shreve v. Voorhees*, 3 N. J. Eq. 25.

*New York*. — *Parker v. Williams*, 4 Paige (N. Y.) 439; *Hawke v. Hawke*, 74 Hun (N. Y.) 370.

2. **When Entire Dissolution Improper.** — It is erroneous to dissolve the injunction in its entirety, where under the case made by the bill the plaintiff is entitled to some relief, and the only objection to the injunction is that it is too broad; and in such case it should be modified.<sup>1</sup>

3. **Discretion of Court.** — The modification of an injunction is in the discretion of the court, and unless there has been an abuse of discretion, the court's action in modifying an injunction, or in refusing to do so, will not be disturbed on appeal.<sup>2</sup>

4. **Enlargement of Injunction.** — Where an injunction in the terms prayed is denied, and a partial restraint is put upon the defendant upon the theory that such restraint will be ample to protect and secure the rights of both parties, the plaintiff is at liberty at any time, upon being advised that he can present the case with more particularity and precision so as to satisfy the court that he is entitled to the injunction as prayed, to ask the court to enlarge the injunction.<sup>3</sup>

*Ohio.* — *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

*Oklahoma.* — *Mason v. Cromwell*, 3 Okla. 240.

*United States.* — *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 59 Fed. Rep. 501; *Brammer v. Jones*, 2 Bond (U. S.) 100; *Baker Mfg. Co. v. Washburn, etc., Mfg. Co.*, 5 McCrary (U. S.) 504; *Tucker v. Carpenter, Hempst.* (U. S.) 440.

1. *Walker v. Ayres*, 1 Iowa 449.

**Insufficient Showing to Warrant Modification.** — In *Maulden v. Armistead*, 18 Ala. 500, an injunction against a judgment was retained, notwithstanding the denials of the answer showed that there was no right to an injunction as to a part of the judgment, because the answer did not afford means of ascertaining how much of the judgment was improperly enjoined. *Distinguished* in *Miller v. Bates*, 35 Ala. 580, in which case the bill itself showed the absence of all right to a continuance of the injunction in its original scope.

2. *Hobbs v. Amador, etc., Canal Co.*, 66 Cal. 161, 8 Am. & Eng. Corp. Cas. 249; *Hollis v. Williams*, 43 Ga. 214; *Mason v. Cromwell*, 3 Okla. 240; *Hill v. Billingsly*, 53 Miss. 111.

**Permission to Try Action at Law.** — It is always in the power of the defendant, when he has been enjoined from further proceedings at law, to move for a modification of the injunction, so far as to allow a trial of the action. *Hill v. Billingsly*, 53 Miss. 111.

**Permission to Complete Work Nearly Completed.** — Where the defendant has nearly completed his work and its completion will do no further injury to the plaintiff, and will not deprive the plaintiff of any claim to relief to which he may on the final hearing appear to be entitled, the injunction will be modified so as to permit the defendant to complete his work. *Hugg v. Fath*, 37 N. J. Eq. 46.

**After Affirmance on Appeal.** — The affirmance on appeal of an interlocutory decree granting an injunction does not operate to deprive the lower court of its inherent power to temporarily suspend such injunction in furtherance of justice. *Edison Electric Co. v. U. S. Electric Lighting Co.*, 59 Fed. Rep. 501.

**Dissolution as to Stranger Improperly Joined.** — Where one who is not interested in the subject-matter of the suit, and who is not contemplating the commission of the grievance complained of, has been joined as a party defendant, the injunction as to him should be dissolved. *Brammer v. Jones*, 2 Bond (U. S.) 100.

**After Removal into United States Court.** — Upon the removal of a cause into a United States Circuit Court after a preliminary injunction has been obtained, the court into which the cause has been removed has power to modify the injunction. *Portland v. Oregonian R. Co.*, 7 Sawy. (U. S.) 122.

3. *Shreve v. Voorhees*, 3 N. J. Eq. 25. See also *Parkhurst v. Kinsman*, 2



5. **Suspension of Injunction.** — The court has inherent power in its discretion to temporarily suspend an injunction when the exigencies of the case require that it should be suspended.<sup>1</sup>

**XVII. REINSTATEMENT OF PRELIMINARY INJUNCTION.** — The court has power so long as the suit remains undetermined to reinstate an injunction which has been dissolved, on a proper showing being made that the dissolution of the injunction was erroneous;<sup>2</sup> or, after an injunction has ceased to exist, the court has power to reinstate it.<sup>3</sup> The case not having been finally disposed of, it is unnecessary to file the bill again;<sup>4</sup> but cause must be shown, and as a general rule the application to reinstate or renew an injunction should present new facts.<sup>5</sup>

**XVIII. THE FINAL HEARING** — 1. **In General.** — Where the cause is regularly set down for final hearing on bill, answer and replication, and the answer denies the material allegations of the bill, the burden of proof is upon the plaintiff, and if the allegations of the bill are not supported by proof there should be a decree against the plaintiff.<sup>6</sup> The court will require the plaintiff to

Blatchf. (U. S.) 78, holding that upon the filing of a supplemental bill containing additional charges against the defendant, based on facts which have occurred since the filing of the original bill, the court will extend the injunction so as to include the additional acts sought to be enjoined.

**New Injunction upon Amended or Supplemental Bill.** — As to the right to an injunction upon the filing of an amended or supplemental bill, see *supra*, p. 998.

1. *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 59 Fed. Rep. 501; *per* Benedict, J., *obiter* in *Pentlarge v. Beeston*, 18 Blatchf. (U. S.) 38.

2. *Peck v. Spencer*, 26 Fla. 23; *Baldwin v. Bellocq*, 35 La. Ann. 982; *Pike v. Bates*, 34 La. Ann. 391; *State v. Northern Cent. R. Co.*, 18 Md. 213; *Penny v. Holberg*, 53 Miss. 567; *Tone v. Brace, Clarke Ch.* (N. Y.) 503; *Jewett v. Albany City Bank, Clarke Ch.* (N. Y.) 59; *Price v. Browning*, 4 Gratt. (Va.) 68; *Gilliam v. Allen*, 1 Rand. (Va.) 414; *Radford v. Innes*, 1 Hen. & M. (Va.) 7; *Toll Bridge v. Free Bridge*, 1 Rand. (Va.) 206; *North v. Perrow*, 4 Rand. (Va.) 4; *Gallaher v. Moundsville*, 34 W. Va. 730; *Bentley v. Joslin, Hempst.* (U. S.) 218; *Tucker v. Carpenter, Hempst.* (U. S.) 440.

In *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, it was said: "In case the judge, at any stage of the proceeding, is satisfied he has erred in dissolving an injunction, he should at

once correct the error, by granting a second injunction."

3. In *Parker v. Maryland*, 12 Wheat. (U. S.) 561, it was held that although the judges of United States District Courts are authorized to grant writs of injunction, which shall not "continue longer than to the circuit court next ensuing," the court, after an injunction has ceased to exist, has power to reinstate it.

4. *Peck v. Spencer*, 26 Fla. 23.

5. *Gallaher v. Moundsville*, 34 W. Va. 730; *Tone v. Brace, Clarke Ch.* (N. Y.) 503; *Livingston v. Gibbons*, 5 Johns. Ch. (N. Y.) 250; *Fanning v. Dunham*, 4 Johns. Ch. (N. Y.) 35; *Bloomfield v. Snowden*, 2 Paige (N. Y.) 355; *Lowry v. M'Gee*, 5 Yerg. (Tenn.) 238; *Heck v. Vollmer*, 29 Md. 507; *France v. France*, 8 N. J. Eq. 619.

**Upon Amended or Supplemental Bill.** — As to the reinstatement of an injunction, or the issuance of a new one upon the filing of an amended or supplemental bill, see *supra*, p. 998.

6. *Hamilton v. Adams*, 15 Ala. 596, in which case it was held that where the plaintiff's right to an injunction depends upon his title to land it is incumbent upon him to prove such title; *Birnbaum v. Salomon*, 22 Fla. 610; *Bressler v. McCune*, 56 Ill. 475, in which case will be found language substantially the same as that used in the text; *Westfall v. Lee*, 7 Iowa 12; *Cowan v. Price*, 1 Bibb (Ky.) 173; *Hutchins v. Hope*, 7 Gill (Md.) 119; *Burnham v.*

show that he has a clear and unexceptional right to an injunction.<sup>1</sup> The court will apply the familiar rules that where the answer is responsive to the bill, and denies its allegations directly and positively, it is incumbent upon the plaintiff to prove his allegations by the testimony of two witnesses, or of one witness with corroborating evidence;<sup>2</sup> that facts which are admitted in the answer, or which are not denied therein, are to be taken as true;<sup>3</sup> that where the defendant denies the allegations of the bill according to his knowledge and belief only, and disclaims knowledge of matters alleged in the bill, such matters must be proved but need not be proved by two witnesses;<sup>4</sup> that proof of affirmative defensive matter alleged in the answer must be made by the defendant;<sup>5</sup> and that the evidence of one defend-

Kempton, 44 N. H. 78; Manufacturers', etc., Bank v. C. W. F. Dare Co., 67 Hun (N. Y.) 44; Grimstone v. Carter, 3 Paige (N. Y.) 421; Spangler v. Cleveland, 43 Ohio St. 526; Tongue v. Gaston, 10 Oregon 328; Spokane St. R. Co. v. Spokane Falls, 46 Fed. Rep. 322.

1. Spangler v. Cleveland, 43 Ohio St. 526, citing Dan. Ch. 1681. See also Grimstone v. Carter, 3 Paige (N. Y.) 421, in which case Chancellor Walworth declared that the plaintiff will be held to strict proof. See likewise Eastman v. Amoskeag Mfg. Co., 47 N. H. 71.

2. Watson v. Palmer, 5 Ark. 501; Burr v. Burton, 18 Ark. 214; Davidson v. Wilson, 3 Del. Ch. 307; Patterson v. Hobbs, 1 Litt. (Ky.) 275; Lee v. Vaughn, 1 Bibb (Ky.) 235; Bouldin v. Baltimore, 15 Md. 18; Crowe v. Wilson, 65 Md. 479; West v. Flannagan, 4 Md. 36; Hascall v. Madison University, 8 Barb. (N. Y.) 174, in which case Gridley, J., adverted to the old practice; Beatty v. Smith, 2 Hen. & M. (Va.) 395; Wise v. Lamb, 9 Gratt. (Va.) 294 [in which case the court cited Thornton v. Gordon, 2 Rob. (Va.) 719; Beatty v. Smith, 2 Hen. & M. (Va.) 395; Pryor v. Adams, 1 Call (Va.) 382; Smith v. Brush, 1 Johns. Ch. (N. Y.) 459; Lenox v. Prout, 3 Wheat. (U. S.) 520; Alam v. Jourdan, 1 Vern. 161; and Pember v. Mathers, 1 Bro. C. C. 52]; Woodworth v. Edwards, 3 Woodb. & M. (U. S.) 120.

**Effect of Answer Under the Code.** — The answer under the code as such is not evidence at all. Hascall v. Madison University, 8 Barb. (N. Y.) 174.

3. Whitaker v. Wickersham, 5 Del. Ch. 187, in which case it was declared that if the answer contains an admission the plaintiff may avail himself of

it, but it must be the admission in its entirety and not in part only. See also the following cases: Boston v. Nichols, 47 Ill. 353; Cunningham v. Gaynor, 87 Iowa 449, wherein it was held that where the defendant pleads guilty the court may proceed to render final judgment, and there is no necessity for a final hearing or trial; Osborne County v. Blake, 19 Kan. 299; Meinhard v. Strickland, 29 S. Car. 491.

**Matters Not Within the Defendant's Knowledge**, and which cannot, by any reasonable implication from anything appearing in the bill, be presumed to be so, although they be not answered or denied, cannot properly be considered as confessed or conceded by the defendant, and must be proved by the plaintiff. Cowan v. Price, 1 Bibb (Ky.) 173.

4. Watson v. Palmer, 5 Ark. 501; Allman v. Owen, 31 Ala. 167; Harlan v. Wingate, 2 J. J. Marsh. (Ky.) 138; Briesch v. McCauley, 7 Gill (Md.) 189; Warfield v. Gambrell, 1 Gill & J. (Md.) 503; Young v. Grundy, 6 Cranch (U. S.) 51.

**Where There Is No Plain and Positive Denial** of any assertion in the bill necessary to the complainant's case, the testimony of two witnesses, or of one witness with corroborating circumstances, will not be insisted upon. Robinson v. Jefferson, 1 Del. Ch. 244.

5. Moses v. Johnson, 88 Ala. 517; Laub v. Burnett, 31 Ga. 304; Mason City Salt, etc., Co. v. Mason, 23 W. Va. 211, 7 Am. & Eng. Corp. Cas. 426.

**Until the Plaintiff Has Established the Allegations of His Bill** the defendant is under no necessity to establish new or evasive matter set up in his answer. Hutchins v. Hope, 7 Gill (Md.) 119.

ant is not evidence against his codefendants.<sup>1</sup>

**2. What Evidence Admissible.**—The affidavits to the bill and answer are not in evidence and cannot be considered,<sup>2</sup> and evidence given on a motion to dissolve cannot be read on the final hearing except by consent of the parties.<sup>3</sup>

**3. Allegations and Proof—Variance.**—The court will strictly apply the rule that the *allegata et probata* must correspond;<sup>4</sup> but no more will be required than that the plaintiff shall not set up a new case not made by the bill, and an immaterial variance is not fatal.<sup>5</sup>

**XIX. THE FINAL DECREE—1. Perpetuation of Injunction.**—The granting of a permanent injunction is part of the final decree, and abides the fate of the decree itself.<sup>6</sup> A perpetual injunction

1. *Briesch v. McCauley*, 7 Gill (Md.) 189, in which case it was declared that if the defendant desires to rely upon the admissions of a codefendant he must examine him as a witness on interrogatories, and thus afford the plaintiff an opportunity to cross-examine him. See also, to the same effect, *Vathir v. Zane*, 6 Gratt. (Va.) 246; *Ward v. Davidson*, 2 J. J. Marsh. (Ky.) 443. In the latter case the court *disapproved* *Field v. Holland*, 6 Cranch (U. S.) 24.

2. *Atty.-Gen. v. Steward*, 21 N. J. Eq. 340.

3. *Bressler v. McCune*, 56 Ill. 475; *Atkinson v. Linden Steel Co.*, 138 Ill. 187; *State v. Brown*, 64 Md. 199.

In Illinois, by statute, depositions which have been taken to be read on the motion to dissolve may be used on the final hearing of the case, but not *ex parte* affidavits. *Hopkins v. Granger*, 52 Ill. 504.

In California express findings by the court are necessary unless they are waived. *Richardson v. Eureka*, 110 Cal. 441.

**Propriety of Preliminary Injunction.**—On the final hearing the court will not consider whether or not the temporary injunction was properly awarded. *Boston v. Nichols*, 47 Ill. 353. See also, as to the effect of an order granting a preliminary injunction, or an order dissolving a preliminary injunction, *supra*, pp. 1011, 1089.

4. *Fisk v. Wilber*, 7 Barb. (N. Y.) 395; *Olmsted v. Loomis*, 6 Barb. (N. Y.) 152, and *James v. McKernon*, 6 Johns. (N. Y.) 543; *Highway Com'rs v. Deboe*, 43 Ill. App. 25.

5. *Farris v. Dudley*, 78 Ala. 124, in which case a levee was improperly de-

scribed as being somewhat longer than it really was; *Hill v. Lenormand*, (Arizona 1888) 16 Pac. Rep. 266, in which case an injunction was sought against the appropriation of water, and it was considered immaterial that the amount of water appropriated, as appeared from the evidence, was less than the amount alleged in the bill.

In *Hicks v. Silliman*, 93 Ill. 255, the court said: "It is only when the allegation is descriptive of the cause of action and is not severable that a variance is fatal. \* \* \* It is a familiar doctrine of law that torts are severable, and that it is only necessary to prove so much of the wrong charged as constitutes a cause of action to entitle the plaintiff to a recovery."

6. *Per Bradley*, J., in *Buffington v. Harvey*, 95 U. S. 99.

**No Preliminary Injunction Awarded.**—If the plaintiff is entitled to an injunction on the merits and on the evidence produced at the hearing, he is not deprived of that right because he did not move for an injunction at a previous stage of the cause. *Buchanan v. Howland*, 5 Blatchf. (U. S.) 151, *following* *Bacon v. Spottiswoode*, 1 Beav. 387.

**Ancillary Injunction.**—Where an injunction is sought ancillary to legal issues, a final injunction should not be granted until the main issues have been determined in the plaintiff's favor. *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

**Vacation of Void Judgment.**—Where a judgment granting a perpetual injunction is void because the proper parties defendant were not brought in to enable the court to make the judgment, it may, under Gen. Stat. Kan., p. 744, § 575, "be vacated at any time,

may be and often is different in its effect and terms from a preliminary injunction,<sup>1</sup> a perpetual injunction being a final adjudication which stays the acts threatened.<sup>2</sup> By the final decree the preliminary injunction may be dissolved in part and perpetuated in part.<sup>3</sup> A decree perpetuating an injunction should contain proper limitations as to place.<sup>4</sup> A perpetual injunction should not be decreed against third persons who are not parties to the cause;<sup>5</sup> and it is ground for refusing a perpetual injunction, that the acts sought to be enjoined have already been consummated,<sup>6</sup> or that the acts complained of have ceased,<sup>7</sup> or that the plaintiff has parted with his interest in the subject-matter of the suit.<sup>8</sup> The court may, in its discretion, anticipate the contingency that the plaintiff's right to an injunction may cease in the future, but a perpetual injunction which omits such provision is not invalid.<sup>9</sup>

**2. Affirmative Relief to the Defendant.** — Where there is no cross-bill warranting the giving of affirmative relief to the defendant,

on motion of a party or any person affected thereby." *Beach v. Shoemaker*, 18 Kan. 147.

1. *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216.

2. *Lake Erie, etc., R. Co. v. Cluggish*, 143 Ind. 347.

3. *Perry v. Kearney*, 14 La. Ann. 401, in which case an injunction was issued against the execution judgment, part of which had been paid.

4. *Talcott v. Brackett*, 5 Ill. App. 60, in which case it was held that an injunction against the violation of a contract should contain the limitations as to place which were stated in the contract.

5. *Waller v. Harris*, 7 Paige (N. Y.) 167, 20 Wend. (N. Y.) 555.

6. *People v. Clark*, 70 N. Y. 518. But see *Holmes v. Calhoun County*, (Iowa 1896) 66 N. W. Rep. 145, in which case it was held that where an injunction is sought against the construction and maintenance of a drain, the fact that the drain has been constructed before the time when the cause was ripe for a decree is no reason why a decree should not be rendered prohibiting the defendant from maintaining the drain.

7. *Reynolds v. Everett*, 67 Hun (N. Y.) 294.

8. *Piedmont, etc., R. Co. v. Speelman*, 67 Md. 260, holding that the preliminary injunction should be dissolved and the bill dismissed.

9. *Cook v. Johnson*, 47 Conn. 175.

**Until Further Order.** — The finality of the decree is not affected by a clause therein contained that the injunction

"ought to be and the same is made perpetual, or until the further order of this court." *Woffenden v. Woffenden*, 1 Arizona 328.

**A Provision Should Be Contained in the Decree** that the defendant may continue his undertaking upon complying with the requirements of law, where the plaintiff's bill entitles him to an injunction against the defendant until the latter has complied with certain requirements of law, and under such circumstances it is improper to render a final and perpetual decree that the defendant shall under no circumstances proceed with the undertaking complained of. *Champion v. Sessions*, 2 Nev. 271.

**Clause that the Defendant May Have the Decree Modified.** — Where the court adjudges that certain acts threatened to be continued by the defendant would constitute a public nuisance which must be forever enjoined, it is improper to insert in the decree a clause that the defendant may at any time, as he may be advised, apply to the court to have the decree modified or vacated, and that whenever it shall appear that official means have been adopted to prevent the continuance of injury toward the plaintiff, the defendant shall be entitled to have the decree vacated and set aside. *People v. Gold Run Ditch, etc., Co.*, 66 Cal. 155, in which case the court said: "It is not the duty of a court to make provision in its final judgment for a reopening or renewal of a controversy which it closes by its judgment." *Citing Atty.-Gen v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146.

and the case is not one in which the doing of equity by the plaintiff is necessary to entitle him to an injunction, the decree should not award the defendant affirmative relief.<sup>1</sup>

**Requirement that the Plaintiff Shall Do Equity.** — The court will frequently require the plaintiff to do equity to the defendant, and whenever it is equitable that money should be paid to the defendant, or a contract should be rescinded, the court will perpetuate the injunction upon terms.<sup>2</sup>

**3. Decree for Complete Relief.** — In a suit for injunction the court will have regard to the rule that when a court of equity acquires jurisdiction over a cause for any purpose it may retain it for all purposes, and may proceed to a determination of all matters put in issue by the pleadings.<sup>3</sup>

**Award of Damages.** — The court, in decreeing that the injunction shall be perpetuated, may, in order to prevent a multiplicity of suits and to do complete justice between the parties, under the prayer for general relief, award damages for the injuries already done by the defendant to the plaintiff.<sup>4</sup>

1. *Locke v. Davison*, 111 Ill. 19; *Garrow v. Carpenter*, 4 Stew. & P. (Ala.) 336, *per* Saffold, J.

2. *Maclary v. Reznor*, 3 Del. Ch. 445; *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364; *Edwards v. Strode*, 2 J. J. Marsh. (Ky.) 506; *Hickman v. White*, (Tex. Civ. App. 1895) 29 S. W. Rep. 692. See further, as to the necessity for the plaintiff to do equity, and the allegations which the bill should contain, showing that he has done, or is willing to do, equity, *supra*, p. 932.

**Sale of Property Taken in Execution.** — Upon the final hearing of a bill to enjoin a judgment at law it is error to decree a sale of the property taken in execution. The decree should be that the bill be dismissed and the injunction dissolved. *Lovette v. Longmire*, 14 Ark. 339.

3. *Disher v. Disher*, 45 Neb. 100, *per* Post, J.; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *White v. Mechanics' Bldg. Fund Assoc.*, 22 Gratt. (Va.) 233; *Todd v. Bowyer*, 1 Munf. (Va.) 447. See also *Adkins v. Edwards*, 83 Va. 300.

4. *Winslow v. Nayson*, 113 Mass. 411. *Citing* *Jesus College v. Bloome*, 3 Atk. 262, *Ambl.* 54; *Franklin v. Greene*, 2 Allen (Mass.) 519; *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Milkman v. Ordway*, 106 Mass. 232; *Brown v. Gardner*, Harr. (Mich.) 291, and *Cathcart v. Robinson*, 5 Pet. (U. S.) 264. See also *Garth v. Cotton*, 1 Ves. 528, and *Watson v. Hunter*, 5 Johns. Ch.

(N. Y.) 169, which cases were *cited* in *Bird v. Wilmington, etc., R. Co.*, 8 Rich. Eq. (S. Car.) 46. See further *Smith v. Cooke*, 3 Atk. 381; *Lee v. Alston*, 1 Ves. Jr. 78; *Whitfield v. Bewit*, 2 P. Wms. 240.

See likewise the following cases: *Fleming v. Collins*, 2 Del. Ch. 230; *Wiggins v. Williams*, 36 Fla. 637, *per* Mabry, C. J.; *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450; *Lefforge v. West*, 2 Ind. 514; *Bonnell v. Allen*, 53 Ind. 130; *Ackerman v. Hartley*, 8 N. J. Eq. 476; *Pegram v. New York El. R. Co.*, 147 N. Y. 135; *Rodgers v. Rodgers*, 11 Barb. (N. Y.) 595; *Disher v. Disher*, 45 Neb. 100; *Gause v. Perkins*, 3 Jones Eq. (N. Car.) 177, 69 Am. Dec. 728; *Ewing v. Rourke*, 14 Oregon 514; *Hostetter v. Vowinkle*, 1 Dill. (U. S.) 329; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217. But see *contra*, *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 89.

**Damages Where Plaintiff Is Not Entitled to Injunction.** — "Where a plaintiff in good faith brings a suit seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief, even though at the time the bill was brought he had no right to relief purely equitable, yet the court will afford relief by awarding compensation;" and, *a fortiori*, the court will award damages if the reason for denying the purely equitable relief occurs pending the suit. *Case v. Minot*, 158 Mass. 577, wherein it became ap-

**4. Conformity to the Prayer and Pleadings** — The court, in rendering its decree, should conform to the prayer of the bill,<sup>1</sup> and the decree should be confined in its scope to the matters in issue.<sup>2</sup> Under the general prayer for relief the plaintiff is entitled to such relief as his case may require.<sup>3</sup> But such a prayer does not entitle the plaintiff to any relief not warranted by the facts alleged and proved.<sup>4</sup>

**XX. DISOBEDIENCE OF INJUNCTION — 1. Jurisdiction to Punish Disobedience.** — It is the duty of all the parties to obey an injunction until it is set aside or modified, and disobedience is a punishable contempt,<sup>5</sup> it being well settled that a court which has allowed an injunction has inherent jurisdiction to punish the

parent during the trial that the proper parties defendant were wanting in order to entitle the plaintiff to an injunction. *Citing Milkman v. Ordway*, 106 Mass. 232; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; and *Brande v. Grace*, 154 Mass. 210.

1. *Mundy's Landing, etc.*, *Turnpike Co. v. Hardin*, (Ky. 1892) 20 S. W. Rep. 385; *Gage v. Nichols*, 112 Ill. 269.

2. *Gibson v. McClay*, 47 Neb. 900; *Spence v. McDonough*, 77 Iowa 460.

**Relief Less Extensive than Prayer.** — Where the bill contains a special prayer for an injunction, but no general prayer, the court may, under such special prayer, give appropriate relief which is of the same character but is less extensive than that which is prayed for. *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525.

3. *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Thomas v. Farley Mfg. Co.*, 76 Iowa 735.

**Quieting Title.** — Where an injunction is sought against one who has conveyed land by a defective deed, to prevent him from making other conveyances, a plaintiff, under a prayer for general relief, can have, if he show himself entitled to it, a decree quieting his title. *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa 74.

4. *Ruppertsberger v. Clark*, 53 Md. 402. See also *Pensacola, etc., R. Co. v. Spratt*, 12 Fla. 26; *Rainey v. Herbert*, 55 Fed. Rep. 443; *Rigg v. Hancock*, 36 N. J. Eq. 42.

**Necessity to Pray for an Accounting.** — In *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507, *Mason, J.*, said: "I have looked very carefully into the books, and have not been able to find a single case in which an accounting for waste committed has ever been decreed unless

the relief was sought by the prayer of the bill."

**Sufficiency of General Prayer.** — Where the bill states a case proper for an account one may be ordered under the prayer for a general relief, although plaintiff has not prayed for such an account. *Stevens v. Gladding*, 17 How. (U. S.) 447; *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727.

5. *Williams v. Lampkin*, 53 Ga. 200; *State v. Durein*, 46 Kan. 695; *State v. Levy*, 36 La. Ann. 941; *Zimmerman v. State*, 46 Neb. 13; *Wilber v. Woolley*, 44 Neb. 739; *Morris v. Hill*, 28 N. J. Eq. 33; *Forrest v. Price*, 52 N. J. Eq. 16; *Toll Bridge v. Free Bridge*, 1 Rand. (Va.) 206; *Wisconsin Cent. R. Co. v. Smith*, 52 Wis. 140, 10 Am. & Eng. R. Cas. 364; *Ulman v. Ritter*, 72 Fed. Rep. 1000; *Muller v. Henry*, 5 Sawy. (U. S.) 464; *Wells v. Oregon R., etc., Co.*, 19 Fed. Rep. 20; *Pentlarge v. Beeston*, 18 Blatchf. (U. S.) 38.

**A Perpetual Injunction** ordered by a final decree continues in existence until it has been suspended or recalled by the court, and may be enforced at any time. *Pentlarge v. Beeston*, 18 Blatchf. (U. S.) 38; *Zimmerman v. State*, 46 Neb. 13.

**Dormancy of Judgment.** — A statutory provision that a judgment shall become dormant and cease to operate as a lien upon the estate of the debtor where an execution has not been taken out for a period of five years, has no application to a judgment perpetually enjoining the defendant from performing certain acts, and after the lapse of five years without an execution having been sued out the defendant may be punished for violating the injunction. *State v. Durein*, 46 Kan. 695.

defendant for a violation of its provisions in a summary way,<sup>1</sup> and such jurisdiction extends not only to preliminary injunctions and perpetual injunctions, but also to restraining orders.<sup>2</sup>

**Acts Done Without the State.** — Acts done without the jurisdiction of the court and in another state may be punished as a contempt where such acts are in terms prohibited by the injunction.<sup>3</sup>

**2. Discretion of Court.** — The court has a large discretion in enforcing obedience to an injunction, and on appeal or writ of error the Supreme Court will be reluctant to interfere with the lower court's exercise of its discretion.<sup>4</sup>

**3. What Court Has Power to Punish.** — The same court which issued the injunction must inflict the punishment for contempt where the injunction has been disobeyed.<sup>5</sup>

**Rumor as to Dissolution.** — The fact that it is currently stated that the injunction has been dissolved, when in fact it has not been dissolved, will not excuse the defendant's disobedience. *Morris v. Hill*, 28 N. J. Eq. 33.

**1. Alabama.** — *Callan v. McDaniel*, 72 Ala. 96.

**California.** — *Morton v. Superior Ct.*, 65 Cal. 496.

**Georgia.** — Code (1895), §§ 4858, 4860; *Williams v. Lampkin*, 53 Ga. 200; *Howard v. Durand*, 36 Ga. 346; *Hines v. Rawson*, 40 Ga. 356; *Hayden v. Phinizy*, 67 Ga. 758.

**Illinois.** — *Dickey v. Reed*, 78 Ill. 261; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Taylor v. Hopkins*, 40 Ill. 442; *Menard v. Hood*, 68 Ill. 121; *Colcord v. Sylvester*, 66 Ill. 540.

**Indiana.** — *Mowrer v. State*, 107 Ind. 539; *State v. Chase*, 41 Ind. 356; *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305.

**Iowa.** — *Teager v. Landsley*, 69 Iowa 725.

**Kansas.** — *Billard v. Erhart*, 35 Kan. 616.

**Kentucky.** — *Society, etc. v. Montedonico*, (Ky. 1884) 4 Am. & Eng. Corp. Cas. 23.

**Louisiana.** — *State v. Levy*, 36 La. Ann. 941.

**Nebraska.** — Code Civ. Pro., § 260; *Zimmerman v. State*, 46 Neb. 13.

**New York.** — Authority to punish disobedience is conferred by statute. *People v. Sturtevant*, 9 N. Y. 263. See also *People v. Albany, etc.*, R. Co., 20 How. Pr. (N. Y. Supreme Ct.) 358; *People v. Spalding*, 2 Paige (N. Y.) 326.

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443, Brady, J., said: "The court having acquired jurisdiction of the parties and

of the subject-matter, and having, in the exercise of its jurisdiction, restrained the defendant from doing certain acts mentioned in the injunction order, there can be no doubt that, in reference to that order, as long as it exists, the court has jurisdiction to punish the defendant for a violation of its provisions."

**South Carolina.** — The court is authorized by statute to enforce its authority by the imposition of a fine. *Columbia Water-Power Co. v. Columbia*, 4 S. Car. 388.

**South Dakota.** — *State v. Knight*, 3 S. Dak. 509.

**United States.** — *In re Debs*, 158 U. S. 564; *In re Chiles*, 22 Wall. (U. S.) 159, *per* Miller, J.; *Wells v. Oregon R., etc., Co.*, 19 Fed. Rep. 20; *Atlantic Giant-Powder Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. Rep. 316.

**2. Williams v. Lampkin**, 53 Ga. 200.

**3. Macaulay v. White Sewing Mach. Co.**, 9 Fed. Rep. 698; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443.

**4. Thweatt v. Gammell**, 56 Ga. 98; *Howard v. Durand*, 36 Ga. 346; *Williams v. Lampkin*, 53 Ga. 200; *Jewelers' Mercantile Agency v. Rothschild*, 6 N. Y. App. Div. 499; *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622.

In *Iowa* the statutes give to the court no discretion as to the punishment of a person shown to have violated an injunction, except as to the amount of fine or term of imprisonment within the limits named. *Lindsay v. Hatch*, 85 Iowa 332.

**5. Manderscheid v. District Ct.**, 69 Iowa 240, *citing* *State v. Tipton*, 1 Blackf. (Ind.) 166.

**A United States Court** has no jurisdiction.

During the Pendency of an Appeal from a decree for an injunction the court which rendered the decree is not ousted of its control over the parties and power to punish disobedience of the injunction; <sup>1</sup> it being well settled by the current of authority that the pendency of an appeal from an order granting an injunction, or from a decree for a perpetual injunction, has not the effect of a *super-sedeas*, and does not permit the defendant to disregard the injunction. <sup>2</sup>

But There Are Exceptions to the General Rule, and where the decree

tion to punish disobedience of an injunction allowed by a state court. *McLeod v. Duncan*, 5 McLean (U. S.) 342.

In California it has been held that an injunction granted by a county judge upon a bill filed in the District Court is of the same effect as if it were granted by the District Court, and that jurisdiction to try and to punish the defendant for contempt resides in the District Court. *People v. County Judge*, 27 Cal. 151.

1. *New Brighton, etc.*, R. Co.'s Appeal, 105 Pa. St. 13; *Bullion, etc.*, Min. Co. v. *Eureka Hill Min. Co.*, 5 Utah 151. See also *Heinlen v. Cross*, 63 Cal. 44; *State v. Chase*, 41 Ind. 356; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430, 3 Abb. N. Cas. (N. Y. Super. Ct.) 53; *Troy, etc.*, R. Co. v. *Boston, etc.*, R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 181; *State v. Houston*, 37 La. Ann. 852; *State v. King*, 47 La. Ann. 606; *Smith v. Western Union Tel. Co.*, 83 Ky. 269; *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509.

**Jurisdiction of Supreme Court to Punish Contempt.** — Where an appeal is taken to the Supreme Court and the injunction is perpetuated by that court, the Circuit Court rather than the Supreme Court is the proper forum to which an application should be addressed for an attachment for contempt for disobedience of the injunction. *Gates v. M'Daniel*, 4 Stew. & P. (Ala.) 69.

In *Kentucky* it has been held that a violation of the injunction occurring pending an appeal by the defendant is to be treated as a contempt and defiance of the Supreme Court, because the lower court, for the time being, has no power to enforce obedience to its judgment. *Kentucky, etc.*, *Bridge Co. v. Krieger*, 91 Ky. 625.

In *Texas* it has been held that when an injunction is dissolved and an appeal taken the injunction becomes the in-

junction of the court to which an appeal is taken, and that that court has power to enforce obedience to it, and to punish its violation. *Gulf, etc.*, R. Co. v. *Fort Worth, etc.*, R. Co., 68 Tex. 98.

2. *California*. — *Dewey v. Superior Ct.*, 81 Cal. 64; *Merced Min. Co. v. Fremont*, 7 Cal. 131; *Heinlen v. Cross*, 63 Cal. 44; *Stewart v. Superior Ct.*, 100 Cal. 543; *Schwarz v. Superior Ct.*, 111 Cal. 106.

*Indiana*. — *Hawkins v. State*, 126 Ind. 294; *State v. Chase*, 41 Ind. 356; *Central Union Telephone Co. v. State*, 110 Ind. 203; *Miller v. Burket*, 132 Ind. 472.

*Iowa*. — *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509.

*Kentucky*. — *Smith v. Western Union Tel. Co.*, 83 Ky. 269; *Yocom v. Moore*, 4 Bibb (Ky.) 221. The latter case was cited in *Williams v. Pouns*, 48 Tex. 141.

*Louisiana*. — *State v. Houston*, 37 La. Ann. 852; *State v. King*, 47 La. Ann. 606.

*Minnesota*. — *Robertson v. Davidson*, 14 Minn. 554, which case was cited in *Hawkins v. State*, 126 Ind. 294.

*Mississippi*. — *Penrice v. Wallis*, 37 Miss. 172, which case was cited in *Williams v. Pouns*, 48 Tex. 141.

*New York*. — *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430, 3 Abb. N. Cas. (N. Y. Super. Ct.) 53; *Troy, etc.*, R. Co. v. *Boston, etc.*, R. Co., 57 How. Pr. (N. Y. Supreme Ct.) 181; *Graves v. Maguire*, 6 Paige (N. Y.) 379; *Howe v. Searing*, 6 Bosw. (N. Y.) 684.

*Texas*. — *Williams v. Pouns*, 48 Tex. 141.

*Utah*. — *Bullion, etc.*, Min. Co. v. *Eureka Hill Min. Co.*, 5 Utah 151.

*Virginia*. — *Turner v. Scott*, 5 Rand. (Va.) 332, which case was cited in *Williams v. Pouns*, 48 Tex. 141.

*United States*. — *Knox County v. Harshman*, 132 U. S. 14; *Leonard v. Ozark Land Co.*, 115 U. S. 465; *Hovey v. McDonald*, 109 U. S. 161; *Slaughterhouse Cases*, 10 Wall. (U. S.) 297.



does not impose restraints upon the defendant, but commands or permits some act to be done, it may be superseded.<sup>1</sup>

**4. Knowledge of Injunction.** — The defendant is not guilty of contempt in the violation of an injunction of which he has no knowledge or information.<sup>2</sup> But if the defendant has knowledge that an injunction is to issue, although the order has not been entered and the process has not been served, he is bound to obey the injunction or incur the consequence of disobedience.<sup>3</sup>

The Notice of an Injunction, to Be Sufficient, need possess but two requisites: first, it must proceed from a source entitled to credit; and second, it must inform the defendant clearly and plainly from what act he must abstain.<sup>4</sup>

**5. Violation of Injunction by Strangers** — *a. LIABILITY OF DEFENDANT.* — The defendant is not liable to be punished for acts done by strangers without his knowledge, procurement, or agency;<sup>5</sup> but the defendant may violate an injunction and

1. *Stewart v. Superior Ct.*, 100 Cal. 543; *Dewey v. Superior Ct.*, 81 Cal. 64; *Central Union Telephone Co. v. State*, 110 Ind. 203; *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 151. See also *Merced Min. Co. v. Fremont*, 7 Cal. 131.

2. *State v. Gilpin*, 1 Del. Ch. 25; *Jones v. Hurlburt*, 13 Neb. 125; *Wheeler v. Gilsey*, 35 How. Pr. (N. Y. C. Pl.) 139; *Columbia Water-Power Co. v. Columbia*, 4 S. Car. 388. See also *McCormick v. Jerome*, 3 Blatchf. (U. S.) 486; *James v. Downes*, 18 Ves. Jr. 522; *Sickels v. Borden*, 4 Blatchf. (U. S.) 14.

3. *Kiser v. Lovett*, 106 Ind. 325, *per* Mitchell, J.; *Winslow v. Nayson*, 113 Mass. 411, *per* Gray, C. J.; *Endicott v. Mathis*, 9 N. J. Eq. 110, *per* Chancellor Williamson; *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16, *per* Ingraham, P. J.

In *Hearn v. Tennant*, 14 Ves. Jr. 136, Lord Eldon said: "If these parties, by their attendance in court, were apprised that there was an order, that is sufficient; and I cannot attend to a distinction so thin as that persons standing here until the moment the lord chancellor is about to pronounce the order, which, from all that passed, they must know will be pronounced, can, by getting out of the hall at that instant, avoid all the consequences." See also *Vansandau v. Rose*, 2 Jac. & W. 264; *In re Bryant*, 4 Ch. Div. 98; *Kimpton v. Eve*, 2 Ves. & B. 349; *Skip v. Harwood*, 3 Atk. 564; *Anonymous*, 3 Atk. 567. See likewise the following cases: *Morton v. Superior Ct.*, 65 Cal. 496; *Thebaut v. Canova*, 11 Fla. 143; *Wimpy*

*v. Phinizy*, 68 Ga. 188; *Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422; *Koehler v. Farmers', etc., Nat. Bank*, 117 N. Y. 661, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 307, 14 Civ. Pro. Rep. (N. Y.) 71; *Aldinger v. Pugh*, 57 Hun (N. Y.) 181; *Hull v. Thomas*, 3 Edw. Ch. (N. Y.) 236; *New York v. New York, etc., Ferry Co.*, 40 N. Y. Super. Ct. 300, 64 N. Y. 623; *Boon v. McGucken*, 67 Hun (N. Y.) 251; *Daly v. Amberg*, 126 N. Y. 490; *Abell v. New York, etc., R. Co.*, 100 N. Y. 634; *Gage v. Denbow*, 49 Hun (N. Y.) 42; *Waffle v. Vanderheyden*, 8 Paige (N. Y.) 45; *Bradford v. Peckham*, 9 R. I. 250; *Howe v. Willard*, 40 Vt. 654; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746, 53 Am. & Eng. R. Cas. 293.

In *Ulman v. Ritter*, 72 Fed. Rep. 1000, Jackson, J., said: "I hold the unquestioned law to be, that an injunction becomes operative from the time the order was made, and effective upon the party from the time he has notice of its existence. It is a matter of no moment how the defendant acquired the information of its existence. When once he has been apprised of the fact, he is legally bound to desist from doing what he is restrained and inhibited from doing. If this were not the rule, often great injury could be inflicted, in numberless cases, though the mandate of the court was in existence."

4. *Per* Vice-Chancellor Van Fleet, in *Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422.

5. *Slater v. Merritt*, 75 N. Y. 268;

render himself liable to punishment by aiding, countenancing, and abetting others in the violation thereof, as well as by doing it directly.<sup>1</sup>

*b. LIABILITY OF STRANGERS.* — As a general rule an injunction is not binding upon any one who is not named therein, and a stranger to the writ cannot be punished for its disobedience.<sup>2</sup>

**6. Violation by Agents, Attorneys, and Servants.** — The injunction requires the defendant to refrain not only from doing the acts enjoined himself, but also from committing or procuring the acts to be done by his agents, attorneys, or servants;<sup>3</sup> but the

*Batterman v. Finn*, 32 How. Pr. (N. Y. Supreme Ct.) 501.

1. *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622; *Société, etc., v. Western Distilling Co.*, 42 Fed. Rep. 96.

In *Blood v. Martin*, 21 Ga. 127, the defendant was enjoined from selling property which he had seized under an attachment, and it was held that he violated the injunction by allowing the attaching officer to make the sale and by being present and acquiescing in the sale.

2. *Buhlman v. Humphrey*, 86 Iowa 597; *Newcomer v. Tucker*, 89 Iowa 486, [in which latter case the court distinguished and disapproved *Silvers v. Traverse*, 82 Iowa 52]; *State v. Miller*, 54 Kan. 244; *Raff v. State*, 48 Kan. 44; *Barthe v. Larquie*, 42 La. Ann. 131; *Murdock's Case*, 2 Bland (Md.) 461; *Boyd v. State*, 19 Neb. 128; *Batterman v. Finn*, 32 How. Pr. (N. Y. Supreme Ct.) 501; *People v. Randall*, 73 N. Y. 416; *Lansing v. Easton*, 7 Paige (N. Y.) 364; *Bate Refrigerating Co. v. Gillett*, 30 Fed. Rep. 685. But see *Buffandeau v. Edmondson*, 17 Cal. 437; *State v. Cutler*, 13 Kan. 131; *Ex p. Lennon*, 64 Fed. Rep. 320.

**Landlord and Tenant.** — The relation of landlord and tenant is not such as to render a landlord against whom an injunction has been issued liable for the acts of his tenant on the theory that the tenant is the landlord's agent: *Batterman v. Finn*, 32 How. Pr. (N. Y. Supreme Ct.) 501. *Citing New York v. Corlies*, 2 Sandf. (N. Y.) 301; *Bears v. Ambler*, 9 Pa. St. 193; and *Cheetham v. Hampson*, 4 T. R. 319.

Nor is a lessee who has no knowledge of the injunction liable for disobeying an injunction against his lessor. *Newcomer v. Tucker*, 89 Iowa 486; *Buhlman v. Humphrey*, 86 Iowa 597.

**Violation by Receiver.** — Where a state court grants an injunction against the use of a street by a railroad company, and thereafter a receiver is appointed by a United States court, he is bound to obey the injunction order; and he may be punished for contempt notwithstanding his removal from the receivership after the commission of the act. *Safford v. People*, 85 Ill. 558.

In *State v. Miller*, 54 Kan. 244, it was held that where a suit is instituted in a United States court for the appointment of a receiver of a railroad company prior to the institution of a suit in a state court for restraining the railroad company from operating its road across the plaintiff's land, a receiver appointed after an injunction has been ordered is not bound to obey such injunction order.

**Purchasers Pendente Lite.** — A purchaser *pendente lite* who has notice of the injunction is bound to obey it. *People v. District Ct.*, 19 Colo. 343; *Safford v. People*, 85 Ill. 558, *per* Walker, J. But see *Buhlman v. Humphrey*, 86 Iowa 597, in which case the injunction, by its express terms, was limited in its operation and effect to the parties therein named, and enjoined the maintenance of a nuisance on certain premises described, and it was held that it was not binding upon a subsequent purchaser of the premises.

3. *Wheeler v. Gilsey*, 35 How. Pr. (N. Y. C. Pl.) 139, in which case the court applied the maxim, *Qui potest et debet votare et non vetat, jubet*. See also *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105; *Slater v. Merritt*, 75 N. Y. 268; *Jewelers' Mercantile Agency v. Rothschild*, 6 N. Y. App. Div. 499; *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622; *Blood v. Martin*, 21 Ga. 127; *State v. Fourth Judicial Dist. Ct.*, 13 Mont. 347.

principal is not liable for the acts of his agent or servant done in disobedience of his express commands.<sup>1</sup>

**Punishment of Servants and Agents.** — Where an injunction is issued against the defendant, his counselors, attorneys, solicitors, agents, servants, etc., if they or either of them have notice of the injunction they are bound to obey it.<sup>2</sup>

**7. Violation by Corporations.** — An injunction against a corporation is binding upon the corporation, and the individuals through whom it acts; and where such injunction is violated the corporation may be fined, and the officers or agents through whom it acts may be punished.<sup>3</sup> There are numerous decisions which show that when an injunction is directed exclusively to the corporation by its corporate name, it is operative and binding not only upon the corporation itself, but upon every person whose personal action as a member or officer of the corporation it seeks to restrain or control; and every such person is as fully bound to personal obedience as if personally named in the injunction, and consequently is just as liable for his disobedience.<sup>4</sup>

1. *Trimmer v. Pennsylvania, etc., R. Co.*, 36 N. J. Eq. 411; *Pennsylvania R. Co. v. Thompson*, 49 N. J. Eq. 318.

**Disobedience by Partnership.** — A member of a partnership is not responsible for the acts of his fellows in disobeying an injunction, where, upon hearing of the existence of the injunction, he immediately takes steps to inform his associates of its existence, and himself takes no action whatever in violation of the injunction. *Matter of South Side R. Co.*, 7 Ben. (U. S.) 391, 10 Nat. Bank. Reg. 274.

2. *Smith v. Cook*, 39 Ga. 191, *citing* 3 Dan. Ch. Pr. 1907. See also *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746, 53 Am. & Eng. R. Cas. 293; *U. S. v. Memphis, etc., R. Co.*, 6 Fed. Rep. 237; *Sickles v. Borden*, 4 Blatchf. (U. S.) 14; *Boyd v. State*, 19 Neb. 128; *Wellesley v. Mornington*, 11 Beav. 181.

**Attorney's Change of Status.** — An attorney of the defendant who has knowledge of the injunction cannot relieve himself of the obligation to obey the writ by changing his status and entering into the employment of others. *Wimpy v. Phinizy*, 68 Ga. 188.

**Liability of Counsel for Erroneous Advice.** — In *Ciancimino's Towing, etc., Co. v. Ciancimino*, (Supreme Ct.) 17 N. Y. Supp. 125, it was said by Daniels, J., *obiter*, that if the defendant's counsel had erroneously advised him that he could do certain acts without violating

the injunction, he could have been joined with the defendant in the proceeding for the punishment.

3. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187; *People v. Albany, etc., R. Co.*, 12 Abb. Pr. (N. Y. Supreme Ct.) 171; *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622; *Trimmer v. Pennsylvania, etc., R. Co.*, 36 N. J. Eq. 411; *U. S. v. Memphis, etc., R. Co.*, 6 Fed. Rep. 237; *Wells v. Oregon R., etc., Co.*, 19 Fed. Rep. 20; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746, 53 Am. & Eng. R. Cas. 293.

4. *Per Duer, J.*, in *Davis v. New York*, 1 Duer (N. Y.) 484. *Citing* *Rex v. Abingdon*, 1 Ld. Raym. 560; *Rex v. Shelford*, 2 Ch. Ca. 171, Ld. Raym. 848; *Rex v. Mayor of Tregony*, 8 Mod. 111.

See also *Hedges v. Superior Ct.*, 67 Cal. 405; *Morton v. Superior Ct.*, 65 Cal. 496; *Parsons v. People*, 51 Ill. App. 467; *State v. Cutler*, 13 Kan. 131; *Bass v. Shakopee*, 27 Minn. 250; *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. Rep. 354; *U. S. v. Memphis, etc., R. Co.*, 6 Fed. Rep. 237; *Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co.*, 30 Fed. Rep. 123; *Macaulay v. White Sewing Mach. Co.*, 9 Fed. Rep. 698.

**A Municipal Corporation** cannot be attached for violation of an injunction, but its officers who disobey the rule may be attached. *London v. Lynn*, 1 H. Bl. 206; *Davis v. New York*, 1 Duer

**8. Violation by the Plaintiff.** — Strictly speaking, the writ of injunction does not impose any restraint upon the plaintiff, but it does not follow that the plaintiff, where the purpose of the injunction is to preserve the existing status of property in litigation until a final adjudication can be had, can with impunity do the acts which at his instance the defendant has been restrained from doing; and if he does do such acts it is a gross abuse of the process, and no doubt the court has ample power to prevent or redress such abuse.<sup>1</sup>

The Rule as to the Intent in proceedings for contempt is analogous to that which prevails in a prosecution for crime, viz.: the intent required to be proved is not an intent to violate the rule or the order of the court, but to do the act which the law or order of the court forbids.<sup>2</sup>

(N. Y.) 451; *Bass v. Shakopee*, 27 Minn. 250; *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187.

1. *Vanzandt v. Argentine Min. Co.*, 2 McCrary (U. S.) 642, in which case the court denied a motion that the plaintiff be ordered to show cause why he should not be punished for contempt in violating the injunction, the court having previously given the defendant redress by ordering the plaintiff to restore the property to the defendant and to abstain from any further interference with the possession thereof pending the suit. See also *Mowrer v. State*, 107 Ind. 539, in which case the court considered that the plaintiff was not guilty of contempt in taking possession and control of property for safe-keeping, in view of the fact that the defendant had waived his right to insist upon a literal observance of the terms of the restraining order; but remarked that the court had ample power to redress such an abuse, and also to dissolve the injunction "upon the ground that the plaintiff has forfeited his claim to the equitable relief which the injunction afforded him, in the event that his misconduct has been so gross as to justify such a proceeding."

**Assertion of Title.** — Where the defendant is prohibited from setting up any claim or title to certain property under a contract, he is guilty of contempt in setting up title thereto springing out of other and different grounds, of defense than those set up in the answer, and the injunction does not merely prohibit a suit to establish title, but is violated by a notice given to a person in another country that the defendant claims the ownership of the property

and warning such person not to part with the possession of the same without due authority from the defendant. *In re Chiles*, 22 Wall. (U. S.) 157.

2. *Per* Dwight, J., in *Gage v. Denbow*, 49 Hun (N. Y.) 42.

It is well settled that the intent with which an act in violation of an injunction is committed does not affect the character of the act, although it may properly be considered in fixing the penalty. *Lindsay v. Hatch*, 85 Iowa 332.

**The Injunction Must Be Obeyed at All Hazards,** and it will be no defense that the defendant has adopted all known and reasonable methods to prevent the infliction of injury upon the plaintiff, if any injury is inflicted. *Pennsylvania R. Co. v. Thompson*, 49 N. J. Eq. 318. *Citing* *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; *McClure v. Gulick*, 17 N. J. L. 340; *State v. Gulick*, 17 N. J. L. 435; and *Den v. Hendrickson*, 18 N. J. L. 366.

**Stratagem of the Plaintiff.** — Where the plaintiff procures the defendant to violate the injunction by stratagem, the plaintiff will not be heard to ask that the defendant be punished for contempt, and if he makes such application will be charged with the costs thereof. *Sparkman v. Higgins*, 2 Blatchf. (U. S.) 29, in which case the defendant was enjoined from infringing a patent, and the plaintiff procured another to purchase the patented article from the defendant's agent in violation of the defendant's commands to his agent.

**Acts Done for Preservation of Property.**

— An order of injunction prohibiting

## 9. Whether the Regularity of the Injunction Can Be Questioned —

*a. MERE IRREGULARITIES.* — It is well settled, and the books are full of cases holding, that a defendant who has disobeyed an injunction cannot justify his disobedience by showing that the injunction was improvidently or erroneously granted or irregularly served; and that if the injunction has been improperly allowed the only remedy is by a motion to vacate or dissolve it.<sup>1</sup>

any disturbance of, or interference with, the status of property, pending litigation concerning it, does not prevent any party having an interest in such property, from doing whatever is reasonably necessary for its preservation. *Behrens v. McKenzie*, 23 Iowa 333, cited with approval in *Mowrer v. State*, 107 Ind. 539.

**Impairment of Plaintiffs Rights.** — In *New York*, where the punishment is inflicted for a civil contempt under Code Civ. Pro., §§ 14 and 2266, the defendant's conduct must be such as to defeat, impair, impede, or prejudice a right or remedy of the party affected by it. *Duffus v. Cole*, (Supreme Ct.) 15 N. Y. Supp. 370; *Boon v. McGucken*, 67 Hun (N. Y.) 251. See also *Dinsmoor v. Commercial Travelers' Assoc.*, (Supreme Ct.) 14 N. Y. Supp. 676; *Swenarton v. Shupe*, 40 Hun (N. Y.) 42; *Sandford v. Sandford*, 40 Hun (N. Y.) 540; *Fall Brook Coal Co. v. Hecksher*, 42 Hun (N. Y.) 535; *Fischer v. Raab*, 81 N. Y. 235; *Wheelock v. Noonan*, 55 N. Y. Super. Ct. 305; *King v. Flynn*, 37 Hun (N. Y.) 329.

1. In *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104, Lord Chancellor Truro said: "I am of opinion that it is not competent for any one \* \* \* to disobey an injunction or any other order of the court on the ground that such orders were improvidently made. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public and to the due administration of justice, that it ought on all occasions to be inflexibly maintained." See also *Partington v. Booth*, 3 Meriv. 148; *Glascott v. Lang*, 3 Myl. & C. 452; *Woodward v. Lincoln*, 3 Swanst. 626; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; 2 Edw. Ch. Pr. 188; *Eden Inj.* 102; *Drury Inj.* 407; *Barb. Ch. Pr.* 636.

Among the numerous American cases in which the doctrine stated in the text finds support are the following:

*California.* — *Exp. Fil Ki*, 79 Cal. 584. *Colorado.* — *Smith v. People*, 2 Colo. App. 99, *per* Reed, J.

*Connecticut.* — *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

*Illinois.* — *Colcord v. Sylvester*, 66 Ill. 540; *Diedrich v. People*, 37 Ill. App. 604, *per* Gary, J.; *Wadhams v. Gay*, 73 Ill. 415; *Loven v. People*, 158 Ill. 159; *Kerfoot v. People*, 51 Ill. App. 409.

*Indiana.* — *Central Union Telephone Co. v. State*, 110 Ind. 203; *Hawkins v. State*, 126 Ind. 297.

*Iowa.* — *Langworthy v. McKelvey*, 25 Iowa 48; *Manderscheid v. District Ct.*, 69 Iowa 240.

*Kansas.* — *Billard v. Erhart*, 35 Kan. 616; *State v. Pierce*, 51 Kan. 241.

*Kentucky.* — *Roberts v. Davidson*, 83 Ky. 279.

*Louisiana.* — *State v. Levy*, '36 La. Ann. 941.

*Nebraska.* — *Wilber v. Woolley*, 44 Neb. 739.

*New Jersey.* — *Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422; *Richards v. West*, 3 N. J. Eq. 456; *Forrest v. Price*, 52 N. J. Eq. 16; *Una v. Dodd*, 39 N. J. Eq. 173, 40 N. J. Eq. 672. *New Mexico.* — *Matter of Sloan*, 5 N. Mex. 590.

*New York.* — *Aldinger v. Pugh*, 57 Hun (N. Y.) 181; *Koehler v. Farmers', etc., Nat. Bank*, 117 N. Y. 661, 17 Civ. Pro. Rep. (N. Y. Supreme Ct.) 307, 14 Civ. Pro. Rep. (N. Y.) 71; *People v. Bergen*, 53 N. Y. 404; *Daly v. Amberg*, 126 N. Y. 490, (Supreme Ct.) 13 N. Y. Supp. 379; *People v. Bouchard*, 6 Misc. Rep. (N. Y. Supreme Ct.) 459; *People v. McKane*, 78 Hun (N. Y.) 154; *Jewelers' Mercantile Agency v. Rothschild*, 6 N. Y. App. Div. 499; *People v. Van Buren*, 136 N. Y. 252; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *People v. Sturtevant*, 9 N. Y. 263; *People v. Spalding*, 2 Paige (N. Y.) 329; *Clark v. Binger*, 75 N. Y. 344; *Sullivan v. Judah*, 4 Paige (N. Y.) 446; *People v. Dwyer*, 90 N. Y. 402; *Davis v. New York*, 1 Duer (N. Y.) 451; *New York v. New York*,

An examination of the authorities shows the necessity of keeping in mind the distinction between the entire want of power conferred by jurisdiction, and the erroneous exercise of or the propriety of the exercise of power conferred.<sup>1</sup>

*b. VIOLATION OF VOID WRIT.*—The general rule is that where the court had no power to grant the injunction and where the mandate is therefore absolutely void, the defendant cannot be punished for contempt for its alleged violation.<sup>2</sup>

etc., *Ferry Co.*, 64 N. Y. 624; *Moat v. Holbein*, 2 Edw. Ch. (N. Y.) 188; *Freeman v. Deming*, 4 Edw. Ch. (N. Y.) 598; *Smith v. Reno*, 6 How. Pr. (N. Y. Supreme Ct.) 124; *Krom v. Hogan*, 4 How. Pr. (N. Y. Supreme Ct.) 225.

*Oklahoma.*—*Uhl v. Irwin*, 3 Okla. 388.

*South Carolina.*—*Watson v. Citizens' Sav. Bank*, 5 S. Car. 159, *citing* *Partington v. Booth*, 3 Meriv. 149.

*Vermont.*—In *Howe v. Willard*, 40 Vt. 654, Chancellor Barrett said: "No case or book has been cited showing that, in any case, does mere impropriety in using an injunction operate a dissolution or discharge of it, and leave a party, who is so charged with knowledge of it as to be amenable to contempt if he violates it, at liberty to violate or disregard it. The most that has been held is, that such impropriety may be good cause for a dissolution or discharge on motion." See also, to same effect, *Stimpson v. Putnam*, 41 Vt. 238.

*West Virginia.*—*State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, which case was *cited* in *Hawkins v. State*, 126 Ind. 297.

*Wisconsin.*—*Wisconsin Cent. R. Co. v. Smith*, 52 Wis. 140, 10 Am. & Eng. R. Cas. 364.

*United States.*—In *U. S. v. Agler*, 62 Fed. Rep. 824, *Baker, J.*, said: "There is not an authority, in the judgment of the court, that can be found in the books—certainly the court is aware of none—in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable." To the same effect are the following cases: *Liddle v. Cory*, 7 Blatchf. (U. S.) 1; *Whipple v. Hutchinson*, 4 Blatchf. (U. S.) 190; *U. S. v. Debs*, 64 Fed. Rep. 724; *Ex p. Lennon*, 64 Fed. Rep. 320; *Roemer v. Newman*, 19 Fed. Rep. 98; *Wells v. Oregon R., etc., Co.*, 19 Fed. Rep. 20, 9 Sawy. (U. S.) 601; *In re*

*Coy*, 127 U. S. 731; *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Ex p. Watkins*, 3 Pet. (U. S.) 193.

**Failure to Obey Remittitur from Appellate Court.**—Where a court which has granted an injunction afterwards attempts to enter a judgment in accordance with the remittitur from an appellate court, the fact that the lower court does not follow the decision of the appellate court in reference to the modification of the injunction, does not make its action void and does not constitute a defense in proceedings to punish the violation of the injunction as modified. *Fischer v. Blank*, 81 Hun (N. Y.) 579.

**Failure to Require Bond.**—The failure of the judge to require a written undertaking before the issuance of the restraining order is a mere irregularity and is not a jurisdictional defect such as will deprive the court of power to punish disobedience of the order. *Watson v. Citizens' Sav. Bank*, 5 S. Car. 159.

**Insufficiency of Bill.**—The fact that no sufficient ground is stated in the bill for the interposition of a court of equity does not justify the defendant in disobeying the injunction. *Colcord v. Sylvester*, 66 Ill. 540; *U. S. v. Debs*, 64 Fed. Rep. 724.

**Defective Affidavit.**—It is immaterial that the affidavit to the petition is defective. *State v. Pierce*, 51 Kan. 241.

**Injunction Too Broad.**—It cannot be objected that the order for an injunction is broader than the bill warrants, because if the injunction ordered is too broad the defendant's remedy is by a motion to dissolve or by an appeal or writ of error. *Loven v. People*, 158 Ill. 159; *State v. Levy*, 36 La. Ann. 941; *Richards v. West*, 3 N. J. Eq. 456; *Sickels v. Borden*, 4 Blatchf. (U. S.) 14. But see *Freeman v. Deming*, 4 Edw. Ch. (N. Y.) 598.

1. *Per* *McFie, J.*, in *Matter of Sloan*, 5 N. Mex. 590.

2. *State v. Judge*, 34 La. Ann. 741.

**10. Advice of Counsel** — *a.* NOT A DEFENSE. — The advice of counsel given to the defendant that he can safely disregard the injunction, which advice is without foundation either in fact or in law, affords him no such protection as will shield him from punishment for violation of the injunction.<sup>1</sup> Especially is the advice of counsel not an excuse where the defendant goes further than he is advised that he can do.<sup>2</sup>

*b.* MITIGATION OF PUNISHMENT. — If the advice of counsel be given in good faith, it is an important element in considering what the judgment of the court should be, and the court is authorized to consider it and the soundness thereof in determining the extent of the punishment.<sup>3</sup>

**11. What Constitutes Violation** — *a.* IN GENERAL. — The defendant will not be punished for doing acts which are not within the terms of the injunction,<sup>4</sup> or where there is no injunc-

See also the following cases: *Willeford v. State*, 43 Ark. 62; *Ex p. Fil Ki*, 79 Cal. 584; *Brown v. Moore*, 61 Cal. 432; *Smith v. People*, 2 Colo. App. 99; *Guebelle v. Epley*, 1 Colo. App. 199; *Hurd v. People*, 14 Colo. 207; *Dickey v. Reed*, 78 Ill. 261; *Walton v. Develing*, 61 Ill. 201; *Andrews v. Knox County*, 70 Ill. 65; *Darst v. People*, 62 Ill. 306; *Lamb v. Burlington, etc., R. Co.*, 39 Iowa 333; *State v. Voorhies*, 37 La. Ann. 605; *Piper v. Pearson*, 2 Gray (Mass.) 120; *Haines v. Haines*, 35 Mich. 143; *People v. Simonson*, 10 Mich. 335; *Hemingway v. Preston, Walk. (Mich.)* 528; *Baker v. Meisch*, 29 Neb. 227; *Calvert v. State*, 34 Neb. 616; *Wilber v. Woolley*, 44 Neb. 739; *State v. Greene*, 48 Neb. 327; *Matter of Sloan*, 5 N. Mex. 590; *Davis v. New York*, 1 Duer (N. Y.) 451; *Perry v. Mitchell*, 5 Den. (N. Y.) 537; *U. S. v. Agler*, 62 Fed. Rep. 824; *U. S. v. Keokuk*, 6 Wall. (U. S.) 518; *In re Sawyer*, 124 U. S. 200; *Riggs v. Johnson County*, 6 Wall. (U. S.) 166; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421; *Ex p. Fisk*, 113 U. S. 718; *Worden v. Searls*, 121 U. S. 14; *In re Ayers*, 123 U. S. 443; *State v. Milligan*, 3 Wash. 144. See further *Munday v. Vail*, 34 N. J. L. 418; *Forrest v. Price*, 52 N. J. Eq. 16.

1. *Ciancimino's Towing, etc., Co. v. Ciancimino*, (Supreme Ct.) 17 N. Y. Supp. 125, 133 N. Y. 672. See also the following cases: *Smith v. Cook*, 39 Ga. 191, *per Warner, J.*; *Lindsay v. Hatch*, 85 Iowa 332; *McKillopp v. Taylor*, 25 N. J. Eq. 139; *Lansing v. Easton*, 7 Paige (N. Y.) 364; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Hawley v.*

*Bennett*, 4 Paige (N. Y.) 163; *Smith v. New York Consol. State Co.*, 18 Abb. Pr. (N. Y. C. Pl.) 424; *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Atlantic Giant Powder Mfg. Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. Rep. 316; *Hamilton v. Simons*, 5 Biss. (U. S.) 77; *Macaulay v. White Sewing Mach. Co.*, 9 Fed. Rep. 698; *Ulman v. Ritter*, 72 Fed. Rep. 1000; *Goodyear v. Mullee*, 5 Blatchf. (U. S.) 437; *U. S. v. Memphis, etc., R. Co.*, 6 Fed. Rep. 237. 2. *Société, etc., v. Western Distilling Co.*, 42 Fed. Rep. 96.

3. *Ciancimino's Towing Co. v. Ciancimino*, (Supreme Ct.) 17 N. Y. Supp. 125, 133 N. Y. 672. See also the following cases: *Parsons v. People*, 51 Ill. App. 467; *Hawley v. Bennett*, 4 Paige (N. Y.) 163; *Smith v. New York Consol. Stage Co.*, 18 Abb. Pr. (N. Y. C. Pl.) 424; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Lansing v. Easton*, 7 Paige (N. Y.) 364; *Walters v. Kenyon*, (Supreme Ct.) 4 N. Y. St. Rep. 398; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Hatton v. McFaddin*, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 42; *People v. Aitken*, 19 Hun (N. Y.) 327; *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Ulman v. Ritter*, 72 Fed. Rep. 1000; *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. Rep. 316.

4. *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63; *Hemingway v. Preston, Walk. (Mich.)* 528; *People v. Simonson*, 10 Mich. 335; *German Sav. Bank v. Habel*, 80 N. Y. 273; *Standard Stock Farm v. National Trotting Assoc.*, (Supreme Ct.) 9 N. Y. Supp. 898; *German Sav. Bank v. Habel*, 58 How. Pr. (N. Y. Ct. App.) 336; *Porous*

tion,<sup>1</sup> or where the injunction order has not taken effect.<sup>2</sup> Each act done in violation of the injunction is a separate contempt.<sup>3</sup>

**Construction of Injunction.** — The defendant is bound to obey the injunction at his peril;<sup>4</sup> and he cannot set up his opinion as to the meaning of the injunction against the court's opinion, but if he has any doubt as to what he may do without violating the injunction he should ask a modification of the injunction or a construction of its terms.<sup>5</sup> But the defendant is to be allowed a fair latitude of construction, as it is the spirit, and not merely the letter, of an injunction that must be obeyed.<sup>6</sup>

**Stipulation Between the Parties.** — The injunction ought to be con-

Plaster Co. v. Seabury, (Supreme Ct.) 1 N. Y. Supp. 134; Davis v. New York, 1 Duer (N. Y.) 451.

1. James v. Downes, 18 Ves. Jr. 522.

2. Winslow v. Nayson, 113 Mass. 411, in which case the order for an injunction was conditioned upon the filing of the bill, and the alleged disobedience occurred before the filing of the bill. See also Clarke v. Hoomes, 2 Hen. & M. (Va.) 23.

**After the Modification of the Injunction.**

— Acts which are not in disobedience of the injunction as modified cannot be made the predicate of contempt proceedings, on the ground that they are in violation of the original injunction. State v. King, 47 La. Ann. 696.

3. Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct., 65 Cal. 187.

**Vagueness of the Injunction.** — The vagueness of the injunction and its irregularity on that account are to be taken into consideration in any proceeding to punish a defendant for the violation of its provisions. Sullivan v. Judah, 4 Paige (N. Y.) 444; Lyon v. Botchford, 25 Hun (N. Y.) 57. See also Moat v. Holbein, 2 Edw. Ch. (N. Y.) 188; Field v. Hunt, 22 How. Pr. (N. Y. Supreme Ct.) 329.

4. Laurie v. Laurie, 9 Paige (N. Y.) 234.

5. Shirk v. Cox, 141 Ind. 301; Wilber v. Woolley, 44 Neb. 739; National Wall Paper Co. v. Gerlach, 15 Misc. Rep. (N. Y. City Ct.) 640; Magennis v. Parkhurst, 4 N. J. Eq. 433; Gage v. Denbow, 49 Hun (N. Y.) 42.

**Discretion Lodged in the Defendant.** —

Where the decree enjoins the defendant from constructing its works in and upon a river, and from extending its piers or wharves beyond points which may be reached by ferryboats, and then proceeds to declare that, the chancellor "not having before him

sufficient information to give any more specific direction as to the manner in which the wharves, piers, and other works \* \* \* in said river shall be constructed," it is, for the present, left to the judgment of the defendant, subject to the provisions of its charter and the directions contained in this order, the defendant proceeds in constructing its works so far at its peril as to render its work liable to be abated; but an error of judgment, where there is no wilful or wanton violation of the chancellor's direction, is not such a violation of an explicit order, as to subject the defendant to an attachment for contempt. Newark Plank Road, etc., Co. v. Elmer, 9 N. J. Eq. 786.

**"And" Construed as "Or."** — In Fischer v. Blank, 81 Hun (N. Y.) 579, the order enjoined the defendant from selling, etc., a certain commodity enclosed in packages similar to those used by the plaintiff, and from making use, in connection with the sale of such commodity, of a designation used by the plaintiff as his trade-mark; and it was held that the word "and" was used in a disjunctive and not in a conjunctive sense, and that the injunction was violated by the use of packages and wrappers of the form enjoined, although the defendant did not use the prohibited designation; *affirming* 144 N. Y. 700.

6. Webb v. Laird, 62 Vt. 448, 22 Am. St. Rep. 121.

**Extraordinary Emergencies.** — Where the injunction prohibits the doing of certain acts except in "extraordinary emergencies," the burden is thrown on the defendant of showing that the act done was excused by the special circumstances. Thompson v. Pennsylvania R. Co., 48 N. J. Eq. 105, *citing* Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316.



sidered in the light of a stipulation between the parties where there is one, and if in view of the stipulation the plaintiff's rights have not been infringed the defendant will not be punished,<sup>1</sup> and the defendant will not be punished unless it is plain and free from doubt that the injunction has been violated.<sup>2</sup>

*b.* SUBTERFUGES AND EVASIONS. — It is the spirit, and not merely the letter, of an injunction that must be obeyed; and the court will not look with indulgence on schemes, however skilfully devised and designed, to thwart its orders.<sup>3</sup> It has been declared that those who undertake to see how near they come to doing the prohibited acts without passing the line will be very apt to overstep the bounds and render themselves guilty of contempt.<sup>4</sup> The difficulty which the defendant encounters in transacting his business without disobeying the injunction forms no excuse for violating it.<sup>5</sup>

1. *People v. Diedrich*, 141 Ill. 665.

It would seem from *Howard v. Durand*, 36 Ga. 346, that where the parties have entered into a contract by which the injunction is in effect dissolved, the court will not punish the defendant for failure to comply with such contract; the court saying: "Equity will enforce the rights of the parties according to the rules and practice of the court; and parties who invoke its aid should not, by contract, thwart its proceedings and render nugatory its processes. Should they do so, they ought not to expect to be relieved from the consequences of their own interference."

**Where There Is No Preliminary Injunction** the defendant may proceed to do the acts complained of without being guilty of any contempt, but he does so at the risk of having his acts declared illegal and being compelled to restore everything to the condition in which it was at the commencement of the suit. *Per Bailey, C. J.*, in *Lambert v. Alcorn*, 144 Ill. 313.

**The Injunction Is Never Retroactive**, and does not make an act unlawful or a disobedience to its provisions, which act was done before the granting of the injunction; consequently, it must appear satisfactorily that the acts alleged to have been done in violation of the injunction were committed after the defendant acquired knowledge of the injunction. *People v. Albany, etc.*, R. Co., 20 How. Pr. (N. Y. Supreme Ct.) 358, 12 Abb. Pr. (N. Y.) 171; *Witter v. Lyon*, 34 Wis. 564.

2. *Smith v. Halkyard*, 19 Fed. Rep. 602, citing *Birdsall v. Hagerstown Mfg. Co.*, 2 Ban. & A. 519; *Welling v. Trim-*

*ming Co.*, 2 Ban. & A. 1; *Liddle v. Cory*, 7 Blatchf. (U. S.) 1; *Bate Refrigerating Co. v. Eastman*, 11 Fed. Rep. 902. See also *Probasco v. Probasco*, 30 N. J. Eq. 61, citing *Magennis v. Parkhurst*, 4 N. J. Eq. 433.

**Substantial Compliance with Injunction.** — Where an injunction is granted against the use of a patented article, and the defendant makes an honest effort to discontinue the use of the article, but through the oversight of his servants a few of the articles are still used, though he is technically guilty of a disobedience the offense is so unsubstantial in extent that an attachment ought not to issue. *Edison Electric Light Co. v. Goelet*, 65 Fed. Rep. 612.

3. *Webb v. Laird*, 62 Vt. 448; *Denis v. Leclerc*, 1 Martin (La.) 297, 5 Am. Dec. 712; *State v. Fourth Judicial Dist. Ct.*, 13 Mont. 347; *Endicott v. Mathis*, 9 N. J. Eq. 110; *Thropp v. Field*, 25 N. J. Eq. 166; *M'Credie v. Senior*, 4 Paige (N. Y.) 378; *Devlin v. Devlin*, 67 Barb. (N. Y.) 290; *New York v. New York, etc.*, *Ferry Co.*, 64 N. Y. 622; *Loven v. People*, 57 Ill. App. 506; *State v. Pierce*, 51 Kan. 241; *Perry v. Kinnear*, 42 Ill. 160; *Muller v. Henry*, 5 Sawy. (U. S.) 464; *Williamson v. Carnan*, 1 Gill & J. (Md.) 184.

4. *Craig v. Fisher*, 2 Sawy. (U. S.) 345.

5. *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105.

In *Kentucky, etc., Bridge Co. v. Krieger*, 91 Ky. 625, it was held that the disobedience of an injunction by a railroad company will not be overlooked because of the fact that it was practically impossible to avoid violating the

**12. Proceedings Against Contemnors — a. PROCEEDING OF A CRIMINAL CHARACTER.** — In most of the states a proceeding for contempt for violation of an injunction is considered as being in the nature of a criminal proceeding, and as being for the purpose of vindicating the authority and the dignity of the court, rather than of affording a remedy to the party who may have been injured by the violation of the injunction;<sup>1</sup> consequently such proceeding is to be governed by the rule of strict construction which prevails in criminal cases, and a writ of attachment will be granted only in cases which are free from any reasonable doubt on the law or the facts.<sup>2</sup>

**b. ATTACHMENT.** — An order for an injunction is not enforceable by an execution, but by proceeding against the defendant for contempt.<sup>3</sup>

injunction except by failing to perform the railroad company's imperative duties to the public.

**Injunction Against Proceedings at Law.** — Where the defendant is enjoined from proceeding it is his duty to advise the attorney who is acting for him of the issuance of the injunction, and to endeavor to stop the proceedings. *U. S. v. Bancroft*, 6 Ben. (U. S.) 392.

Notice of trial is a breach of an injunction staying proceedings in an action at law. *Clark v. Wood*, 6 N. J. Eq. 458; *Bird v. Brancker*, 2 Sim. & S. 186.

An order of revivor which is necessary to keep a judgment from becoming dormant is not an attempt to collect the same by virtue of any process, and is not in violation of an injunction restraining the levying of an execution or attempts to collect the judgment. *Raff v. State*, 48 Kan. 44.

**1. Delaware.** — *State v. Gilpin*, 1 Del. Ch. 25.

**Louisiana.** — *State v. King*, 47 La. Ann. 696.

**Nebraska.** — *O'Chander v. State*, 46 Neb. 10; *Johnson v. Bouton*, 35 Neb. 903; *Boyd v. State*, 19 Neb. 128; *Gandy v. State*, 13 Neb. 445.

**New Jersey.** — *Magennis v. Parkhurst*, 4 N. J. Eq. 433.

**South Dakota.** — *State v. Knight*, 3 S. Dak. 509.

**Utah.** — *Ex p. Whitmore*, 9 Utah 441.

**Virginia.** — Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. (Va.) 57.

**Wisconsin.** — *Haight v. Lucia*, 36 Wis. 355.

**United States.** — *Vanzandt v. Argentine Min. Co.*, 2 McCrary (U. S.) 642; *Fischer v. Hayes*, 6 Fed. Rep. 63, 102

*U. S.* 121; *Woodruff v. North Bloomfield Gravel Min. Co.*, 45 Fed. Rep. 129; *Bate Refrigerating Co. v. Gillett*, 30 Fed. Rep. 685; *New Orleans v. New York Mail Steamship Co.*, 20 Wall. (U. S.) 387; *Ex p. Kearney*, 7 Wheat. (U. S.) 38.

**In Illinois** the violation of the injunction is a misdemeanor. *Per Gary, J.*, in *Parsons v. People*, 51 Ill. App. 467, citing *Beattie v. People*, 33 Ill. App. 651. But see *People v. Diedrich*, 141 Ill. 665, wherein it was declared that proceedings to punish the violation of the injunction are for the benefit of the plaintiff, and that the remedy is a civil one.

**New York.** — Under Code Civ. Pro., § 8, disobedience of injunction is punishable as a criminal contempt. *People v. McKane*, 78 Hun (N. Y.) 154.

In *People v. Dwyer*, 90 N. Y. 402, it was declared that wilful disobedience is a criminal contempt, while a mere disobedience by which the rights of the party are defeated or hindered is treated otherwise, and the fact that the wilful contempt is denominated "criminal" does not make the proceeding by a civil court to protect its dignity and compel respect for its mandates any the less a civil special proceeding.

**2. Bate Refrigerating Co. v. Gillett**, 30 Fed. Rep. 685; *Woodruff v. North Bloomfield Gravel Min. Co.*, 45 Fed. Rep. 129; *Vanzandt v. Argentine Min. Co.*, 48 Fed. Rep. 770; *O'Chander v. State*, 46 Neb. 10.

**3. State v. Baldwin**, 57 Iowa 266.

**Proceeding in Aid of Enforcement of Order.** — In *Manderscheid v. District Ct.*, 69 Iowa 240, it was said: "It is true that the proceeding is not an

The Proper and Regular Course of proceeding against persons who are alleged to have committed a contempt of court in disobeying the command of a writ of injunction, is by a motion for an attachment against such persons.<sup>1</sup>

*c. ORDER TO SHOW CAUSE.* — The court instead of issuing an attachment in the first instance may require a rule to be served on the defendant to show cause against punishment, and this is the usual and the safer course.<sup>2</sup> It always rests in the discretion of the court whether the rule for an attachment shall be absolute or *nisi*.<sup>3</sup>

equity proceeding, but it is in aid of the enforcement of orders made in an equity proceeding."

**Motion by Defendant to be Purged from Contempt.** — Where the defendant moves to be purged from contempt on the ground that it was not intentional, he should make all the reparation that he can. *Hazard v. Durant*, 11 R. I. 195.

**Laches of the Plaintiff.** — Delay in proceeding to enforce the injunction will not prevent the court from issuing an attachment unless the plaintiff has been guilty of unreasonable laches which has prejudiced the defendant, or operated in such a manner as to relieve him from the consequence of his contempt. *Gulf, etc., R. Co. v. Fort Worth, etc., R. Co.*, 68 Tex. 98; *Dale v. Roosevelt*, 1 Paige (N. Y.) 35.

**Jury Trial.** — The punishment of disobedience of an injunction by the court without a jury is not an invasion of the constitutional right of trial by jury. *In re Debs*, 158 U. S. 564; *Manderscheid v. District Ct.*, 69 Iowa 240; *State v. Cutler*, 13 Kan. 131; *State v. Durein*, 46 Kan. 695; *Carleton v. Rugg*, 149 Mass. 550.

1. *Gray v. Chicago, etc., R. Co.*, 1 Woolw. (U. S.) 63; *Goodyear v. Mullee*, 5 Blatchf. (U. S.) 437, 3 Fisher Pat. Cas. 209; *American Constr. Co. v. Jacksonville, etc., R. Co.*, 52 Fed. Rep. 937; *Commercial Bank v. Waters*, 10 Smed. & M. (Miss.) 559; *Matter of Vanderbilt*, 4 Johns. Ch. (N. Y.) 57; *Livingston v. Gibbons*, 4 Johns. Ch. (N. Y.) 571; *Merced Min. Co. v. Tremont*, 7 Cal. 131.

In Iowa an attachment against the defendant is authorized by statute (Code, § 3026). *State v. Baldwin*, 57 Iowa 266.

In Georgia, under statute (Code, §§ 4216, 4218), the process of attachment is the ordinary mode of enforcing

obedience to an injunction. *Byne v. Byne*, 54 Ga. 258.

**Motion to Quash an Attachment.** — An affidavit on which a motion to quash an attachment for contempt is based should, as a general rule, be made by the defendant; and if it be made by the defendant's counsel excuse should be offered for the defendant's failure to make it himself. *People v. Spalding*, 2 Paige (N. Y.) 326.

2. *Per* Chancellor Kent, in *Matter of Vanderbilt*, 4 Johns. Ch. (N. Y.) 57. See also *Gates v. M'Daniel*, 4 Stew. & P. (Ala.) 69; *M'Credie v. Senior*, 4 Paige (N. Y.) 378; *Columbia Water-power Co. v. Columbia*, 4 S. Car. 388.

**Rule Against Aiders and Abettors.** — Where an injunction is disobeyed by one who was not in terms enjoined, but who had knowledge of the existence of the order, the rule against him should not be to show cause why he "should not be attached and committed to jail for contempt of court in disobeying the injunction entered in this cause," but it should be "in knowingly and wilfully aiding and abetting \* \* \* in disobeying and violating said injunction." *Parsons v. People*, 51 Ill. App. 467; *Wellesley v. Mornington*, 11 Beav. 181.

In California it has been provided by statute (Code Civ. Pro., § 1212), that when a contempt is not committed in the immediate presence of the court a warrant of commitment may be granted upon an order to show cause. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187.

In Iowa it is required by statute that a rule shall be served upon the defendant to show cause against the punishment. *Manderscheid v. District Ct.*, 69 Iowa 240.

3. *Per* Chancellor Kent, in *Matter of Vanderbilt*, 4 Johns. Ch. (N. Y.) 57, wherein it is said that if the contempt

*d.* NOTICE. — It is well settled as a general rule that a writ of attachment authorizing the summary arrest and imprisonment of the defendant cannot issue without such previous notice as will afford him an opportunity of being heard.<sup>1</sup>

**The Prosecutor.** — An injunction obtained to protect a merely private right is so far within the control of the party obtaining it, and is so far a matter of individual concern, that only those persons who have a present interest in the right to be protected can be heard to complain of its violation.<sup>2</sup>

*e.* THE AFFIDAVIT OR INFORMATION. — It is not necessary that an information shall be filed, although there is no harm in doing so;<sup>3</sup> but an affidavit showing that the injunction was served upon the defendant or that he had knowledge of its contents, and stating the specific acts of omission or commission on the part of the defendant which constituted the alleged contempt, is essential, and such affidavit constitutes the groundwork of the attachment and forms the charge against the defendant.<sup>4</sup>

appears from the affidavit to be direct and palpable, wilful and extreme, the process frequently issues in the first instance.

1. *New Brighton, etc., R. Co.'s Appeal*, 105 Pa. St. 13; *Gray v. Chicago, etc., R. Co.*, 1 Woolw. (U. S.) 63.

**Cases of Extraordinary Emergency** may sometimes arise in which a strict observance of the rule requiring notice to the defendant before issuing a writ of attachment would defeat the ends of justice, and in such cases the general rule may be departed from, but these exceptional cases are very rare. *Per Sterrett, J.*, in *New Brighton, etc., R. Co.'s Appeal*, 105 Pa. St. 13.

In *New York* it is not an absolute right of the plaintiff to proceed against the defendant upon an order or short notice, rather than upon a notice for usual and regular term. *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430.

2. *Diedrich v. People*, 37 Ill. App. 604; *Cocks v. Simmons*, 57 Miss. 183; *Secor v. Singleton*, 35 Fed. Rep. 376. In the last mentioned case the court cited *Hawley v. Bennett*, 4 Paige (N. Y.) 163, in support of the proposition that the prosecutor or person filing the information must have an interest in the proceeding differing from that of the general public; and *Mills v. Cobby*, 1 Meriv. 3; *Barfield v. Nicholson*, 2 L. J. Ch. 90, and *Hull v. Harris*, 45 Conn. 544, in support of the proposition that a party in whose favor an injunction has been awarded may, by express

agreement or by his conduct, release the injunction, or at least waive his right to have particular acts done in violation of the injunction adjudged to be a contempt.

In *Nevada* it is not required by statute that the affidavit upon which proceedings against the defendant for contempt is based shall be made by a party beneficially interested in the proceedings, but the court will nevertheless refuse to act unless satisfied that the party making the affidavit was authorized to do so by the party beneficially interested in the proceedings. *Strait v. Williams*, 18 Nev. 430, in which case, however, it was held that it is to be presumed that the plaintiff, by his attorney, presented the affidavit, and that the fact will be sufficient to satisfy the court that the party making the affidavit was authorized to do so.

3. *U. S. v. Agler*, 62 Fed. Rep. 824, in which case it was said that the essential thing is the filing of a statement or charge that shall show clearly and distinctly that the injunction has been served on the defendant, or, if it has not been served upon him, that he had notice or knowledge of its contents. See also *State v. Myers*, 44 Iowa 580; *State v. Cutler*, 13 Kan. 131.

4. *State v. Gilpin*, 1 Del. Ch. 25; *Parkhurst v. Kinsman*, 2 Blatchf. (U. S.) 76; *Murdock's Case*, 2 Bland (Md.) 465; *U. S. v. Agler*, 62 Fed. Rep. 824.

**Affiant's Knowledge of Facts.** — An

**How Proceedings Should Be Entitled.** — Contempt proceedings, though sometimes entitled in the name of the people or state *ex rel.*, etc., may properly be in the name of the parties to the original bill, and need not be brought and prosecuted in the name of the people or state.<sup>1</sup>

**f. INTERROGATORIES PROPOUNDED TO THE DEFENDANT.** — The party alleging a contempt of court by breach of an injunction may examine the party accused upon interrogatories, and use his answers to such interrogatories as proof.<sup>2</sup>

**g. ANSWERS TO INTERROGATORIES.** — It was at one time the rule that if the defendant makes a full and frank answer to all the facts, and positively denies or justifies all that is alleged against him, he must be at once discharged, and this rule at present pre-

affidavit required by statute which merely shows the facts constituting the violation of the injunction, and does not show that the affiant has personal knowledge of the facts, is sufficient where it is not expressly provided that he shall show that he has personal knowledge of the facts. *Jordan v. Circuit Ct.*, 69 Iowa 177.

In *Iowa*, under a statute (Code, § 3495), unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as the basis for proceedings for contempt. *Jordan v. Circuit Ct.*, 69 Iowa 177.

**Immaterial Irregularities.** — Where an order to show cause is made and served, and the defendant is given an opportunity to appear and answer any contempt alleged against him, and the defendant is committed upon the oral testimony of witnesses and documentary evidence introduced on the return day of the order to show cause, irregularities in the affidavit upon which the order to show cause was made are immaterial. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Ct.*, 65 Cal. 187.

**Charges Against Officers of Corporations.** — Where an injunction is issued against a corporation, its officers, agents, superintendents, etc., an affidavit on which contempt proceedings are based need not state in terms that the defendants are officers, agents, superintendents, etc., of the corporation. It is sufficient to charge that they had full knowledge of the issuance, service, and effect of the injunction, and that they

did the acts charged in violation of the injunction and in contempt of the authority of the court issuing it, from which allegations it will be presumed that the operations were permitted and authorized by the corporation. *Hedges v. Superior Ct.*, 67 Cal. 405.

1. *Per Wilkin, J.*, in *People v. Diedrich*, 141 Ill. 665; *Manderscheid v. District Ct.*, 69 Iowa 240; *per Gray, C. J.*, in *Winslow v. Nayson*, 113 Mass. 411; *People v. Craft*, 7 Paige (N. Y.) 325; *Fischer v. Hayes*, 6 Fed. Rep. 63.

In *New York* it has been provided by statute (Code Civ. Pro., § 2283) that upon the return of the order to show cause in proceedings for contempt, the questions which arise may be determined as upon any other motion. *Aldinger v. Pugh*, 57 Hun (N. Y.) 188, in which case it was held that the court may of its own motion direct a reference to determine and report upon any question of fact; *citing People v. Alexander*, 3 Hun (N. Y.) 211.

2. *Magennis v. Parkhurst*, 4 N. J. Eq. 433, *citing Bl. Com.* 288, 1 Com. Dig. 599, and *Newl. Ch. Pr.* 392. See also *Jewett v. Dringer*, 27 N. J. Eq. 271.

**The Interrogatories Must Be Limited to the Particular Offense** alleged, and it is not competent for the plaintiff to file interrogatories in regard to matters not specifically charged against the defendant in the proofs furnished on the application for the attachment; the plaintiff is not entitled to require the defendant to answer interrogatories as to particulars which are charged on information and belief of the plaintiff or of other witnesses, and are not established by direct evidence. *Parkhurst v. Kinsman*, 2 Blatchf. (U. S.) 76.

vails in some jurisdictions;<sup>1</sup> but the weight of authority is that a sworn answer, however full and unequivocal, is not conclusive, and witnesses may be examined by either party.<sup>2</sup>

*h.* **PENALTY FOR DISOBEDIENCE** — **Purpose of Punishing the Defendant.** — The defendant is punished for violating an injunction, for two purposes; one, to vindicate the authority of the court and insure obedience to its process, and the other to compel, for the plaintiff's benefit, the performance of some act or duty required of him by the court which he refuses to perform.<sup>3</sup> The punishment should be sufficiently great to maintain the majesty of the law and to vindicate the authority of the court,<sup>4</sup> and the court has power to restore the subject-matter of the injunction, and cause restitution to the party injured.<sup>5</sup>

**Fine and Imprisonment.** — The defendant is liable to punishment

1. *Murdock's Case*, 2 Bland (Md.) 461, in which case Chancellor Bland said that he knew of no instance in which proofs and affidavits had been allowed to be introduced in opposition to the answer of the accused. See also *Postal Tel. Cable Co. v. Norfolk, etc.*, R. Co., 88 Va. 929; *Wells v. Com.*, 21 Gratt. (Va.) 500, in which latter case the court said: "If the party can clear himself upon oath he is discharged, but if perjured may be prosecuted for the perjury;" and *cited* 4 Bl. Com. 287, 288.

2. *Loven v. People*, 158 Ill. 159; *Crook v. People*, 16 Ill. 534; *U. S. v. Debs*, 64 Fed. Rep. 724. See also *Welch v. People*, 30 Ill. App. 409; *Buck v. Buck*, 60 Ill. 105; *Yates's Case*, 4 Johns. (N. Y.) 317; *M'Credie v. Senior*, 4 Paige (N. Y.) 378; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372; *Underwood's Case*, 2 Humph. (Tenn.) 46; *Rutherford v. Metcalf*, 5 Hayw. (Tenn.) 58; *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864; *U. S. v. Anonymous*, 21 Fed. Rep. 761. See, further, the article **CONTEMPT**, vol. 4, pp. 795, 796.

3. *Forrest v. Price*, 52 N. J. Eq. 16. *Citing In re Chiles*, 22 Wall. (U. S.) 157, and *Stimpson v. Putnam*, 41 Vt. 238.

4. *People v. Barnes*, (Supreme Ct.) 7 N. Y. Supp. 802; *State v. Eddy*, 2 Del. Ch. 269.

5. *Wimpy v. Phinizy*, 68 Ga. 188; *Stimpson v. Putnam*, 41 Vt. 238; *Matter of South Side R. Co.*, 7 Ben. (U. S.) 391, 10 Nat. Bank Reg. 274, in which last mentioned case it was held that the extent of the punishment is to

be determined by the expense and loss incurred by the plaintiff by reason of the defendant's disobedience.

**In New York** it has been required by statute (2 Rev. Stat. 538, § 21) that the court shall impose a fine sufficient, at least, to indemnify the plaintiff. *Taber v. New York El. R. Co.*, 12 Misc. Rep. (N. Y. Super. Ct.) 460; *Ross v. Clussman*, 3 Sandf. (N. Y.) 676; *People v. Spalding*, 2 Paige (N. Y.) 326.

**Compensation to the Plaintiff.** — The fine is imposed for the public good, in order to secure obedience to lawful authority, and it is not divided between the injured party and the state, unless such practice is authorized by statute. *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Crook v. People*, 16 Ill. 534; *Vanzandt v. Argentine Min. Co.*, 48 Fed. Rep. 770. In the last mentioned case the court *cited* *Haight v. Lucia*, 36 Wis. 355.

Although the extent of the violation, that is, the extent to which the plaintiff has been injured by the violation, is not shown, it is proper to make an allowance of counsel fees and disbursements which were made necessary to establish the violation itself; but in such case the court should not impose on the defendant a further pecuniary fine by way of indemnity to the plaintiff. *Doubleday v. Sherman*, 8 Blatchf. (U. S.) 45.

**Penalty Too Small.** — It does not lie with the defendant to complain that the fine was much less than the law required the court to impose on him for the indemnity of the plaintiff. *People v. Spalding*, 2 Paige (N. Y.) 326.

by fine or imprisonment, or both, in the discretion of the court.<sup>1</sup> The amount of fine and duration of imprisonment are within the sole discretion of the court which issued the injunction, and no court of review has control over the matter.<sup>2</sup>

**Mitigating Circumstances.** — Where the defendant has intended no actual contempt for the court or any of its officers, and has not been guilty of wilful contempt, the court will be lenient with him and will impose a nominal fine and costs only.<sup>3</sup>

**XXI. REMEDIES UPON DISSOLUTION OF INJUNCTION** — 1. **Assessment of Damages by the Court** — *a.* IN THE ABSENCE OF STATUTORY PROVISIONS. — Unless authorized by statute the court is not authorized to assess damages upon the dissolving of an injunction, whether an injunction bond has been given or not, and even when the court is authorized by statute to assess damages it should not exceed the powers so conferred.<sup>4</sup>

1. *Stimpson v. Putnam*, 41 Vt. 238; *Elliot v. Whitmore*, 10 Utah 246.

**United States Statute.** — Rev. Stat. U. S., § 725, provides for punishment of a contempt by fine or imprisonment; but the court may order that the defendant shall be fined within thirty days, and that if the fine is not paid the defendant shall stand committed until it is paid, and such order does not violate the statute by both fining and imprisoning the defendant, as there is no commitment until the fine is not paid, and if there be a commitment for non-payment of the fine there must be a discharge as soon as the fine is paid. *Fischer v. Hayes*, 6 Fed. Rep. 63.

2. *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121, in which case it was held that a statute limiting the punishment for contempt committed in the presence of the court has no application where an injunction has been disobeyed; *Hayden v. Phinizy*, 67 Ga. 758; *People v. Sturtevant*, 9 N. Y. 263; *In re Chiles*, 22 Wall. (U. S.) 157, in which last mentioned case it was held that under Rev. Stat. U. S., § 725, the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense.

3. *People v. Bouchard*, 6 Misc. Rep. (N. Y. Supreme Ct.) 459; *Stimpson v. Putnam*, 41 Vt. 238; *Morss v. Domestic Sewing-Machine Co.*, 38 Fed. Rep. 482; *Muller v. Henry*, 5 Sawy. (U. S.) 464; *Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. Rep. 615; *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 74 Iowa 585, 36 Am. & Eng. R. Cas. 132, in which last mentioned case the officers of the city

disobeyed an injunction under the belief that it was their duty to do so under resolutions and ordinances of the city.

**A Disavowal of Intention** to disobey the order, with an expression of regret for what has been done, will operate to the defendant's benefit in the measure of a penalty. *Watson v. Citizens' Sav. Bank*, 5 S. Car. 159.

**Irregularity of Injunction.** — In *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121, it was held that the defendant should not be permitted to show that the allegations of the bill are not true for the purpose of affecting the extent of the punishment; the court saying: "If the allegations are untrue the respondents may apply, and ought to apply, to procure a modification of the injunction or to set it aside."

In *Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422, it was held that the fact that the order contemned was improvidently or erroneously made may be construed in awarding punishment. *Citing Partington v. Booth*, 3 Meriv. 148; *Sullivan v. Judah*, 4 Paige (N. Y.) 444.

**Remission of Sentence.** — After conviction and commitment for contempt for violating an injunction, the court has no more power on the petition of the defendant to remit the sentence than it has in the case of a conviction and commitment for any other crime or offense, and the only remedy of the defendant is to apply to the executive for pardon. *In re Mullee*, 7 Blatchf. (U. S.) 23.

4. 10 Am. and Eng. Encyc. of Law (1st ed.) 993, which authority was cited

b. STATUTORY PROVISIONS. — In many states it has been provided by statute that the court may, in a summary way,

in *Grove v. Bush*, 86 Iowa 94, and in *Spencer v. Sherwin*, 86 Iowa 117.

Among the numerous cases in which the doctrine stated in the text finds support are the following:

*Alabama*. — *Bogacki v. Welch*, 94 Ala. 429; *Harris v. Carter*, 3 Stew. (Ala.) 233.

*Arkansas*. — *Lawson v. Barton*, (Ark. 1888) 7 S. W. Rep. 387; *Stanley v. Bonham*, 52 Ark. 354; *Greer v. Stewart*, 48 Ark. 21; *Clayton v. Martin*, 31 Ark. 217; *Marshall v. Green*, 24 Ark. 410.

*Colorado*. — *Sartor v. Strassheim*, 8 Colo. 185.

*Illinois*. — In *Phelps v. Foster*, 18 Ill. 309, Caton, J., said, with reference to the practice of assessing damages, upon its being determined that the injunction was improperly sued out: "I cannot find authority for sustaining it in the practice of the English Court of Chancery. The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant without a cross-bill, and when the pleadings do not justify it." See also *Palmer v. Vermilion County*, 46 Ill. 447.

*Indiana*. — *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545, *per* Lotz, J.

*Iowa*. — *Shenandoah Nat. Bank v. Read*, 86 Iowa 136; *Grove v. Bush*, 86 Iowa 94; *Fountain v. West*, 68 Iowa 380; *Chicago, etc., R. Co. v. Dey*, 76 Iowa 278; *Taylor v. Brownfield*, 41 Iowa 264; *Spencer v. Sherwin*, 86 Iowa 117.

*Kentucky*. — *Eastern R. Co. v. Brown*, (Ky. 1896) 36 S. W. Rep. 555, holding that the court has no authority to assess damages except as allowed by statute, where the enforcement of the judgment has been enjoined. See also *Alexander v. Gish*, 88 Ky. 13; *Rankin v. Estes*, 13 Bush (Ky.) 428; *Logsdon v. Willis*, 14 Bush (Ky.) 183.

*Minnesota*. — *Hayden v. Keith*, 32 Minn. 277, which case was cited in *Spencer v. Sherwin*, 86 Iowa 117, and in *Coates v. Caldwell*, 71 Tex. 19.

*Tennessee*. — *Henley v. Cliborne*, 3 Lea (Tenn.) 213, which case was cited in *Coates v. Caldwell*, 71 Tex. 19.

*Louisiana*. — *Boyer v. Joffrion*, 40 La. Ann. 657; *Elder v. New Orleans*, 31 La. Ann. 500, in which case it was held that it is only where an injunction has

been issued to restrain the execution of a money judgment that the principal and sureties may be summarily condemned *in solido*; *Sheen v. Stothart*, 29 La. Ann. 630; *Hodgson v. Roth*, 33 La. Ann. 941; *Testart v. Belot*, 33 La. Ann. 1469; *Nolan v. Babin*, 2 La. Ann. 357; *Scott v. Sheriff*, 30 La. Ann. 580; *Crescent City Live Stock Landing, etc., Co. v. Larrieux*, 30 La. Ann. 740; *Morris v. Bienvenu*, 30 La. Ann. 878; *Robinson v. Freret*, 9 La. Ann. 303.

*Maine*. — *Union Wharf v. Mussey*, 48 Me. 307.

*Mississippi*. — *Valentine v. McGrath*, 52 Miss. 112.

*Nebraska*. — *Bemis v. Gannett*, 8 Neb. 236, which case was cited in *Spencer v. Sherwin*, 86 Iowa 117.

*New Jersey*. — *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 359, which case was cited in *Spencer v. Sherwin*, 86 Iowa 117.

*New York*. — *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232; *Lawton v. Green*, 64 N. Y. 326 [in which case the court declared that the broad proposition laid down by the writer of a certain work on injunctions, that the court has power to ascertain the damages and decree their payment, is not sustained by the authorities cited by him]; *Patterson v. Bloomer*, 37 How. Pr. (N. Y. Supreme Ct.) 450; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277; *Cayuga Bridge Co. v. Magee*, 2 Paige (N. Y.) 116; *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65.

*North Carolina*. — *Burnett v. Nicholson*, 79 N. Car. 548.

*South Carolina*. — In *Hill v. Thomas*, 19 S. Car. 230, the court said: "We cannot recall a case under the practice of the old Court of Equity in which that court undertook by mere reference to ascertain damages upon an injunction bond against persons who were not parties to the principal action in which the order was made."

*Texas*. — *Janes v. Reynolds*, 2 Tex. 250, holding that where the court is authorized by statute to render a summary judgment against the obligors, without notice or trial by jury, such summary judgment will not be rendered where the bond does not substantially conform to the requirements of the statute. See also *Coates v. Caldwell*, 71 Tex. 19 [in which case the



assess the damages which have been sustained by the wrongful suing out of the injunction, the method provided by many of the statutes being a reference; and in some states it is specially provided that where an injunction against the enforcement of a judgment has been wrongfully sued out, the court shall, by a reference or otherwise, ascertain the amount of damages that have been sustained and render a decree for such amount.<sup>1</sup>

court *cited* *Elder v. New Orleans*, 31 La. Ann. 500; *Hayden v. Keith*, 32 Minn. 277; *Henley v. Cliborne*, 3 Lea (Tenn.) 213].

*Vermont*.—In *Sturgis v. Knapp*, 33 Vt. 486, it was said, *obiter* "In the absence of all statutory provisions or rules on the subject, we apprehend the Court of Chancery possesses full power to make such a reference, and thus to ascertain the damages that may be occasioned by an injunction, issued by such court, when such damages are by the order of the court to be paid by the party praying for the injunction. The Court of Chancery may, in their discretion, proceed to ascertain the damages by any other method that they may think best adapted to the accomplishment of such object. This we think is in accordance with the practice in this state and in England." *Disapproving* *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232. But in the first-mentioned case it was conceded that the court has no jurisdiction to enforce the bond against the sureties, and that in order to fix their liability proceedings must be instituted upon the bond itself.

*Virginia*.—*Medley v. Pannill*, 1 Rob. (Va.) 67.

*United States*.—*Bein v. Heath*, 12 How. (U. S.) 168; *Merryfield v. Jones*, 2 Curt. (U. S.) 306. But see *Russell v. Farley*, 105 U. S. 433.

1. *Alabama*.—Act 1826, Rev. Code, § 3404; *Wiswell v. Munroe*, 4 Ala. 9; *Mallory v. Matlock*, 10 Ala. 595.

*Arkansas*.—*Gantt's Dig.*, § 3482; *Daniel v. Daniel*, 39 Ark. 266; *Stanley v. Bonham*, 52 Ark. 354; *Marshall v. Green*, 24 Ark. 410.

*Illinois*.—Rev. Stat., c. 69, § 12; *Kohlsaat v. Crate*, 144 Ill. 14; *Holmes v. Stalder*, 57 Ill. 209; *Poyer v. Des Plaines*, 123 Ill. 111, 124 Ill. 310; *McWilliams v. Morgan*, 70 Ill. 551; *Garity v. Chicago*, etc., R. Co., 22 Ill. App. 404; *Walton v. Develing*, 61 Ill. 201; *Wing v. Dodge*, 80 Ill. 564; *Hamilton v. Stewart*, 59 Ill. 330; *Misner v. Bullard*, 43 Ill. 470; *Post-Boynton*

*Strong Co. v. Williams*, 57 Ill. App. 434.

*Iowa*.—Rev. Stat., § 3794; *Parker v. Slaughter*, 24 Iowa 252; *Woods v. Irish*, 14 Iowa 427.

*Kansas*.—Gen. Stat. 1889, ¶ 6975 (*Webb's Anno. Stat.* 1897, p. 911), which statute applies to injunctions against the collection of taxes due upon personal property; *Rogers v. Kansas City*, etc., R. Co., 48 Kan. 471.

*Kentucky*.—Civ. Code, § 295, authorizes the court, upon dissolution of an injunction staying proceedings upon a judgment, to assess the damages. *Logsden v. Willis*, 14 Bush (Ky.) 183; *Davis v. Ballard*, 7 T. B. Mon. (Ky.) 603; *Fawcett v. Pendleton*, 5 Litt. (Ky.) 136; *White v. Guthrie*, 1 J. J. Marsh. (Ky.) 503; *Kilpatrick v. Tunstall*, 5 J. J. Marsh. (Ky.) 80; *Cook v. Edmondson*, 3 J. J. Marsh. (Ky.) 423; *Lowe v. Baber*, 3 J. J. Marsh. (Ky.) 423; *Martin v. Wade*, 5 T. B. Mon. (Ky.) 77; *Head v. Perry*, 1 T. B. Mon. (Ky.) 253; *South-erland v. Crawford*, 2 J. J. Marsh. (Ky.) 369; *Dawson v. Stratton*, 2 J. J. Marsh. (Ky.) 551; *Wilson v. McCullough*, 5 J. J. Marsh. (Ky.) 363.

*Louisiana*.—Code Prac., art. 304, Act 1855, p. 324; *Verges v. Gonzales*, 33 La. Ann. 410; *Armistead v. Ardis*, 48 La. Ann. 320; *Meaux v. Pittman*, 35 La. Ann. 360; *Friedman v. Adler*, 36 La. Ann. 384; *Betts v. Mougins*, 15 La. Ann. 52; *Denton v. Erwin*, 5 La. Ann. 21. See also *Bein v. Heath*, 12 How. (U. S.) 168; *Meyers v. Block*, 120 U. S. 206.

*Minnesota*.—*Hayden v. Keith*, 32 Minn. 277. See also *Russell v. Farley*, 105 U. S. 433.

*New York*.—*Lawton v. Green*, 64 N. Y. 326, which case was decided under Code, § 222. See also *Jordan v. Volkenning*, 72 N. Y. 300; *Methodist Churches v. Barker*, 18 N. Y. 463; *Poillon v. Volkenning*, 11 Hun (N. Y.) 385; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277; *Hotchkiss v. Platt*, 7 Hun (N. Y.) 57.

*South Carolina*.—Code Civ. Pro., § 243; *Hill v. Thomas*, 19 S. Car. 230.

**2. Remedies Other than Those Afforded by the Bond.** — Although the preliminary injunction ought not to have been granted and

*Texas.* — Coates *v.* Caldwell, 71 Tex. 19; Sharp *v.* Schmidt, 62 Tex. 263.

*Vermont.* — Sturgis *v.* Knapp, 33 Vt. 486.

*Virginia.* — Michaux *v.* Brown, 10 Gratt. (Va.) 612; Claytor *v.* Anthony, 15 Gratt. (Va.) 518; Washington *v.* Parks, 6 Leigh (Va.) 581.

**Injunction Against Decree in Chancery.** — A statute authorizing the assessment of damages upon the dissolution of an injunction against the enforcement of a judgment at law does not apply to injunctions enjoining decrees in chancery. Martin *v.* Wade, 5 T. B. Mon. (Ky.) 77, citing Head *v.* Perry, 1 T. B. Mon. (Ky.) 253.

**Notice Before Assessment of Damages.** — Notice to the sureties is desirable, even if not absolutely necessary. Spencer *v.* Sherwin, 86 Iowa 117; Jordan *v.* Volkenning, 72 N. Y. 300; Methodist Churches *v.* Barker, 18 N. Y. 463; Hill *v.* Thomas, 19 S. Car. 230.

In *Illinois* the plaintiff, if suggestions have been filed, must have an opportunity to be heard in his defense. Hamilton *v.* Stewart, 59 Ill. 330.

In *Louisiana* the sureties are so completely identified with the plaintiff as to become his coplaintiffs *ipso facto* by the mere fact of suretyship, and they are not entitled to notice. Friedman *v.* Adler, 36 La. Ann. 384. See also Denton *v.* Erwin, 5 La. Ann. 21.

**Jury Trial.** — The plaintiff is not entitled to a jury trial of right, but only in the discretion of the chancellor. Holmes *v.* Stateler, 57 Ill. 209.

**Suggestions.** — In *Illinois* there must be suggestions in writing stating the injury and amount of damages sustained by the defendant, in order to confer upon the court jurisdiction to make assessments. Hamilton *v.* Stewart, 59 Ill. 330.

**The Decree.** — In *Kentucky* it has been held in numerous cases that where an injunction against the enforcement of a judgment has been dissolved, the amount of damages must be fixed by the decree, and it is not proper to decree ten per cent. damages and costs without ascertaining and decreeing the amount of damages. White *v.* Guthrie, 1 J. J. Marsh. (Ky.) 503; Wilson *v.* McCullough, 5 J. J. Marsh. (Ky.) 363; Cook *v.* Edmondson, 3 J. J. Marsh. (Ky.) 423; Lowe *v.* Baber, 3 J. J.

Marsh. (Ky.) 423; Southerland *v.* Crawford, 2 J. J. Marsh. (Ky.) 369; Ward *v.* Davidson, 2 J. J. Marsh. (Ky.) 443; Dawson *v.* Stratton, 2 J. J. Marsh. (Ky.) 551.

In *Illinois* it has been repeatedly decided that the record must show the evidence upon which the damages were assessed, or there must be such a finding of facts in the decree as will dispense with the necessity of preserving the evidence. Mitchell *v.* Northwestern Mfg., etc., Co., 26 Ill. App. 295; Steele *v.* Boone, 75 Ill. 457; Wilson *v.* Weber, 3 Ill. App. 125; Delahanty *v.* Warner, 75 Ill. 185; Kransz *v.* Kagebein, 60 Ill. App. 430; Albright *v.* Smith, 68 Ill. 181; Panton *v.* Collar, 12 Ill. App. 160; Hamilton *v.* Stewart, 59 Ill. 330; Forth *v.* Xenia, 54 Ill. 210; Spring *v.* Olney, 78 Ill. 101; Goodwillie *v.* Millmann, 56 Ill. 525; Pankey *v.* Raum, 51 Ill. 88; Wilhite *v.* Pearce, 47 Ill. 413; Steele *v.* Thatcher, 56 Ill. 257; Jevne *v.* Osgood, 57 Ill. 340; Adair *v.* Adair, 54 Ill. App. 502; Baird *v.* Powers, 131 Ill. 66.

**Effect of Statute Authorizing Summary Assessment of Damages.** — A statute authorizing the court to assess damages upon the dissolution of an injunction merely provides a new remedy and vests the courts of chancery with powers which they did not previously have, and does not take away the common-law remedy of an action at law upon the injunction bond. Rees *v.* Peltzer, 1 Ill. App. 315; Hayden *v.* Keith, 32 Minn. 277.

**Subsequent Events Justifying Dissolution.** — If when the bill was filed there was good cause for issuing an injunction, subsequent events justifying the dissolution and authorizing the dismissal of the bill will not render the plaintiff liable for damages. Butchers' Union, etc., Co. *v.* Howell, 37 La. Ann. 280 [in which case the court cited Davis *v.* Millaudon, 14 La. Ann. 881; Raiford *v.* Thorn, 15 La. Ann. 81; Pointer *v.* Roth, 19 La. Ann. 78; Watts *v.* Sanders, 10 B. Mon. (Ky.) 372; Manlove *v.* Vick, 55 Miss. 567; and Palmer *v.* Foley, 71 N. Y. 109]. See also Apollinaris Co. *v.* Venable, 136 N. Y. 46 [in which case the court cited Palmer *v.* Foley, 71 N. Y. 109, and Johnson *v.* Elwood, 82 N. Y. 362]; Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84; Massie *v.* Sebas-

has been set aside for that reason, yet the damages incurred where the proceedings have been regular cannot be recovered otherwise than by an action on the injunction bond, except upon the theory that the injunction was sued out maliciously and without probable cause, in which case the party who abuses the process is considered as a trespasser and is liable as in other cases of malicious prosecution.<sup>1</sup>

**3. Accrual of Right to Prosecute Bond** — *a.* CONSTRUCTION OF BOND. — The parties are entitled to stand strictly on the terms of the bond, beyond which their liability cannot be extended; and the sureties especially are entitled to stand on the precise terms of their undertaking.<sup>2</sup>

*tian*, 4 Bibb (Ky.) 437; *Payne v. Wallace*, 6 T. B. Mon. (Ky.) 380; *Fishback v. Williams*, 3 Bibb (Ky.) 342; *Fawcett v. Pendleton*, 5 Litt. (Ky.) 136, *per* Boyle, C. J.; *Carroll v. Readheimer*, 35 La. Ann. 374; *Findlay v. Carson*, (Iowa 1896) 66 N. W. Rep. 759 [in which case the court *cited* *Boden v. Dill*, 58 Ind. 273]; *Reeves v. Dickey*, 10 Gratt. (Va.) 138.

1. *California*. — *Robinson v. Kellum*, 6 Cal. 399; *Asevado v. Orr*, 100 Cal. 293.

*Georgia*. — *Mitchell v. Southwestern R. Co.*, 75 Ga. 398, holding that an action on the case is maintainable where an injunction has been sued out maliciously without probable cause, and that there is no distinction between a suit so prosecuted in equity and one so prosecuted at law.

*Indiana*. — *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545. *per* Lotz, J.

*Kentucky*. — *Cox v. Taylor*, 10 B. Mon. (Ky.) 17; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51.

*Minnesota*. — *Hayden v. Keith*, 32 Minn. 277.

*Mississippi*. — *Manlove v. Vick*, 55 Miss. 567.

*Missouri*. — *Keber v. Mercantile Bank*, 4 Mo. App. 195; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349; *Teasdale v. Jones*, 40 Mo. App. 243.

*New York*. — *Lawton v. Green*, 64 N. Y. 326, 5 Hun (N. Y.) 157; *Cayuga Bridge Co. v. Magee*, 2 Paige (N. Y.) 116; *Palmer v. Foley*, 71 N. Y. 106; *Mark v. Hyatt*, 61 Hun (N. Y.) 325, 135 N. Y. 306.

*North Carolina*. — *Burnett v. Nicholson*, 79 N. Car. 548.

*Vermont*. — *Sturgis v. Knapp*, 33 Vt. 486.

*United States*. — *Russell v. Farley*,

105 U. S. 433; *Tobey Furniture Co. v. Colby*, 35 Fed. Rep. 592; *Meyers v. Block*, 120 U. S. 206.

**Injunction Granted in Excess of Jurisdiction.** — Where an injunction is granted by a court in excess of its authority, the party who procures it is not liable in an action of trespass, unless he was aware of the court's lack of jurisdiction. *Mark v. Hyatt*, 61 Hun (N. Y.) 325, 135 N. Y. 306.

**Right of Action Irrespective of Bond.** —

When the process of injunction has been sued out maliciously there may be a right of action in favor of the defendant, regardless of whether or not any bond was given. *Cox v. Taylor*, 10 B. Mon. (Ky.) 17; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349. But see, *contra*, *Gorton v. Brown*, 27 Ill. 489, in which case the court *disapproved* *Cox v. Taylor*, 10 B. Mon. (Ky.) 17.

2. *Tarpey v. Shillenberger*, 10 Cal. 390; *Carter v. Mulrein*, 82 Cal. 167; *Ovington v. Smith*, 78 Ill. 250; *Grove v. Bush*, 86 Iowa 94; *Spencer v. Sherwin*, 86 Iowa 117; *Butchers' Union, etc., Co. v. Howell*, 37 La. Ann. 280; *Eakle v. Smith*, 27 Md. 467; *Steuart v. State*, 20 Md. 97; *Wallis v. Dilley*, 7 Md. 237; *Smith v. Gregg*, 9 Neb. 212; *Shearman v. New York Cent. Mills*, 11 How. Pr. (N. Y. Supreme Ct.) 269.

**A Suit Against the Principal** is not necessary to determine the liability of the sureties. *Shenandoah Nat. Bank v. Read*, 86 Iowa 136 [following *Dangel v. Levy*, 1 Idaho 722, in which latter case it was held that it was not necessary to aver that the principal was insolvent or that the plaintiff might not have recovered his damages in an action against him; and *disapproving* expressions to the contrary in *Bunt v. Rheum*, 52 Iowa 619].

**b. ISSUANCE OF PRELIMINARY INJUNCTION.**—Where the writ of injunction, on the issuance of which the obligors agreed to make themselves responsible, is never issued, no liability accrues.<sup>1</sup> A recital in the bond that the plaintiff has obtained an order for the injunction is not conclusive evidence of the issue of the injunction.<sup>2</sup>

**Want of Jurisdiction to Grant Injunction.**—It is the better opinion, that after the plaintiff has obtained an injunction and stayed his adversary's proceedings, and thereby caused his adversary to suffer damages, it is too late for the plaintiff to set up as a defense in an action on the injunction bond a want of jurisdiction to grant the injunction. He is estopped from raising that question.<sup>3</sup>

**An Action on the Case** to ascertain the defendant's damages is not essential before bringing an action on the bond, where the condition of the bond is to pay such damages as may be sustained by vexatious suing out of the injunction. *Garrett v. Logan*, 19 Ala. 344.

**Bond Given in United States Court—Action in State Court.**—An action at law lies in a state court on an injunction bond given in a United States court. *Eastern R. Co. v. Brown*, (Ky. 1896) 36 S. W. Rep. 555, citing *Meyers v. Block*, 120 U. S. 206.

**Order Canceling Bond.**—The court, in ordering the discontinuance of a suit, has no power to cancel the undertaking without the consent or knowledge of all the defendants. *Dry Dock, etc., R. Co. v. Cunningham*, 45 How. Pr. (N. Y. Supreme Ct.) 458.

1. *Dubberly v. Black*, 38 Ala. 193; *Shorter v. Mims*, 18 Ala. 655; *Byam v. Cashman*, 78 Cal. 525; *Carter v. Mulrein*, 82 Cal. 167; *Ridgley v. Minneapolis Threshing Mach. Co.*, 61 Ill. App. 173; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138; *Garner v. Strobe*, 5 Litt. (Ky.) 314; *Wagner v. Rock Island*, 61 Ill. App. 583. See also *Eagle v. Smith*, 27 Md. 467, in which case the court cited *James v. Downes*, 18 Ves. Jr. 522.

**Noncompliance with Condition.**—Where an injunction is ordered upon a condition which is not complied with, the injunction is not effectual to delay the party, and it is error to decree damages upon the dissolution of the injunction. *M'Coun v. Delany*, 2 Bibb (Ky.) 440, in which case the plaintiff failed to execute a bond.

**Immediate Recall of Injunction.**—Where immediately after granting the order of injunction an order is issued to prevent its enforcement, the defend-

ant is not entitled to reconventional damages. *Hyde v. Teal*, 46 La. Ann. 645.

**Ambiguity of Injunction.**—It is not a defense to an action on an injunction bond, that the writ of injunction was so ambiguous that the defendant was not under the necessity of obeying it, as the defendant need not assume the responsibility and hazard of disobeying it. *Asevado v. Orr*, 100 Cal. 293, citing *Webb v. Laird*, 62 Vt. 448, 22 Am. St. Rep. 121.

2. *Dubberly v. Black*, 38 Ala. 193; *Adams v. Olive*, 57 Ala. 249, per *Manning, J.* See also *Carter v. Mulrein*, 82 Cal. 167, in which case it was held that the sureties are not bound unless an injunction issues pursuant to the order recited in the bond, and then it is immaterial that at the time of the execution of the bond an injunction had already issued, and that the principal obligor relied upon the bond to support such injunction previously issued.

**Estoppel by Recitals in Bond.**—Where an injunction is granted to restrain the prosecution of an action at law, and the bond recites that such action is pending, the obligors are estopped to assert that no such suit was pending. *Perron v. Thornton*, 86 Ala. 308.

3. *Adams v. Olive*, 57 Ala. 249; *Walton v. Develing*, 61 Ill. 201; *Robertson v. Smith*, 129 Ind. 422; *Hanna v. McKenzie*, 5 B. Mon. (Ky.) 314; *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16; *People v. Falconer*, 2 Sandf. (N. Y.) 81; *Loomis v. Brown*, 16 Barb. (N. Y.) 325.

In *Stevenson v. Miller*, 2 Litt. (Ky.) 306, the injunction was issued by a justice of the peace who had no power to grant an injunction, and the court said: "The injunction was procured

c. FINAL DECREE IN SUIT FOR INJUNCTION — (1) *In General*. — A right of action does not accrue on an undertaking given on the issue of a preliminary injunction or restraining order until a final decree in the suit in which it has been issued has been rendered.<sup>1</sup>

(2) *Dissolution of Injunction by Interlocutory Order*. — The great weight of authority is that after the dissolution of an injunction upon a preliminary hearing, but before there has been a final determination of the suit in which the bond was executed, no action can be maintained upon the bond, and the uniform reason given is that at the final hearing, upon evidence then adduced, the injunction may be reinstated and perpetuated.<sup>2</sup>

\* \* \* and the bond executed without the agency or consent of the obligees, and has had all the consequences of delay that a valid injunction could have had, and may have subjected the opposite party to as great injury, which would form a consideration sufficiently valid to sustain the bond. We know of no statute, and are aware of no principle of the common law, which declares such a bond void. There is no reason, then, why it should not be held valid at common law." This case does not seem to be reconcilable with *Wilkins v. Owings*, 5 Litt. (Ky.) 239. See also *Montgomery v. Houston*, 4 J. J. Marsh. (Ky.) 488, holding that where the individual assuming to act has no official power *de jure* to grant injunctions, upon the dissolution of an injunction granted by such an individual there should be no assessment of damages, the court saying: "Damages are only given by law in the dissolution of injunctions granted by competent authority. If the authority be not competent to grant, there is no injunction, and therefore the very basis upon which damages are given never had existence, and the contingency on which damages are allowed has never happened."

1. *Alabama*. — *May v. Walter*, 85 Ala. 438.

*Arkansas*. — *Scott v. Fowler*, 14 Ark. 427, holding that no action can be maintained until the injunction has been discharged or dissolved.

*California*. — *Dowling v. Polack*, 18 Cal. 625; *Bennett v. Pardini*, 63 Cal. 154; *Clark v. Clayton*, 61 Cal. 634.

*Kansas*. — *Jones v. Ross*, 48 Kan. 474; *Brown v. Galena Min., etc., Co.*, 32 Kan. 528.

*Kentucky*. — *Cates v. Wooldridge*, 10 Encyc. Pl. & Pr. — 71.

*J. J. Marsh. (Ky.)* 268, in which case was cited *Scott v. Fowler*, 14 Ark. 427.

*Maryland*. — *Gray v. Veirs*, 33 Md. 159, in which case was cited *Penny v. Holberg*, 53 Miss. 567.

*Mississippi*. — *Yates v. Mead*, 69 Miss. 473; *Penny v. Holberg*, 53 Miss. 567; *Goodbar v. Dunn*, 61 Miss. 624.

*Nebraska*. — *Bemis v. Gannett*, 8 Neb. 236.

*New York*. — *Harter v. Westcott*, 11 N. Y. Misc. Rep. (Brooklyn City Ct.) 180; *Shearman v. New York Cent. Mills*, 11 How. Pr. (N. Y. Supreme Ct.) 269; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277, *per Monell, J.*; *Roberts v. White*, 73 N. Y. 375; *Lawton v. Green*, 64 N. Y. 326.

**Without Awaiting the Signing and Filing of a Formal Decree** an action may be maintained on the bond after an entry has been made in a docket dismissing the bill on its merits. *Thurston v. Haskell*, 81 Me. 303.

**Death of Plaintiff**. — An action may be brought on the bond notwithstanding the death of the plaintiff, where the suit is revived and prosecuted without effect, by his administrator. *Fowler v. Scott*, 11 Ark. 675.

**Termination of Suit in Fraud of Sureties**. — The sureties may make defense that the injunction was dissolved or that the suit was dismissed through fraudulent and corrupt procurements of the defendant, for the purpose of fixing liability upon the sureties. *Boynton v. Robb*, 22 Ill. 525; *Shenandoah Nat. Bank v. Read*, 86 Iowa 136.

2. *California*. — *Dougherty v. Dore*, 63 Cal. 170; *Dowling v. Polack*, 18 Cal. 625; *Clark v. Clayton*, 61 Cal. 634.

*Colorado*. — *Kilpatrick v. Haley*, 6 Colo. App. 407.

*Illinois*. — *Terry v. Hamilton Primary*

(3) *Partial Dissolution of Injunction.* — According to the weight of authority, upon the dissolution of the injunction in part by a

School, 72 Ill. 476; *Beauchamp v. Kankakee County*, 45 Ill. 274, in which case there was an order dissolving the injunction because there was not a sufficient bond, which order was followed immediately by an order for another injunction upon the filing of a new bond; *Woerishoffer v. Lake Erie, etc.*, R. Co., 25 Ill. App. 84.

*Iowa.* — *Monroe Bank v. Gifford*, 65 Iowa 648.

*Kansas.* — *Brown v. Galena Min., etc.*, Co., 32 Kan. 528, in which case the court cited *Bemis v. Gannett*, 8 Neb. 236, and *Mills v. Hoag*, 7 Paige (N. Y.) 18.

*Louisiana.* — In *Butchers' Union, etc.*, Co. v. *Howell*, 37 La. Ann. 280, it was held that the mere dissolution of the injunction did not necessarily imply that it had been wrongfully obtained, the court saying: "It is essential to a recovery on the bond that the injunction be decided to have been wrongfully obtained; in other words, that the plaintiff who procures the writ be judicially declared not to have been originally entitled to it." But see *Lemounier v. McClearley*, 41 La. Ann. 411.

*Maryland.* — *Gray v. Veirs*, 33 Md. 159.

*Massachusetts.* — In *Foster v. Goodrich*, 127 Mass. 176, the court said: "The fact that the injunction was dissolved on the motion of the plaintiffs, before the case was fully decided, cannot affect the rights and obligations of the parties to the bond, while the injunction continued."

*Mississippi.* — *Penny v. Holberg*, 53 Miss. 567, which case was cited in *Dougherty v. Dore*, 63 Cal. 170, and in *Monroe Bank v. Gifford*, 65 Iowa 648.

*Missouri.* — *Cohn v. Lehman*, 93 Mo. 574, which case was cited in *Kilpatrick v. Haley*, 6 Colo. App. 407.

*Montana.* — In *Stewart v. Miller*, 1 Mont. 301, *Warren, C. J.*, said: "Where the dissolution of an injunction is not consequent upon a final determination or adjudication upon the merits of the action, the obligors in the bond may, according to the weight of authority and principle, show the facts and circumstances entitling them to the injunction, if not in full defense, at least in mitigation of damages in an action upon the bond, the order of dissolution being in such cases only *prima facie*

evidence that the injunction was improperly issued."

*Nebraska.* — *Bemis v. Gannett*, 8 Neb. 236, which case was cited in *Dougherty v. Dore*, 63 Cal. 170, and in *Monroe Bank v. Gifford*, 65 Iowa 648. See also *Browne v. Edwards, etc.*, *Lumber Co.*, 44 Neb. 361.

*New York.* — *Dunkin v. Lawrence*, 1 Barb. (N. Y.) 447; *New York Security, etc.*, Co. v. *Lipman*, 83 Hun (N. Y.) 569 [in which latter case the court cited *Musgrave v. Sherwood*, 76 N. Y. 194; *Palmer v. Foley*, 71 N. Y. 106; and *Methodist Churches v. Barker*, 18 N. Y. 463]. See also *Benedict v. Benedict*, 76 N. Y. 600, 15 Hun (N. Y.) 305; *Neugent v. Swan*, 61 How. Pr. (N. Y. Supreme Ct.) 40; *Weeks v. Southwick*, 12 How. Pr. (N. Y. Supreme Ct.) 170; *Mills v. Hoag*, 7 Paige (N. Y.) 18.

*United States.* — *Bentley v. Joslin, Hempst.* (U. S.) 218.

*Contra.* — In *Browne v. Edwards, etc.*, *Lumber Co.*, 44 Neb. 361, the court said: "We have not been cited, nor have we found, a well-considered case in which it has been held that an action on an injunction bond could be maintained before final decree in the cause in which such bond was given. The authorities are all the other way." But there are cases which apparently support the proposition that an action may be maintained on the bond upon the bare dissolution of the injunction without awaiting a final decree; but these cases, as a general rule, were decided upon the peculiar phraseology of the bonds. Among such cases are *Stone v. Cason*, 1 Oregon 100, where the bond was conditioned to pay all the damages occasioned by the injunction and was silent as to the dissolution of the injunction, or ascertaining that it was improperly obtained; *Sizer v. Anthony*, 22 Ark. 465; *Tallahassee R. Co. v. Hayward*, 4 Fla. 411. The two latter cases were distinguished in *Dougherty v. Dore*, 63 Cal. 170, in which case it was pointed out that the condition of the bond in each of the cases was that the party who sued out the injunction should, in the event of its being dissolved, pay such sum as should be awarded against him; and were expressly disapproved in *Monroe Bank v. Gifford*, 65 Iowa 648.

**Void Order of Dissolution.** — Where an

decree which has the requisite finality, a right of action upon the bond accrues.<sup>1</sup>

(4) *Dismissal or Discontinuance* — In General. — The dismissal of the bill on the final hearing or on demurrer amounts to a final disposition of the cause adverse to the plaintiff, and entitles the defendant to bring an action on the bond.<sup>2</sup>

**Dismissal for Want of Prosecution.** — The dismissal of the suit for want of prosecution terminates the proceedings, and by its legal operation and effect sets aside and discharges the injunction so as to entitle the defendant to his remedies on the injunction bond.<sup>3</sup>

injunction is issued by a state court, and the cause is thereafter removed into a United States Circuit Court, and the injunction is dissolved, and thereafter the cause is remanded to the state court for the reason that the citizenship of the parties was not such as to authorize the removal, the order of dissolution must be regarded as a nullity, and will not authorize an action on the injunction bond. *Alexander v. Gish*, (Ky. 1891) 17 S. W. Rep. 287.

1. *Smith v. Mutual Loan, etc., Co.*, 102 Ala. 282, in which case the injunction was dissolved as to part of the obligees only, and it was held that the obligees as to whom it was dissolved had a cause of action; *Lambert v. Alcorn*, 144 Ill. 313; *Brackebush v. Dorsett*, 138 Ill. 167; *Walker v. Pritchard*, 135 Ill. 103; *White v. Clay*, 7 Leigh (Va.) 68; *Pierson v. Ells*, 46 Hun (N. Y.) 336. See also *Penny v. Holberg*, 53 Miss. 567; *Roberts v. Fahs*, 36 Ill. 268. In *Walker v. Pritchard*, 135 Ill. 103, the court distinguished *Russell v. Farley*, 105 U. S. 433. See, *contra*, *Pointer v. Roth*, 19 La. Ann. 78; *Raiford v. Thorn*, 15 La. Ann. 81.

In *Ovington v. Smith*, 78 Ill. 250, the undertaking was to pay two persons such damages as should be awarded against the plaintiff, in case an injunction against such two persons should be dissolved. It was held that no liability accrued upon the dissolution of the injunction as to one of the defendants only. See also *Hill v. McKenzie*, 39 Ala. 314.

**Unsubstantial Modification.** — A modification of the injunction, but not to such an extent as to involve a decision that the plaintiff was not entitled to the injunction substantially as granted, does not entitle the defendant to bring an action on a bond conditioned to pay damages, if the court shall finally decide that the plaintiff was not entitled

to the injunction. *Palmer v. Foley*, 71 N. Y. 106.

**Effect of Stipulation for Modification of Injunction.** — Where, after the execution of the bond and the issuance of the injunction, the parties to the suit stipulate that the injunction shall be modified, and thereafter the injunction, as modified, is dissolved, a right of action accrues upon the bond, and the modification of the injunction by stipulation does not have the effect to relieve the sureties from their liability. *Brackebush v. Dorsett*, 37 Ill. App. 581. *Citing Boynton v. Phelps*, 52 Ill. 210, and *Towle v. Towle*, 46 N. H. 431.

2. *Zeigler v. David*, 23 Ala. 127; *Dowling v. Polack*, 18 Cal. 627; *Shenandoah Nat. Bank v. Read*, 86 Iowa 136; *Pugh v. White*, 78 Ky. 210; *Carondelet Canal, etc., Co. v. Touche*, 38 La. Ann. 388; *Smith v. Gregg*, 9 Neb. 212; *Loomis v. Brown*, 16 Barb. (N. Y.) 325; *Williams v. Montgomery*, 148 N. Y. 519; *Granger v. Smyth*, 70 Hun (N. Y.) 9; *Jordan v. Donnelly*, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 413; *Musgrave v. Sherwood*, 76 N. Y. 194; *Palmer v. Foley*, 71 N. Y. 106; *Lawton v. Green*, 64 N. Y. 326; *Coates v. Coates*, 1 Duer (N. Y.) 644; *Shearman v. New York Cent. Mills*, 11 How. Pr. (N. Y. Supreme Ct.) 269; *Methodist Churches v. Barker*, 18 N. Y. 463; *Jacobs v. Miller*, 11 Hun (N. Y.) 441; *Waterbury v. Bouker*, 10 Hun (N. Y.) 262; *Vanderbilt v. Schreyer*, 28 Hun (N. Y.) 61.

3. *Dowling v. Polack*, 18 Cal. 625, in which case the court disapproved *Gelston v. Whitesides*, 3 Cal. 309. See also *Manufacturers', etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44 [*affirming* 138 N. Y. 635, 51 N. Y. St. Rep. 935]; *Granger v. Smyth*, 70 Hun (N. Y.) 9; *Apollinaris Co. v. Venable*, 136 N. Y. 46; *Coates v. Coates*, 1 Duer (N. Y.) 664.

**Dismissal by the Plaintiff.** — The voluntary dismissal of the action by the plaintiff has the same effect, as regards the defendant's right to enforce the bond, as a decision of the court that the plaintiff was not entitled to the injunction.<sup>1</sup>

**d. ASSESSMENT OF DAMAGES BEFORE BRINGING ACTION ON BOND.** — Ordinarily, where the court is not authorized by statute to assess the defendant's damages no assessment of damages is necessary in order to vest in the defendant a cause of action for the damages which he has sustained;<sup>2</sup> and according to the great

**Report of Referee in Favor of Dismissal.**

— Where a referee makes a report dismissing the complaint with costs, until a judgment has been entered upon such report so that the decision of the referee becomes the judgment of the court, there is no final decision that the plaintiff was not entitled to the injunction, and the defendant is not entitled to a reference to ascertain the damages. *Weeks v. Southwick*, 12 How. Pr. (N. Y. Supreme Ct.) 170, citing *Dunkin v. Lawrence*, 1 Barb. (N. Y.) 447.

**Dismissal of Suit After Allowance of Ancillary Injunction.** — Where an ancillary injunction is asked for in a suit for an accounting, and a restraining order is allowed, the dismissal of the action on the ground that the plaintiffs had no title to the land as to which they sought an accounting is not of itself sufficient to entitle the defendant to have the damages assessed. *Garlington v. Copeland*, 43 S. Car. 389, in which case the court said: "The fact that the plaintiffs failed to establish their claim against the defendant does not necessarily show that the injunction was improperly granted in the first instance, for a case may be conceived of in which a court of equity, as a precautionary measure, and in the interest of justice, might grant an injunction to preserve matters *in statu quo* until the parties could have the opportunity of having what they honestly conceived to be their rights investigated."

**Injunction Obtained in Subsequent Suit.** — In an action on the injunction bond, brought upon the dismissal of an action for injunction, it is no defense that in a subsequent action seeking the same relief the defendant obtained a decree perpetually enjoining the defendant. *Swan v. Timmons*, 81 Ind. 243. See also *Weaver v. Poyer*, 73 Ill. 489.

1. *Asevado v. Orr*, 100 Cal. 293 [in which case the court followed *Dowling v. Polack*, 18 Cal. 625]; *Richardson v.*

*Allen*, 74 Ga. 719; *Swan v. Timmons*, 81 Ind. 243; *Mitchell v. Sullivan*, 30 Kan. 232; *Apollinaris Co. v. Venable*, 136 N. Y. 46; *Mutual Safety Ins. Co. v. Roberts*, 4 Sandf. Ch. (N. Y.) 592; *Pacific Mail Steamship Co. v. Toel*, 85 N. Y. 646; *Amberg v. Kramer* (Supreme Ct.) 8 N. Y. Supp. 821; *Carpenter v. Wright*, 4 Bosw. (N. Y.) 655; *New York City Suburban Water Co. v. Bissell*, 78 Hun (N. Y.) 176; *Roach v. Gardner*, 9 Gratt. (Va.) 89. But see, *contra*, *Gelston v. Whitesides*, 3 Cal. 309, in which case the injunction was dissolved, and thereafter the suit was dismissed by the plaintiff, and it was held that this was not an admission that the injunction had been improperly sued out, and that it was necessary, in order to maintain an action on the bond, to show that there was no proper cause for the injunction. This case, however, was disapproved in *Dowling v. Polack*, 18 Cal. 625.

**Discontinuance Pursuant to Stipulation.**

— The discontinuance of the action by an amicable and voluntary agreement of the parties, unlike a voluntary dismissal by the plaintiff of his own motion in consequence or in view of an adverse interlocutory decision of the court, is not such a final decision adverse to the plaintiff as to fix liability on the injunction bond. *Palmer v. Foley*, 71 N. Y. 106, which case was cited in *Manufacturers', etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44, and distinguished in *Amberg v. Kramer*, (Supreme Ct.) 8 N. Y. Supp. 821.

2. *Eastern R. Co. v. Brown*, (Ky. 1896) 36 S. W. Rep. 555; *Rankin v. Estes*, 13 Bush (Ky.) 428; *Alexander v. Gish*, 88 Ky. 13; *Howell v. Cronan*, 31 La. Ann. 247.

In *Rees v. Peltzer*, 1 Ill. App. 315, the court said: "We are referred to no case of a suit upon an injunction bond conditioned, as in this case, for the payment of all damages that should accrue by reason of the wrongful suing out of



weight of authority the damages need not have been previously assessed by the court, even where the condition of the bond is to pay all costs and damages which may be awarded against the defendant and his sureties.<sup>1</sup>

the injunction, where it was held that no recovery could be had in the absence of a previous award of damages."

1. In *Clayton v. Anthony*, 15 Gratt. (Va.) 519, Lee, J., said: "The condition is to pay the judgment and costs and such damages as may be awarded by the court, and it is said that the court has not decreed the payment of any damages. In express terms, it is true, it has not; but payment of the damages is the penalty of the failure to sustain the injunction, and the order of dissolution necessarily imports that this penalty is to be paid unless it be expressly remitted by its terms." See also, to the same effect, *Underhill v. Spencer*, 25 Kan. 71; *Union Wharf v. Mussey*, 48 Me. 307; *Roberts v. Dust*, 4 Ohio St. 502. But see, *contra*, *Ashby v. Chambers*, 3 Dana (Ky.) 437, in which case the condition was to prosecute the suit for injunction with effect, or, in failure thereof, to well and truly pay such costs and damages as should be awarded. The court said: "According to any fair construction of the terms of the condition, an award of damages, when damages alone are sought to be recovered, seems necessarily to precede a breach of the condition on the part of the surety. He is not in default for failing to pay damages, when damages have not been awarded. For it is only the damages which may be awarded that he has undertaken to pay in default of his principal, and not any other damages." See also *Bein v. Heath*, 12 How. (U. S.) 168, which case was followed in *Deakin v. Lea*, 11 Biss. (U. S.) 34. Likewise see *Tarpey v. Shilenberger*, 10 Cal. 390. In *Union Wharf v. Mussey*, 48 Me. 307, the court pointed out that the decision in *Bein v. Heath*, 12 How. (U. S.) 168, was influenced by a statute of Louisiana which virtually made the sureties parties to the suit, and declared that the decision in that case, so far as it requires damages to be decreed by the chancellor, "is adverse to the whole current of authorities, and cannot be regarded as sound law."

In *Colorado*, under Civ. Code, § 161 (Sess. Laws '1887), it is not necessary to the maintenance of an action on the

bond that an award of damages shall have first been made against the principal. *Smith v. Atkinson*, 18 Colo. 255. But see *Carson Min. Co. v. Hill*, 7 Colo. App. 141, from which case it would seem that where the condition of the bond is that the obligors shall pay all damages awarded in case the injunction is dissolved, the damages must be assessed before any liability will accrue.

In *Kentucky*, unless the court is authorized by statute to assess damages, as it is where the enforcement of a judgment has been enjoined, no assessment of damages on the dissolution of the injunction is necessary in order to vest in the defendant a cause of action for such damages as he has sustained. *Eastern R. Co. v. Brown*, (Ky. 1896) 36 S. W. Rep. 555; *Alexander v. Gish*, 88 Ky. 13; *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469; *Rankin v. Estes*, 13 Bush (Ky.) 428. It is imperative that the damages should be assessed upon the dissolution of the injunction where such assessment of damages is authorized by the statute, the statutory remedy being exclusive of all others. *Hayden v. Phillips*, 89 Ky. 1; *Crawford v. Woodworth*, 9 Bush (Ky.) 745; *Logsdon v. Willis*, 14 Bush (Ky.) 183.

*Illinois* — It has been held that where the bond is conditioned to pay all such damages as shall be awarded "in case the said injunction shall be dissolved," a recovery in an action upon the bond will be an award of damages within the condition. *Hibbard v. McKindley*, 28 Ill. 240. See also *Brown v. Gorton*, 31 Ill. 416; *Edwards v. Edwards*, 31 Ill. 474.

Under Act 1861, authorizing the chancellor on the dissolution of an injunction to assess damages upon the filing of suggestions in writing, it was held that where a bond has been given conditioned to pay such damages as may be awarded to the plaintiff, the condition is intended to refer to the awarding of damages by the chancellor, and that where damages have not been awarded no suit can be maintained on the bond. *Russell v. Rogers*, 56 Ill. 176, in which case the court pointed out that *Hubbard v. McKindley*, 28 Ill. 240, was decided before the enactment of the

**4. Conclusiveness of the Decree in Chancery.** — In an action on an injunction bond the defendants are concluded by the decree in chancery upon the question whether or not there was any right to an injunction, and they cannot reopen questions which were the subject matter of the injunction suit.<sup>1</sup>

statute. See also *McWilliams v. Morgan*, 70 Ill. 551; *Brownfield v. Brownfield*, 58 Ill. 152; *Mix v. Vail*, 86 Ill. 40.

Rev. Stat. 1874, c. 580, § 12, contains a proviso that the failure of the court to assess damages shall not operate as a bar to an action upon the injunction bond; but this statute was held not to affect the right to maintain an action on a bond which was executed before the statute became operative. *Mix v. Vail*, 86 Ill. 40. See also *Marthaler v. Druiding*, 58 Ill. App. 336; *Linnington v. Strong*, 8 Ill. App. 388.

1. *Dowling v. Polack*, 18 Cal. 625; *Sipe v. Holliday*, 62 Ind. 4; *Offut v. Bradford*, 4 Bush (Ky.) 413; *Hughes v. Wickliffe*, 11 B. Mon. (Ky.) 202; *Hopkins v. State*, 53 Md. 502; *Yale v. Baum*, 70 Miss. 225; *Smith v. Wells*, 46 Miss. 64; *Bemis v. Gannett*, 8 Neb. 236; *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 359; *Harter v. Westcott*, 11 N. Y. Misc. Rep. (Brooklyn City Ct.) 180; *Pacific Mail Steamship Co. v. Toel*, 85 N. Y. 646; *Arthur v. Crenshaw*, 4 Leigh (Va.) 394; *White v. Brooke*, 11 Wash. 99.

**Dismissal without Prejudice.** — In *Yale v. Baum*, 70 Miss. 225, it was held that a decree dismissing the bill without prejudice was conclusive upon the question whether the injunction was rightly sued out.

**An Order of the Chancery Court** permitting the plaintiff to sue upon the bond is unnecessary. *Zeigler v. David*, 23 Ala. 127, wherein Chilton, C. J., said: "We see no reason why a party against whom an injunction or process of seizure has been obtained, and who has been injured in consequence thereof, may not, after the suit in chancery has been abandoned by the complainant and dismissed for want of prosecution, institute his action at law to recover upon the bond, required to be given by the *fiat* as a prerequisite to obtaining such process, without any permission from the Chancery Court." But see *contra*, *Brown v. Easton*, 30 N. J. Eq. 725.

In *New York* it has been held that where, by the rules of the court or by

statute, the plaintiff is required to file his bond before the issue of the injunction, the bond is under the control of the court, and the defendant must obtain an order of the court giving him leave to prosecute the bond before commencing an action thereon, and the remedy for irregularly prosecuting the bond without leave is by a motion to set aside the proceedings. *Higgins v. Allen*, 6 How. Pr. (N. Y. Supreme Ct.) 30, citing *Harris v. Hardy*, 3 Hill (N. Y.) 393.

**Reference under New York Code.** — Where a reference is had under Code N. Y., § 222, the order should be confined to fixing the amount of damages, and payment can only be enforced by an action upon the undertaking. *Lawton v. Green*, 64 N. Y. 326; *Troxell v. Haynes*, 16 Abb. Pr. N. S. (N. Y. C. Pl.) 1; *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277.

**Burden of Proof.** — It is the duty of the defendant where a reference has been made to show what his damages are, if any. *Dwight v. Northern Indiana R. Co.*, 54 Barb. (N. Y.) 271.

**Conclusiveness of Report.** — The report of the referee is conclusive upon the sureties as to the amount for which they are liable. *Leavitt v. Dabney*, 40 How. Pr. (N. Y. Super. Ct.) 277, citing *Methodist Churches v. Barker*, 18 N. Y. 463.

**Disobedience of Injunction.** — Ordinarily obedience to an injunction is not a condition to a recovery on the bond, but doing things which the writ commands not to be done will only operate to prevent the accruing of damages which would have resulted if the writ had been obeyed. *Colcord v. Sylvester*, 66 Ill. 540; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19.

In *Steel v. Gordon*, 14 Wash. 521, it was held that the proof showed so many violations of the writ that the court was justified in directing the jury that the defendant could have suffered no damages. *Distinguishing Colcord v. Sylvester*, 66 Ill. 540; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19.

**Mississippi.** — Code Miss. 1892, § 573,

**5. Parties to Action on Bond — The Plaintiff.** — No one has a right of action on the bond who has not some vested right which was injuriously affected by the injunction, and strangers who were not enjoined and who were not made parties to the bond have no right of action.<sup>1</sup>

**Plurality of Obligees.** — Where there is more than one obligee the action should be brought in the name of all of them for the use of those who were injured by the issuance of the writ.<sup>2</sup>

**The Defendant.** — The rules as to the persons to be sued for the

authorizes the damages to be ascertained and decreed by the chancellor or the Chancery Court. *Barber v. Levy*, 73 Miss. 484; *Davis v. Hart*, 66 Miss. 642.

**Pending an Appeal** from the judgment rendered in a suit for an injunction, an action on the bond or a motion for a reference to ascertain the damages should not be allowed, as the cause still remains undetermined, and the final result cannot be known until the appellate tribunal has rendered its judgment. *Hamilton v. State*, 32 Md. 348; *Howard v. Park*, 59 How. Pr. (N. Y. Supreme Ct.) 344; *Musgrave v. Sherwood*, 76 N. Y. 194; *Palmer v. Foley*, 71 N. Y. 106.

1. *Steuart v. State*, 20 Md. 97; *Dunham v. Seiberling*, 12 Ind. App. 212.

**Action by Real Party in Interest.** — Where an injunction is obtained against a city treasurer to restrain him from selling property for taxes, and an injunction bond in the usual form is given, the city is the real party in interest, and the damages sustained by suing out the injunction are recoverable by the city. *Helena v. Brule*, 15 Mont. 429. See *Alexander v. Gish*, 88 Ky. 13; *Watts v. Sanders*, 10 B. Mon. (Ky.) 372, in which latter case it was held that the action may be brought in the name of the joint obligees, although in fact for the benefit of one of them.

**California Statute.** — In *Lally v. Wise*, 28 Cal. 540, it was held under Prac. Act Cal., § 6, that the party beneficially interested in the damages claimed is competent to sue on the injunction bond.

**Iowa Statute.** — Under Code Iowa, § 2552, one who is intended to be secured by a bond may bring an action thereon, although the bond is not payable to him. *Van Gorder v. Lundy*, 66 Iowa 448.

**Maryland Statute.** — Code Md., art. 16, § 108, provides that when it is proper to order a bond to be given, the

court may take such bond in the name of the state as obligee, and that the same may be sued on by any person interested. Upon a bond thus taken suit must be brought in the name of the state as legal plaintiff. *Le Strange v. State*, 58 Md. 26. See also *Hopkins v. State*, 53 Md. 502.

**Receiver of Corporation.** — Where an injunction is obtained against a receiver of a corporation, and afterwards dissolved, an action may be brought on the injunction bond by the receiver in behalf of the corporation as a party plaintiff. *Wason v. Frank*, 7 Colo. App. 541.

**Action by Agent in Name of Principal.** — Where the injunction was obtained against one who was the agent of another, and the bond was given to the agent, an action on the bond should be prosecuted in the name of the agent for the benefit of his principal. *Richardson v. Allen*, 74 Ga. 719.

2. *Smith v. Mutual Loan, etc., Co.*, 102 Ala. 282. See also *Wallis v. Dilley*, 7 Md. 237; *Loomis v. Brown*, 16 Barb. (N. Y.) 325; *Lillie v. Lillie*, 55 Vt. 470.

**Joinder of Defendant Not Named.** — In *Boden v. Dill*, 58 Ind. 273, it was held that where two defendants are enjoined and both are injured by the injunction, both may join in a suit on the bond, although one of them only was named in the bond as obligee.

In *California*, under the code, whatever the rule may be under the old system, where an injunction bond is given to several obligees by name, although no words directly expressing a several obligation are used, a several liability is created, and an action on the bond should be brought in the name of the party injured alone, without joining as parties plaintiff his co-obligees. *Summers v. Farish*, 10 Cal. 347. Also see, to the same effect, *Prader v. Purkett*, 13 Cal. 588; *Lally v. Wise*, 28 Cal. 540.

breach of a bond and the joinder of the obligees are the same as those which govern in actions upon bonds in general.<sup>1</sup>

**6. The Declaration or Complaint — In General.** — It is necessary to aver in an action on the bond, that the writ had issued, that the plaintiff had been restrained by it, and that it had been dissolved or disposed of.<sup>2</sup>

**Assignment of Breaches.** — Such an action is an action on a contract to pay money, and it must be alleged that there is a breach of the contract; but, in general, it is sufficient to assign the breach in the words of the covenant.<sup>3</sup>

**Description of Bond.** — It is sufficient to describe the bond with such precision, certainty, and clearness, as to fully apprise the defendant of the cause of action and what he is called on to answer.<sup>4</sup>

**Allegations Concerning the Injunction.** — It is sufficient to allege in apt words that a suit for injunction was pending in the proper court, and that an injunction was granted; and it is not necessary to anticipate the defense by averring that the proceedings in the court of chancery were regular.<sup>5</sup>

**Improvident Issuance of Injunction.** — It should be alleged that the injunction was wrongful or without sufficient cause, and not

1. See the article BONDS, vol. 3, p. 642.

2. *Eagle v. Smith*, 27 Md. 467, *per* Crain, J.

**Malice.** — It is not essential to allege in an action on the bond that the injunction was sued out maliciously. *Block v. Myers*, 35 La. Ann. 220.

**Demand.** — It is not necessary to allege that the plaintiff has demanded his damages of the defendant. *Rosendorf v. Mandel*, 18 Nev. 129.

**Insolvency of Principal.** — The liability of the sureties becomes absolute by the terms of the bond when the court finally decides that the plaintiff is not entitled to the injunction; therefore it is not necessary to allege that the principal is insolvent. *Dangel v. Levy*, 1 Idaho 722.

3. *Ansly v. Mock*, 8 Ala. 444; *Curtiss v. Bachman*, 84 Cal. 216; *Hibbard v. McKindley*, 28 Ill. 240.

**Nonpayment of Damages.** — It is insufficient to allege merely that the plaintiff was injured and damaged by reason of the issuance and continuance of the injunction; but it must be charged that the damages sustained have not been paid. *Curtiss v. Bachman*, 84 Cal. 216.

Where the condition of the bond is "to satisfy the execution which the plaintiff in this action seeks to enjoin

to the extent which the injunction may be dissolved," an allegation that the injunction was wholly dissolved and the defendants had failed to satisfy the execution, or any part of it, and that it is yet due, owing and unpaid, is a sufficient averment as to the breach of the covenant to pay. *Riggan v. Crain*, 86 Ky. 249. See also *Rosendorf v. Mandel*, 18 Nev. 129.

4. *Tallahassee R. Co. v. Hayward*, 4 Fla. 411.

In *Indiana* a copy of the injunction bond must be filed as a part of the complaint, this being necessary under statute. *Cress v. Hook*, 73 Ind. 177.

In *California* it is proper to either set forth the undertaking in the body of the complaint or to inclose it as an exhibit. *Lambert v. Haskell*, 80 Cal. 611.

5. *Merrifield v. Weston*, 68 Ind. 70. See also *Dubberly v. Black*, 38 Ala. 193, in which case the court cited *Ex p. Greene*, 29 Ala. 52.

**Service of Injunction.** — It being alleged that the plaintiff was prohibited, and that the injunction continued in full and uninterrupted effect, it is not necessary to specifically aver that the writ of injunction was issued and served upon the plaintiff. *Merrifield v. Weston*, 68 Ind. 70.

merely that the injunction was dissolved, as the dissolution of the injunction is only *evidence* of its being wrongful.<sup>1</sup>

**Injurious Effect of Injunction.** — In an action on an injunction bond it must be alleged that the plaintiff was prevented by the injunction from exercising or enjoying some right or privilege which he desired to exercise and which he was entitled to enjoy.<sup>2</sup>

**Allegations and Proof — Variance.** — The allegations and the proof must correspond, and no proof will be admitted which is not authorized by the plaintiff's allegations.<sup>3</sup>

1. *Olds v. Cary*, 13 Oregon 362, in which case, however, it was said that, although the complaint did not allege that the injunction was wrongful and alleged merely that the injunction had been dissolved, it was not fatally defective and was good after verdict.

**Injunction Sued Out Vexatiously.** — Where the condition of the bond is to pay such costs and damages as may be occasioned by the vexatious suing out of the injunction, it must be alleged in an action on the bond that the injunction was sued out vexatiously. *Garrett v. Logan*, 19 Ala. 344.

**Dismissal of Bill.** — It is sufficient to aver that the bill for the injunction was dismissed, without stating the grounds of dismissal. *Zeigler v. David*, 23 Ala. 127.

**Grounds for Dissolution.** — It would seem, from *Hibbs v. Western Land Co.*, 81 Iowa 285, that the petition should allege the grounds upon which the injunction was dissolved. But see *Le Strange v. State*, 58 Md. 26, in which case an allegation that the in-

junction was not prosecuted with effect, but that the same had been dissolved by order of the court, was considered sufficient.

2. *Hibbs v. Western Land Co.*, 81 Iowa 285. See also *Tallahassee R. Co. v. Hayward*, 4 Fla. 411. See further, as to the method of setting forth the damages which the plaintiff has sustained, *Barber v. Levy*, 73 Miss. 484; *Parker v. Bond*, 5 Mont. 1; *Woodson v. Johns*, 3 Munf. (Va.) 230; *Donahue v. Johnson*, 9 Wash. 187.

3. *Washington v. Timberlake*, 74 Ala. 259, holding that where the declaration claims damages payable to one and the bond shows damages payable to two, the variance is fatal. See also *Hildrup v. Brentano*, 16 Ill. App. 443, in which case the court applied the rule that where the bond is conditioned for the payment of all such damages as the obligees may sustain, damages accruing to one of the obligees individually are not within the condition; *Ovington v. Smith*, 78 Ill. 250; *Safford v. Miller*, 59 Ill. 205; *Rees v. Peltzer*, 1 Ill. App. 315.

# INNS AND INNKEEPERS.

## I. ACTIONS BY INNKEEPERS, 1130.

1. *Generally*, 1130.
2. *Enforcement of Lien*, 1130.

## II. ACTIONS AGAINST INNKEEPERS FOR LOSS OF GOODS OR PERSONAL INJURY, 1131.

1. *In General*, 1131.
2. *Form of Action*, 1131.
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## CROSS-REFERENCES.

As to *sale of liquors by innkeepers*, see article *INTOXICATING LIQUORS*.

**I. ACTIONS BY INNKEEPERS — 1. Generally.** — An innkeeper may collect claims against his guest by ordinary actions, by attachment sometimes, or by the enforcement of his lien where that exists.<sup>1</sup>

**2. Enforcement of Lien.** — The innkeeper has a lien upon the baggage or effects of his guests for the nonpayment of their bills, but he has no power to enforce such lien by sale without judicial process.<sup>2</sup> This enforcement may be made by a court of law,<sup>3</sup>

**1. Attachment.** — Under Pa. Act of May 8, 1876, § 1 (P. L., p. 134), providing that proprietors of inns and boarding houses shall have the right to attach wages due a guest to satisfy a claim for board, an attachment may issue as an original process to collect such claim. *Smith v. Dingus*, 12 Pa. Co. Ct. Rep. 299.

**Criminal Complaint.** — Statutes of *Minnesota* 1894, § 6611 (Gen. Stat. 1878, c. 124, § 23), provides that a person who obtains any food or accommodation at an inn without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn by the use of any false pretenses, or who after obtaining

credit or accommodation at an inn absconds and surreptitiously removes his baggage therefrom without paying for his food and accommodation, is guilty of a misdemeanor. Under this a complaint in an action by an innkeeper for the third offense created by this section need not state the food or accommodation procured or the baggage removed to be of any value. *State v. Benson*, 28 Minn. 424.

**2. Case v. Fogg**, 46 Mo. 44. See also title *Inns and Innkeepers*, Am. and Eng. Encyc. of Law.

**3. Missouri — Enforcement by Justice of the Peace.** — By the provisions of § 3197, Rev. Stat. Mo., the lien of an innkeeper upon the baggage, etc., of a

or, in a proper case, by a court of equity.<sup>1</sup> See in general article LIENS.

**II. ACTIONS AGAINST INNKEEPERS FOR LOSS OF GOODS OR PERSONAL INJURY** — 1. **In General.** — Actions against innkeepers in respect to jurisdiction, time of bringing, etc., do not appear to differ from other personal actions of like nature.<sup>2</sup>

2. **Form of Action.** — The most usual common-law form of action to recover of an innkeeper the value of goods of a guest, alleged to have been lost at his inn, is an action on the case for the wrong done.<sup>3</sup> But in some jurisdictions, at least, the action

guest is to be enforced by suit before a justice of the peace of the ward, district, or township in which the claimant resides, in the manner provided by said section; and if the judgment is for the plaintiff, the justice is required to order that the property upon which the lien shall have been found to exist be sold to satisfy it. But the lien as a certain and complete right cannot exist before the indebtedness is established, and by the judgment the lien is for the first time fixed and established. And a judgment declaring the indebtedness and establishing the lien could be rendered only by a justice of the peace of the ward, district, or township in which the plaintiff resided. *Coates v. Acheson*, 23 Mo. App. 255.

**Lien Not Enforceable by Garnishment.** — In Missouri the lien of a boarding-house keeper upon a guest's wages cannot be enforced by garnishment. *Hodo v. Benecke*, 11 Mo. App. 393; *Rischert v. Kunz*, 9 Mo. App. 283.

**General Judgment on Failure to Establish Lien.** — Where a boarding-house keeper fails to establish his lien he is entitled to a general judgment for the debt shown to be due by a guest for board. *Hodo v. Benecke*, 11 Mo. App. 393.

**Averments of Petition to Enforce Lien.** — In *Kentucky* the words "tavern keeper or innkeeper" have a technical meaning and special application; and to enforce a lien upon defendant's goods for board, etc., while he was a guest of the house, the petition must especially aver that plaintiff was a tavern keeper or innkeeper. An allegation that he was "a landlord, proprietor of the Meyers House," is insufficient. Under this allegation he might have been merely a boarding or lodging house keeper, and as such not entitled to any lien on the defendant's

goods, baggage, etc. *Southwood v. Myers*, 3 Bush (Ky.) 681.

**Plea by Innkeeper Raising Lien.** — In an action against an innkeeper for refusing to deliver over certain horses left in his charge, a plea by the innkeeper raising a lien for the charges for the care and maintenance of the animal, that he was the keeper of a public inn and as such received said horses, is sufficient to show the relation of innkeeper and guest, without particularly averring that the other party was a traveler and guest and as such delivered the horses to be kept. *Peet v. McGraw*, 25 Wend. (N. Y.) 653.

1. A court of equity has jurisdiction to enforce liens and pledges of personal property generally, and may order a sale of the horse of an innkeeper's guest to pay charges. *Black v. Brennan*, 5 Dana (Ky.) 310.

2. *Rockwell v. Proctor*, 39 Ga. 105; *Churchill v. Pacific Imp. Co.*, 96 Cal. 490.

3. **Case.** — The following were actions of case for loss of goods: *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47; *Pettigrew v. Barnum*, 11 Md. 434; *Norcross v. Norcross*, 53 Me. 163; *Hilton v. Adams*, 71 Me. 19; *Sparr v. Wellman*, 11 Mo. 230; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72; *Rubenstein v. Cruikshanks*, 54 Mich. 199; *Mason v. Thompson*, 9 Pick. (Mass.) 280; *Hall v. Pike*, 100 Mass. 495; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Neal v. Wilcox*, 4 Jones L. (N. Car.) 146; *Read v. Amidon*, 41 Vt. 15.

**Trover Not Maintainable.** — The liability of a common carrier and innkeeper is very similar; they are both bailees and liable for loss under similar circumstances; and the same rules seem to be applicable to both as to the mode of subjecting them to liability; and if so, trover cannot be maintained

may be upon the implied contract of the innkeeper to safely keep the goods.<sup>1</sup> For personal injuries sustained by a guest at an inn, case is the proper action.<sup>2</sup>

**3. By Whom Brought.** — Generally speaking, it is the guest or bailor who sues an innkeeper for loss of goods.<sup>3</sup> But the action is not in all cases restricted to those who are guests,<sup>4</sup> and if the proper relationship to the bailor exist the suit may be brought by one not having been a guest at defendant's inn at all.<sup>5</sup>

though case may be. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547. See also *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54.

**1. Assumpsit.** — In *Rockwell v. Proctor*, 39 Ga. 105, the action was upon the implied contract of the innkeeper. And so, in *Dickinson v. Winchester*, 4 Cush. (Mass.) 114, and *McDaniels v. Robinson*, 28 Vt. 387, assumpsit was held to be a proper form of action.

**Joinder of Case and Assumpsit.** — "Several preliminary objections are raised by the defendant against the plaintiff's right to maintain the action in its present form. It is said that the action is assumpsit, and that case is the proper form of action. It is true that case is the usual form of action where negligence is charged, though we are by no means certain that assumpsit could not be maintained on breach of an innkeeper's contract safely to keep and deliver the goods of his guests when the facts are sufficiently set forth in the declaration. The first and third counts in the writ, however, are drawn with the necessary formality of declarations in case, but the second count is in assumpsit. No demurrer has been filed to the misjoinder of the two forms of action, and the plaintiff has moved for leave to discontinue as to the [second] count. Under these circumstances, we think the objection cannot avail the defendant, it being entirely competent for the court to allow the discontinuance of the second count, or to render judgment on the first and third counts." *Per* Dickerson, J., in *Norcross v. Norcross*, 53 Me. 163.

**2.** The obligation placed upon an innkeeper to keep his guests safe is one imposed by law and not growing out of contract, and for violation of it the action is an action on the case for the injuries sustained and not an action for breach of contract. *Stanley v. Bircher*, 78 Mo. 245.

**3.** *Schouler's Bailments and Carriers* (2d ed.), § 299.

A trunk containing property belonging, some of it to the husband and some of it to the wife, was broken open after it had been delivered to the servants of an innkeeper, and jewelry and gloves belonging to the wife, and money belonging to the husband, were stolen. In traveling, the husband looked after the baggage, receiving and holding the checks therefor. It was held that an action could not be maintained against the innkeeper by the husband alone for the value of the jewelry belonging to the wife, but the action could be maintained by the husband against the innkeeper for the value of the gloves and money. *Noble v. Milliken*, 74 Me. 225.

**4. Action by Partners.** — An action against an innkeeper for the loss of goods which belonged to two partners could, at common law, be properly brought in the name of both, though one only was a guest at the inn. By the N. Y. Code of Procedure the action must be brought in their joint names. *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54.

**5. Master and Servant.** — If a servant is deprived of his master's money or goods, the master may maintain an action against the innkeeper in whose house the loss was sustained. *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47; *Mason v. Thompson*, 9 Pick. (Mass.) 280.

**Parent and Child.** — Where means provided by a father for the support of his minor son while traveling and attending college are stolen from the latter's room while stopping at an inn, the father may maintain an action against the innkeeper to recover the amount so stolen. *Epps v. Hinds*, 27 Miss. 657.

So clothing purchased by a father for a minor son belongs to the father, and he may recover for its loss of an innkeeper, unless it appears to have been absolutely given to the son or unless he is emancipated. *Dickinson v. Winchester*, 4 Cush. (Mass.) 114.



#### 4. Allegations of Declaration or Complaint — *a.* IN GENERAL. —

In this action the declaration or complaint should, of course, contain all the material allegations necessary to support it.<sup>1</sup>

*b.* OF INNKEEPER AND GUEST. — It is generally necessary to show by the pleadings that the defendant was an innkeeper and the plaintiff his guest.<sup>2</sup>

*c.* OF FAULT OR NEGLIGENCE. — An innkeeper being *prima facie* liable for loss of goods belonging to a guest, the complaint need not allege that plaintiff was free from fault or negligence.<sup>3</sup> But in an action for injuries received the complaint should allege facts sufficient to show a degree of negligence in the defendant.<sup>4</sup>

**Real Owner and Bailee.** — In an action against an innkeeper, if he is liable for gross negligence as bailee, the action for not delivering the property upon a proper demand being made can be maintained either by the bailee, from whom the defendant received it, or from the real owner. *Coykendall v. Eaton*, 37 How. Pr. (N. Y. Supreme Ct.) 438.

1. An objection that the allegation in a declaration in an action against an innkeeper is of the loss of money in bank notes, and that bank notes are not money, cannot be sustained. *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47.

**The Common Law** of England in regard to the liability of innkeepers so far as not changed by statute, is the

common law in Kentucky; and it is not necessary to set out the law in pleading. *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 73.

2. It is necessary to set out in the declaration that the plaintiff was a guest at the inn at the time of the loss of the property. *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47.

The words, "being entertained as a guest therein at the inn of said" defendant, constitute a sufficient allegation that the defendant was an innkeeper. *Norcross v. Norcross*, 53 Me. 163.

3. *Bowell v. De Wald*, 2 Ind. App. 303. See also article CONTRIBUTORY NEGLIGENCE, vol. 5, p. 1.

4. *Sneed v. Moorehead*, 70 Miss. 690; *West v. Thomas*, 97 Ala. 622. See in general article NEGLIGENCE.

# INQUEST OF OFFICE.

See article *ESCHEAT*, vol. 8, p. 1.

## INQUESTS AND INQUIRIES.

BY ROBERT GRATTAN.

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**XIV. AFTER DEMURRER TO EVIDENCE OVERRULED, 1164.****XV. CONNECTICUT PRACTICE, 1165.****XVI. KENTUCKY PRACTICE, 1168.**

**I. DEFINITION.** — A writ of inquiry is a writ by which the sheriff is directed to summon a jury to ascertain the damages due from a defendant against whom there has been an interlocutory judgment, entered either by default or confession, the amount not being ascertainable by mere calculation.<sup>1</sup>

**II. NATURE OF WRIT AND OF PROCEEDINGS THEREON.** — A writ of inquiry is in the nature of an inquest of office to inform the conscience of the court.<sup>2</sup>

It Usually Issues After a Judgment by default, *nil dicit*, or other interlocutory judgment where the court is in doubt as to the amount of damages to be awarded,<sup>3</sup> wherefore the sheriff is commanded that "by the oaths of twelve honest and lawful men he inquire into said damages, and return such inquisition into court."<sup>4</sup>

1. Anderson's Law Dict., p. 549; Black's Law Dict., p. 1247.

2. Raymond v. Danbury, etc., R. Co., 43 Conn. 599, 14 Blatchf. (U. S.) 133; Vanlandingham v. Fellows, 2 Ill. 234; Dicken v. Smith, 1 Litt. (Ky.) 209; Wood v. Leach, 69 Me. 560; Hanley v. Sutherland, 74 Me. 212; Joan v. Shields, 3 Har. & M. (Md.) 7; Dent v. Morrison, 1 Mo. 130; Ward v. Haight, 3 Johns. Cas. (N. Y.) 80; Clor v. Malory, 1 Code Rep. (N. Y.) 126; Price v. Dearborn, 34 N. H. 485; Hickman v. Baltimore, etc., R. Co., 30 W. Va. 296; Bruce v. Rawlins, 3 Wils. 62; Holdipp v. Otway, 2 Saund. 107, note.

The court generally refuses to assess damages in actions where the law has prescribed no rule by which they may be measured, but leaves them to the feelings of a jury. Perry v. Goodwin, 6 Mass. 499.

3. Colorado Springs Co. v. Hewitt, 3 Colo. 277; Hickman v. Baltimore, etc., R. Co., 30 W. Va. 300.

At Common Law a writ of inquiry

issued only where the judgment was interlocutory. See *infra*, VI. *When Executed*.

4. Hickman v. Baltimore, etc., R. Co., 30 W. Va. 300; Bossout v. Rome, etc., R. Co., 131 N. Y. 40; Price v. Dearborn, 34 N. H. 485; Colorado Springs Co. v. Hewitt, 3 Colo. 277; Hanley v. Sutherland, 74 Me. 212.

**Not Regular Process.** — In Cooke v. Tuttle, 2 Wend. (N. Y.) 289, the court said: "The process prohibited by the statute from being sued out or made returnable after the second week of term is process against the person or property of a party, not a writ of this kind, which is but a warrant to the sheriff to assess the damages, and is no more process within the meaning of the statute than a rule for assessment of damages by the clerk."

For a Form of Summons see 1 El. & Bl. App. 32.

**Jury Distinct from Regular Panel — No Connection with Regular Panel.** — In Colorado Springs Co. v. Hewitt, 3

**Nature of the Trial.** — The writ issued, accordingly, is directed to the sheriff, who in the execution thereof sits as a judge and tries by a jury what damages the plaintiff has really sustained, under very nearly the same rules of law as upon a trial by jury at nisi prius.<sup>1</sup>

**After a Verdict Rendered** the sheriff returns the inquisition, and final judgment is entered that the plaintiff recover the damages so assessed.<sup>2</sup>

**"Nominal Damages" Supports the Proceedings.** — That the plaintiff is entitled to nominal damages only, is, not of itself a sufficient reason for refusing an inquest, since the function of a writ of inquiry is not only to ascertain the amount of damages, but to remove any uncertainty which may exist as to the subject or amount in controversy.<sup>3</sup>

**III. BY WHAT COURT GRANTED.** — An order for a writ of inquiry issues out of the court where the action is brought,<sup>4</sup> and,

Colo. 277, the court said: "At common law a jury summoned by writ of inquiry in case of default had no necessary connection with the regular panel. Did they serve on or constitute it in part or whole, it was in virtue of the writ of inquiry, and not in their character as regular jurors."

1. Price v. Dearborn, 34 N. H. 485; Hickman v. Baltimore, etc., R. Co., 30 W. Va. 300.

In Colorado Springs Co. v. Hewitt, 3 Colo. 278, the court said: "While the inquisition was at common law subject in many respects to the same laws and conditions as a trial by jury at nisi prius, it was in its writ, its object, its presiding officer, its place of meeting, and its mode of procedure a distinct and separate proceeding, with a well defined practice."

2. Hickman v. Baltimore, etc., R. Co., 30 W. Va. 300.

3. James River, etc., Co. v. Lee, 16 Gratt. (Va.) 432.

**Waivers of Inquest.** — In Boon v. Juliet, 2 Ill. 258, it was held that the plaintiff might have an inquest to ascertain damages, but that he might waive this and take judgment for nominal damages.

**Confession of Damages.** — It seems, also, that if the defendant, to save charges, will confess the whole damages laid in the declaration, the inquest may be dispensed with. Hickman v. Baltimore, etc., R. Co., 30 W. Va. 300.

4. 1 Tidd's Pr. 573.

**Mistake Cured.** — Where an order of

reference to assess damages on failure to answer was, by mistake, obtained from another court than that in which the action was brought, and the witnesses were examined thereunder, but afterwards, the mistake having been discovered, the case was referred by the proper court to the same referee, before whom all the witnesses, except one, reswore to their depositions, it was held that the irregularity was cured as to the witnesses resworn after the referee had been duly appointed, and that the fact that the referee had attached to his report some testimony which was irregularly taken was not a ground for vacating his report when the objectionable deposition could be entirely suppressed and disregarded without impairing the report itself. Pearl v. Robitschek, 2 Daly (N. Y.) 50.

**In Equity a Writ of Inquiry Is Never Ordered,** and the sheriff's jury has no jurisdiction to assess damages. If the court requires information on any subject it sends the case to a court of common law on a feigned issue, to be submitted to a jury regularly summoned and impaneled before a judge sitting at nisi prius. And so in an equity case under the *New York Code*, it was held that a writ of inquiry to have damages assessed by a sheriff's jury, although allowed with the consent of the defendant's attorney, was null and void, but that a reference would have been proper. Kreitz v. Frost, 55 Barb. (N. Y.) 474.

it seems, is made part of the interlocutory judgment entered in the cause.<sup>1</sup>

**IV. BY WHOM EXECUTED** — 1. **By the Sheriff.** — It is the usual practice for the writ to be executed by the sheriff<sup>2</sup> or his deputy,<sup>3</sup> and in executing the writ it has been decided that the sheriff's authority is ministerial and not judicial.<sup>4</sup>

2. **By the Court.** — In cases of legal difficulty, however, the writ may be executed before a judge who presides in the place of the sheriff and certifies to the inquisition.<sup>5</sup> In order to justify a

1. See *Hickman v. Baltimore, etc.*, R. Co., 30 W. Va. 300.

2. *Bossout v. Rome, etc.*, R. Co., 131 N. Y. 40; *Stanley v. Anderson*, 1 Code Rep. (N. Y.) 52; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658; *Price v. Dearborn*, 34 N. H. 485; *Hickman v. Baltimore, etc.*, R. Co., 30 W. Va. 300; *White v. Hunt*, 6 N. J. L. 330; *Moore v. Purple*, 8 Ill. 149; *Vanlandingham v. Fellows*, 2 Ill. 233; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277.

3. *Vanlandingham v. Fellows*, 2 Ill. 234; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 660; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277. See also *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 107.

In *Denny v. Trapnell*, 2 Wils. 378, it was held that where an inquisition was taken before two under-sheriffs extraordinary it would be set aside, on the ground that the sheriff could appoint but one.

4. *Vanlandingham v. Fellows*, 2 Ill. 234; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277.

The rule is broadly laid down, that in executing a writ of inquiry the sheriff acts ministerially; and generally this is correct. Where no objection is made before him to the proceedings his acts are all ministerial; but if an objection is made to a juror, the sheriff may, for cause satisfactory to him, set him aside and summon another; and if he refused to do so it would be a good ground for an application to set aside the inquisition. *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 661.

**The Rule Questioned.** — In *Joannes v. Fisk*, 3 Robt. (N. Y.) 710, it was said: "It is very doubtful whether the right of challenge may not exist in case of the execution of a writ of inquiry. The Revised Statutes seem to provide for the holding of a court by the sheriff, in such cases (2 Rev. Stat. 286, §§ 47, 58); and if so, he must have a right to exercise judicial powers as to the subordinate questions arising in

the course of the assessment, as well as the preservation of order and the punishment of witnesses for disobeying a subpoena. That statutory provision did not exist at the time of the decision in *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63, holding that the sheriff's duties were entirely ministerial, and that therefore no right of challenge existed."

5. *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658; *Bossout v. Rome, etc.*, R. Co., 131 N. Y. 40; *Cazneau v. Bryant*, 4 Abb. Pr. (N. Y. Super. Ct.) 402; *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 107; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277; *Vanlandingham v. Fellows*, 2 Ill. 234; *Rose v. Barr*, 2 Wis. 492; *White v. Hunt*, 6 N. J. L. 330; *Jersey City v. Chase*, 30 N. J. L. 235. See also *Joannes v. Fisk*, 3 Robt. (N. Y.) 710; *Dillaye v. Hart*, 8 Abb. Pr. (N. Y. Supreme Ct.) 394.

Mr. Archbold says that a writ of inquiry is usually executed before the sheriff or his deputy; it may, however, under special circumstances, be executed before the chief justice, or before a judge of assize. He adds that it is only where some difficult point of law is likely to arise in the course of the inquiry, or where the facts are important, that the court will grant this indulgence; and a notice of such execution is given for the sittings or assizes generally in the same manner as a notice of trial is given. 2 Archbold's Prac. 23; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 661.

**Under the New York Practice** there is nothing which compels the execution of a writ of inquiry or of an inquest of the damages at the circuit, although for purposes of convenience it is better so to execute it, as a jury is there already provided. *Bossout v. Rome, etc.*, Co., 131 N. Y. 40. See also, as to the former practice, *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 661.

**Venire Tam Quam.** — Where there is an

departure from the regular method of assessment the specific objections relied upon should be pointed out.<sup>1</sup>

issue as to one defendant and a default as to another, the damages should be assessed against both defendants by a jury at the circuit, on a *venire tam quam*. *Van Schaick v. Trotter*, 6 Cow. (N. Y.) 599.

Upon a *venire tam quam* the plaintiff has his election to assess contingent damages on the trial in fact, before arguing the demurrer, or to argue the demurrer first and assess damages afterwards. *Munro v. Alaire*, 2 Cai. (N. Y.) 320. See also *Van Schaick v. Trotter*, 6 Cow. (N. Y.) 599.

**Judge as Assistant to Sheriff.**—In *Anonymous*, 12 Mod. 610, it was held by Holt, C. J., that a judge of nisi prius, upon a trial of a writ of inquiry, was only an assistant to the sheriff and had no judicial power; and that if the parties came to any agreement there, the way to make it effectual was to bring it to him to sign, and afterwards to move above to have it made a rule of court. The authority of this case, however, was denied in *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658.

1. *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 107; *Joannes v. Fisk*, 3 Robt. (N. Y.) 710; *Dillaye v. Hart*, 8 Abb. Pr. (N. Y. Supreme Ct.) 394; *Cazneau v. Bryant*, 6 Duer (N. Y.) 670; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277; *White v. Hunt*, 6 N. J. L. 330.

In *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 107, the defendant moved that the writ of inquiry of damages should be executed before the judge of circuit, on the ground that important questions of law were expected to arise on the inquiry, which he was advised would render the presence of the judge necessary to decide upon them, and that he verily believed that an impartial inquiry could not be had before the sheriff. Such relief was allowed and a change of venue granted, if desired by the defendant. *Quoted* in *Colorado Springs Co. v. Hewitt*, 3 Colo. 277.

In *Joannes v. Fisk*, 3 Robt. (N. Y.) 710, the plaintiff procured an order to assess damages by a sheriff's jury, and then moved to vacate the order and have damages assessed before a judge of the court; but it was held that such motion would not be granted where no complicated questions of law were shown to arise in the case, nor any incapacity on the part of the sheriff to

act, or any difficulty in regard to the mitigating circumstances.

**Cause Exciting Public Attention.**—In *Dillaye v. Hart*, 8 Abb. Pr. (N. Y. Supreme Ct.) 394, it was held that where the cause of action was one that had excited much public attention, and it was probable that the question as to what extent provocation might be admitted in mitigation would arise, a motion that the assessment should be had at the circuit should be granted, in order to give the parties the right of challenge and other advantages of a regular trial of the question.

**Prejudice of Sheriff.**—In *Hays v. Berryman*, 6 Bosw. (N. Y.) 679, it was moved to have the damages assessed by the court, on the ground that the attorneys for the defendant were the legal advisers of the sheriff; but such objection was held insufficient where there was no imputation upon the integrity of the sheriff or the attorneys.

In an **Action of Libel** where the defendant has failed to answer it seems that the probability that difficult questions of law may arise upon the construction of the complaint, the legal effect of the default upon the allegations in the complaint, as to the meaning of the words, and respecting the admissibility of evidence in mitigation, may be grounds for ordering the writ of inquiry to be executed before the court at a trial term instead of before a sheriff's jury. *Cazneau v. Bryant*, 4 Abb. Pr. (N. Y. Super. Ct.) 402.

**Assault and Battery.**—After an interlocutory judgment by default in an action for assault and battery, the court has the power, in case of difficulty, or when special circumstances are laid before it, to direct a special jury to be summoned in order to assess the damages, and the inquiry to be held before a judge at nisi prius; but the mere circumstance of the battery having been very severe is not sufficient to take the case out of the ordinary course. *White v. Hunt*, 6 N. J. L. 330.

**Leave to Renew Motion.**—Where, after a default, the plaintiff moves for an order that his damages be assessed by a jury in open court, and the motion is denied, and an order entered that they be assessed before the sheriff's jury, such decision is conclusive in respect to any ground for the application

**V. WHERE EXECUTED.** — The writ may be executed before the sheriff at any place within his bailiwick,<sup>1</sup> and, as we have before seen, it may be executed at the circuit if so directed.<sup>2</sup>

**VI. WHEN EXECUTED** — In Vacation. — The writ may be executed by the sheriff in vacation, and after the regular panel has been discharged.<sup>3</sup>

then existing and then known to the moving party, unless leave be given in the order to renew the motion on further affidavit. *Cazneau v. Bryant*, 6 Duer (N. Y.) 668.

1. *Moore v. Purple*, 8 Ill. 149; *Vanlandingham v. Fellows*, 2 Ill. 233; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 532; *Colorado Springs Co. v. Hewitt*, 3 Colo. 277.

In *Chicago, etc., R. Co. v. Ward*, 16 Ill. 532, the court said: "The practice of assessing damages by the sheriff, at any time and place within the county where he may please, is fraught with dangers, apparent to every one; but it is the law, and it is not for the courts to apply the remedy."

2. See *supra*, IV. *By Whom Executed*. — *Ætna Ins. Co. v. Phelps*, 27 Ill. 71, where it was held that it would be regular for the sheriff to summon a jury from the bystanders and have damages assessed in the presence of the court.

It is not necessary to execute the writ in court unless the court expressly so directs, nor that it be executed in term time, nor at the court house. *Vanlandingham v. Fellows*, 2 Ill. 234.

**Illinois Statute.** — The Illinois Act concerning practice in courts of law (R. L. 490, § 13; *Gale's Stat.* 532) provided that "whenever judgment shall be given against the defendant or defendants by default, in any action brought on any instrument of writing for the payment of money only, the court may direct the clerk to assess the damages by computing the interest, and report the same to the court, upon which final judgment shall be given; and in all other actions, when judgment shall go by default, the plaintiff may have his damages assessed by the jury in court." This language was construed to mean that the plaintiff might, if he elected so to do, have his inquest taken in court. The common-law practice is, that the plaintiff, by showing good reasons, can have the writ of inquiry executed in court; but under this statute he had a right to

insist upon its being executed in court, though he undoubtedly might waive the right. *Vanlandingham v. Fellows*, 2 Ill. 234.

3. *Ætna Ins. Co. v. Phelps*, 27 Ill. 71, where it was urged that the court erred in impaneling a jury to assess the damages after the regular panel had been discharged for the term. Passing upon the point the court said: "At common law the court had the unquestioned right to issue a venire facias, at any time during its session, returnable to the term, whenever the business of the court might require it. And we must suppose, if it was designed to constitute this a regular panel, that such a writ was issued. But if that were not so, still, upon a default, a writ of inquiry may issue to have the damages assessed, which may be executed in court or be directed to the sheriff to execute in vacation. If the sheriff executed the writ by summoning the jury and having the damages assessed in the presence of the court, it would certainly be as regular as if done in vacation. So that whether it were executed before the court or the sheriff, with a portion of the regular panel or bystanders, can make no difference."

In *Dent v. Morrison*, 1 Mo. 133, it was objected that a writ of inquiry ought actually to have been issued to the sheriff, and executed before him in term time, but out of court. But the court said: "The uniform practice in all our courts of record has, under our statute, been otherwise. In no instance, so far as has come to our knowledge, has such a writ issued; and were the court now to sustain the objection, it would amount to a declaration that all final judgments, heretofore taken by default, were erroneous."

**Arkansas Statute.** — Under the Arkansas statute (*Rev. Stat.*, c. 116, § 81), it is provided that "in all other cases [meaning where the demand cannot be ascertained by computation] of such interlocutory judgments, the damages shall be assessed by a jury impaneled

**Before the Court.** — Or it may be executed before the court, according to the direction of the order upon which the inquest is had.<sup>1</sup>

**Prior Interlocutory Judgment Essential.** — In any case, however, before the writ of inquiry is executed or an assessment of damages is had, it is necessary that an interlocutory judgment be first entered or a default taken.<sup>2</sup> It is enough if the interlocutory judgment is entered at any time before the execution of the writ;<sup>3</sup> but if such interlocutory judgment is not taken, the proceedings in the case are so irregular that a judgment based thereon will be reversed.<sup>4</sup>

## VII. NOTICE OF ASSESSMENT — 1. Generally. — After a defend-

in the court for that purpose, and every such inquiry of damages shall be made at the term next after the term at which such interlocutory judgment shall be rendered, unless the court direct it to be made at the same term." See *Hodges v. Crawford*, 25 Ark. 566.

**In Florida**, under a default where the action was not founded upon a liquidated demand, it was held proper for the court to refer the case to a jury during term time to assess the damages. *Parkhurst v. Stone*, 36 Fla. 403.

**Missouri.** — In *Summers v. Tice*, 1 Mo. 349, it was held that a writ of inquiry was well executed, although executed at the same term at which it was directed. *Faber v. Bruner*, 13 Mo. 541; *Robinson v. Lawson*, 26 Mo. 69.

If the writ be awarded at the same term, notice should be given to the defendant of the day on which the inquiry will be executed. *Evans v. Bowlin*, 9 Mo. 406.

It was held in *Froust v. Bruton*, 15 Mo. 619, that the writ might be executed at a subsequent term.

**Writ Executed on Sunday.** — A writ of inquiry of damages cannot be executed on Sunday; nor can a jury who have been impaneled on Saturday, and heard the allegations and proof of the parties before twelve o'clock at night, assess the damages and deliver their verdict to the sheriff on Sunday. *Butler v. Kelsey*, 15 Johns. (N. Y.) 177.

1. See *supra*, V. *Where Executed*.

2. *Evans v. Parks*, 10 Ark. 306; *Briggs v. Sneghan*, 45 Ind. 20; *Romain v. Muscatine County*, 1 Morr. (Iowa) 357; *Simmons v. Garrett*, 1 McCahon (Kan.) 84; *Griffith v. Lynch*, 21 Md. 575; *Evans v. Bowlin*, 9 Mo. 409; *Price v. Dearborn*, 34 N. H. 485; *Gould v. Spencer*, Col. & C. Cas. (N.

Y.) 373; *Hart v. De Lord*, 17 Johns. (N. Y.) 270; *Hickman v. Baltimore*, etc., R. Co., 30 W. Va. 300; *Fisher v. Chase*, 2 Chand. (Wis.) 3; *Hibbard v. Pettibone*, 8 Wis. 271; *Holmes v. Lewis*, 2 Wis. 83; *Robins v. Pope*, Hempst. (U. S.) 219. As to judgments by default generally, see article DEFULTS, vol. 6, p. 1.

**If the Defendant Fails to Plead** within the time allowed him it is the right of the plaintiff to have his default entered; but before proceeding to an assessment of damages, judgment interlocutory should be entered. *Holmes v. Lewis*, 2 Wis. 83.

**Plea Undisposed of.** — If a party files an issuable plea after his demurrer has been overruled, and before any default has been taken against him, it is irregular for the plaintiff to assess his damages and take judgment therefor. *Fisher v. Chase*, 2 Chand. (Wis.) 3.

**Failure to Plead Over.** — In an action on an open account, where a demurrer is sustained to defendant's plea and he declines to plead over, the proper practice is for the court to render an interlocutory judgment against him, and order a writ of inquiry to have the plaintiff's damages assessed; it is erroneous for the court to render final judgment for the amount of the account on the demurrer. *Evans v. Parks*, 10 Ark. 306.

**Where One of Two Defendants Makes Default**, and the other pleads, the plaintiff cannot proceed to try the issue joined and have damages assessed against both defendants before an interlocutory judgment has been regularly entered against the defendant who neglects to plead. *Hart v. De Lord*, 17 Johns. (N. Y.) 270.

3. *Gould v. Spencer*, Col. & C. Cas. (N. Y.) 373.

4. *Hibbard v. Pettibone*, 8 Wis. 271.



ant has appeared in an action he is entitled to notice of the assessment of damages, which should always be given.<sup>1</sup> Such notice may be given at any time after default,<sup>2</sup> though it may be given previous to the entry of rule for interlocutory judgment.<sup>3</sup> Where notice of appearance is not given until after the entry of a default for not pleading, the plaintiff is not bound to serve the defendant with notice of assessment,<sup>4</sup> nor to delay entering his judgment for the purpose of giving notice of assessment.<sup>5</sup>

**2. Time of Service of Notice.** — The time within which notice must be served, and the contents of such notice, are matters of practice regulated by rules pertaining to the court in which action is brought.<sup>6</sup>

1. *Boyd v. Seely*, 2 Wend. (N. Y.) 242; *Green v. Guthrie*, 10 Johns. (N. Y.) 128; *Mayell v. Sprague*, 8 Cow. (N. Y.) 116; *Bossout v. Rome*, etc., R. Co., 131 N. Y. 40; *Sinnock v. Hosmer*, 97 Mich. 475; *Wheeler v. Wilkins*, 19 Mich. 81; *Mason v. Reynolds*, 33 Mich. 60; *Holmes v. Lewis*, 2 Wis. 83; *Rose v. Barr*, 2 Wis. 492.

Where the defendant's default was entered, and the plaintiff gave notice of assessment of damages, and thereupon the defendant procured an order staying proceedings until the decision of a motion to set aside plaintiff's declaration, which motion was denied and the plaintiff proceeded to assess damages and enter judgment, it was held that such action was regular, since it was not necessary to give new notice of assessment. *Purdy v. Green*, 3 How. Pr. (N. Y. Supreme Ct.) 126.

**Provisional Notice.** — In *Smith v. Rogers*, 18 Wend. (N. Y.) 671, it was held that where a plaintiff moved for judgment on a frivolous demurrer he might accompany such notice of motion with a provisional notice of assessment or inquiry.

In *Oothout v. Rooth*, 12 Johns. (N. Y.) 151, it was held that a notice of executing a writ of inquiry "provided an interlocutory judgment shall then have been obtained in this cause," was good, and the words of the proviso might be rejected as surplusage.

**Same Notice as of Trial.** — In *Michigan* the same notice of assessment must be given where the damages are assessed otherwise than by the clerk, as is required upon the trial of a cause. *Sinnock v. Hosmer*, 97 Mich. 475.

In *New York* the same rule formerly obtained where the damages were assessed before the clerk. *Green v.*

*Guthrie*, 10 Johns. (N. Y.) 128. See also *Mayell v. Sprague*, 8 Cow. (N. Y.) 116.

2. *Gould v. Spencer*, 2 Cai. (N. Y.) 109; *Boyd v. Seely*, 2 Wend. (N. Y.) 242.

3. *Boyd v. Seely*, 2 Wend. (N. Y.) 242.

4. *Lynds v. West*, 12 Wend. (N. Y.) 235; *White v. Featherstonhaugh*, 7 How. Pr. (N. Y. Supreme Ct.) 358; *Pearl v. Robitschek*, 2 Daly (N. Y.) 53.

5. *White v. Featherstonhaugh*, 7 How. Pr. (N. Y. Supreme Ct.) 358; *Pearl v. Robitschek*, 2 Daly (N. Y.) 50.

6. In *Williams v. Frith*, Doug. 198, it was held that upon notice to execute a writ of inquiry at a certain hour, the party was not tied down to the exact time fixed by the notice.

**Continuance of Notice.** — So, in *Jones v. Chune*, 1 B. & P. 363, it was held that if notice of a writ of inquiry to be executed at a certain time and place be continued, the notice of continuance need not express any hour or place.

In *Michigan* a notice of assessment of damages may be for a day in term, but it must be served fourteen days before the time fixed for the assessment. *Sinnock v. Hosmer*, 97 Mich. 475.

**The New York Code** provided that in case the defendant gave notice of appearance in an action, he should be entitled to five days' notice of the time and place of assessment. *White v. Featherstonhaugh*, 7 How. Pr. (N. Y. Supreme Ct.) 358. Substantially the same provision existed before the adoption of the code. 2 Rev. Stat. 357, § 4.

**Discrepancy in Notice.** — Notice of executing a writ of inquiry on "Wednesday, the 11th day of June inst.," when Wednesday fell on the 10th of June, on

## VIII. ASSESSMENT BY COURT — 1. In General — Without a Jury. —

Where the damages sought in an action are liquidated and capable of computation, the court may render judgment by default or *nil dicit*, without the intervention of a jury to assess them.<sup>1</sup>

which day the writ was executed, was held sufficient, and the court refused to set aside the execution of the writ where there was no affidavit that the defendant was misled by the notice. *Eldon v. Haig*, 1 Chit. Rep. 11, 18 E. C. L. 14. See also *Batten v. Harrison*, 3 B. & P. 1.

**Sufficiency of Service.** — In *England*, where the notice of executing a writ of inquiry was served upon the defendant personally, and not upon his attorney or clerk in court, the service was held to be insufficeint. *Brooks v. Till*, 2 Y. & J. 276.

A defendant not having appeared to a writ of summons, a distringas was obtained, and an appearance entered, and a copy of the declaration was afterwards, by leave of the court, stuck up in the office of pleas, and judgment by default was afterwards signed. The plaintiff was unable to serve the defendant personally with a notice of inquiry, and was unable to discover where he had removed to. The court, on application, granted a rule that on a notice of inquiry being stuck up in the office, and a copy left at the defendant's last place of residence, it should be deemed good service unless cause was shown within a week. *Watson v. Delcroix*, 2 Crompt. & M. 425.

1. *Alabama*. — *Porter v. Burleson*, 38 Ala. 344; *Moreland v. Ruffin*, Minor (Ala.) 18; *Phillips v. Malone*, Minor (Ala.) 110; *Byrne v. Haines*, Minor (Ala.) 286; *Pettigrew v. Pettigrew*, 1 Stew. (Ala.) 586; *Chapman v. Arrington*, 3 Stew. (Ala.) 480; *Randolph v. Parish*, 9 Port. (Ala.) 76; *Kennon v. M'Rae*, 3 Stew. & P. (Ala.) 249; *Amason v. Nash*, 24 Ala. 279; *Beville v. Reese*, 25 Ala. 451; *Malone v. Hathaway*, 3 Stew. (Ala.) 29; *Connolly v. Alabama, etc.*, R. Co., 29 Ala. 373; *Wood v. Winship Mach. Co.*, 83 Ala. 424; *Driver v. Spence*, 3 Ala. 98; *Hanrick v. Farmers' Bank*, 8 Port. (Ala.) 545.

*Arkansas*. — *Hodges v. Crawford*, 25 Ark. 566; *Wallace v. Henry*, 5 Ark. 108; *Leech v. Pirani*, 5 Ark. 118; *Witt v. State*, 14 Ark. 173; *Johnson v. Pierce*, 12 Ark. 599; *Chrisman v. Rogers*, 30 Ark. 357.

*Colorado*. — *Jones v. Stevens*, 1 Colo. 69; *Taylor v. McLaughlin*, 2 Colo. 375. *Connecticut*. — *Batchelder v. Bartholomew*, 44 Conn. 501.

*Illinois*. — *Hopkins v. Ladd*, 35 Ill. 185; *Thompson v. Haskell*, 21 Ill. 216; *Clemson v. State Bank*, 2 Ill. 45; *Robertson v. Hamet*, 19 Ill. 161; *Vandlandingham v. Fellows*, 2 Ill. 234; *Burlingame v. Turner*, 2 Ill. 589; *Dunbar v. Bonesteel*, 4 Ill. 34; *Wilcox v. Woods*, 4 Ill. 51; *Phelps v. Reynolds*, 49 Ill. 210; *Towner v. George*, 53 Ill. 168; *Rust v. Frothingham*, 1 Ill. 331; *Palmer v. Harris*, 98 Ill. 507; *Rives v. Kumler*, 27 Ill. 291; *Meyers v. Phillips*, 72 Ill. 460; *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199; *Smith v. Harris*, 12 Ill. 462.

*Indiana*. — *Henrie v. Sweasey*, 5 Blackf. (Ind.) 273; *Tannehill v. Thomas*, 1 Blackf. (Ind.) 144; *Harington v. Witherow*, 2 Blackf. (Ind.) 37; *Bradfield v. M'Cormick*, 3 Blackf. (Ind.) 161.

*Iowa*. — *Musser v. Hobart*, 14 Iowa 250; *Burlington, etc., R. Co. v. Shaw*, 5 Iowa 463; *Burlington, etc., R. Co. v. Marchand*, 5 Iowa 468; *Taylor v. Barber*, 2 Greene (Iowa) 350; *Lind v. Adams*, 10 Iowa 398; *Swift v. Berry*, 9 Iowa 43; *Davis v. Morford*, 1 Morr. (Iowa) 99; *Parvin v. Hoopes*, 1 Morr. (Iowa) 294; *Cameron v. Armstrong*, 8 Iowa 212; *Rife v. Inghram*, 3 Greene (Iowa) 125; *McGregor v. Armill*, 2 Iowa 30; *Stevens v. Campbell*, 6 Iowa 538.

*Kentucky*. — *Goff v. Hawks*, 5 J. J. Marsh. (Ky.) 342; *Jenkins v. Yeates*, 2 J. J. Marsh. (Ky.) 48; *Dicken v. Smith*, 1 Litt. (Ky.) 209.

*Maryland*. — *Davidson v. Myers*, 24 Md. 538.

*Massachusetts*. — *Worster v. Canal Bridge*, 16 Pick. (Mass.) 541.

*Michigan*. — *Hoard v. Little*, 7 Mich. 470; *Wilcox v. Sweet*, 24 Mich. 355; *O'Flynn v. Holmes*, 8 Mich. 95; *Mason v. Reynolds*, 33 Mich. 60; *Prentiss v. Spalding*, 2 Dougl. (Mich.) 90.

*Minnesota*. — *Kent v. Bown*, 3 Minn. 347.

*Mississippi*. — *Owen v. Little*, Walk (Miss.) 326; *Chace v. East*, Walk

**Reference to Officer of Court.** — In such cases it is the usual practice to refer the matter to the clerk,<sup>1</sup> or to a master appointed for such purpose, who assesses the damages, and upon the assessment thus made judgment is entered.<sup>2</sup> This method of assessing

(Miss.) 439; *Sandford v. Campbell*, 7 Smed. & M. (Miss.) 110; *Washington v. Planters' Bank*, 1 How. (Miss.) 230.

*Missouri.* — *Wetzell v. Waters*, 18 Mo. 336; *Alexander v. Hayden*, 2 Mo. 211; *Dent v. Morrison*, 1 Mo. 130; *M'Cutchin v. Batterton*, 1 Mo. 342; *Pratte v. Corl*, 9 Mo. 163; *Robinson v. Lawson*, 26 Mo. 71.

*New Hampshire.* — *West v. Whitney*, 26 N. H. 314; *Collins v. Walker*, 55 N. H. 438.

*New Jersey.* — *Rogers v. Brundred*, 16 N. J. L. 159; *Peacock v. Haney*, 37 N. J. L. 179.

*New York.* — *Colden v. Knickerbacker*, 2 Cow. (N. Y.) 31; *Fenton v. Garlick*, 6 Johns. (N. Y.) 287; *American Exch. Bank v. Smith*, 6 Abb. Pr. (N. Y. Super. Ct.) 1; *Kreitz v. Frost*, 55 Barb. (N. Y.) 474; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658; *Bulkeley v. Marks*, 15 Abb. Pr. (N. Y. C. Pl.) 454.

*North Carolina.* — *Parker v. Smith*, 64 N. Car. 291; *Rogers v. Moore*, 86 N. Car. 85.

*South Carolina.* — *Wilkie v. Walton*, 2 Spears L. (S. Car.) 473; *State Bank v. Vaughan*, 2 Hill L. (S. Car.) 556.

*Tennessee.* — *Masonic Educational Assoc. v. Cook*, 3 Head (Tenn.) 314.

*Texas.* — *Storey v. Nichols*, 22 Tex. 87; *Wheeler v. Pope*, 5 Tex. 262; *Trabue v. Stonum*, 20 Tex. 453; *Graves v. Farquhar*, 20 Tex. 455; *Holland v. Cook*, 10 Tex. 244; *Harland v. Hendricks*, 19 Tex. 292; *Tarrant County v. Lively*, 25 Tex. Supp. 399; *Niblett v. Shelton*, 28 Tex. 548; *Swift v. Faris*, 11 Tex. 18; *Guest v. Rhine*, 16 Tex. 549.

*Vermont.* — *Webb v. Webb*, 16 Vt. 636.

*Virginia.* — *Commercial Union Assur. Co. v. Everhart*, 88 Va. 952.

*United States.* — *Brown v. Van Braam*, 3 Dall. (U. S.) 344; *Renner v. Marshall*, 1 Wheat. (U. S.) 215; *McLain v. Rutherford*, Hempst. (U. S.) 47; *Aurora City v. West*, 7 Wall. (U. S.) 104.

*England.* — *Dennison v. Mair*, 14 East 622; *Byrom v. Johnson*, 8 T. R. 410; *Pell v. Brown*, 1 B. & P. 369; *Nelson v. Sheridan*, 8 T. R. 395; *Andrews v. Blake*, 1 H. Bl. 529; *Holdipp*

*v. Otway*, 2 Saund, 107, note 2; *Duero v. Johnson*, 7 T. R. 469; *Rashleigh v. Salmon*, 1 H. Bl. 252; *Shepherd v. Charter*, 4 T. R. 275; *Longman v. Fenn*, 1 H. Bl. 541; *Andrews v. Blake*, 1 H. Bl. 529.

1. *Musser v. Hobart*, 14 Iowa 250; *Leech v. Pirani*, 5 Ark. 118; *Campbell v. Gilman*, 26 Ill. 120.

In Iowa, where the amount of the judgment is a mere matter of computation the clerk shall ascertain the amount, but in other cases the court must hear proof to ascertain the amount due. *Musser v. Hobart*, 14 Iowa 250.

**Equivalent to Verdict on Inquiry.** — Such assessment when properly made is of the same force and effect as the finding of a jury upon an inquiry of damages. *Thompson v. Haskell*, 21 Ill. 215.

In a Suit on a Bail Bond, the declaration being good and the breaches well assigned, upon default the plaintiff is entitled to judgment without a writ of inquiry, the amount of damages being the recovery in the original suit, with interest, which appears in the declaration. The court may make the computation, or order it to be made by the clerk. *Leech v. Pirani*, 5 Ark. 118.

2. *Wood v. Leach*, 69 Me. 560. See also *Gilman v. Cunningham*, 44 Me. 502.

In *Byron v. Johnson*, 8 T. R. 410, it was referred to a master to compute what was due in an action of covenant for the nonpayment of rent, where nonpayment was the only breach assigned. In *Berthen v. Street*, 8 T. R. 326, the court referred it to a master to compute what was due for principal and interest on a mortgage in an action of covenant. But a rule to compute was refused in an action of covenant for the nonpayment of rent and land tax. *Morris v. Thompson*, 4 Scott 295, 36 E. C. L. 381.

In *Dennison v. Mair*, 14 East 622, the action was upon a bond to indemnify the plaintiffs, who had indemnified a bank for advances. In discharging a rule to show cause why the plaintiffs should not be at liberty to sign final judgment without executing a writ of

damages is usually adopted where the action is founded upon an instrument in writing ascertaining the plaintiff's demand,<sup>1</sup> an action of debt upon a judgment being classed among such ascertainable demands.<sup>2</sup>

inquiry of damages, Lord Ellenborough said: "The court are called upon to say what damages are due to the plaintiffs for the breach of the defendant's covenant of indemnity; and they have always been in the course of delivering such an inquiry to a jury, except in certain cases where, the demand being in its nature certain, it is perfectly clear to the court what the damages must be; and in those cases they will, on the application of the plaintiff, after interlocutory judgment, delegate the function to their own officer of computing principal and interest." *Quoted in* *Peacock v. Haney*, 37 N. J. L. 180.

In New York, where a complaint states a cause of action arising on contract, and prays no relief except judgment for the recovery of the money only, and no answer has been filed, the damages must be assessed by the clerk. *Croden v. Drew*, 3 Duer (N. Y.) 652; *Squire v. Elsworth*, 4 How. Pr. (N. Y. Supreme Ct.) 77. See *American Exch. Bank v. Smith*, 6 Abb. Pr. (N. Y. Super. Ct.) 1.

If assessed in such a case by a referee appointed by the court, a judgment entered upon the assessment will be set aside as irregular. *Croden v. Drew*, 3 Duer (N. Y.) 652.

The practice which was prescribed by 2 New York Rev. Stat. 280, requiring the clerk to assess the plaintiff's damages on default, demurrer, or confession, in certain specified cases, leaving the damages in all other cases to be ascertained by a sheriff's jury upon a writ of inquiry, was substantially continued by the Code of Procedure; only that in cases where the taking of an account or the proof of any fact is necessary to enable the court to give judgment, the court may, in its discretion, order a reference for such purpose. *Kreitz v. Frost*, 55 Barb. (N. Y.) 474.

**1. Note Stipulating for Attorney's Fees.** — In *Ledbetter v. Vinton*, 108 Ala. 644, it was held that a note containing a stipulation for attorney's fees would support a judgment by default, which includes such fees without a writ of inquiry. *Wood v. Winship Mach. Co.*, 83 Ala. 424.

**Stock Subscriptions.** — In *Spangler v. Indiana, etc.*, R. Co., 21 Ill. 276, where a declaration was filed to recover stock subscriptions, and a demurrer to the same was overruled, it was held that if the party did not ask permission to plead over, it was proper for the clerk to assess the damages, since the subscription was equivalent to an instrument of writing for the payment of money only.

**Unpaid Calls for Railroad Stock.** — In *Connolly v. Alabama, etc.*, R. Co., 29 Ala. 373, it was held that unpaid calls for railroad stock were not "instruments of writing ascertaining the plaintiff's demand," within the meaning of the statute authorizing the rendition of a final judgment by default without the intervention of a jury.

**An Insurance Policy** providing that if there be other insurances on the property, the loss, if any, shall be adjusted among the several insurers, is not "a writing for the payment of money," as contemplated by a statute authorizing judgment without a writ of inquiry in actions upon such instruments. *Commercial Union Assur. Co. v. Everhart*, 88 Va. 954.

**2. Roe v. Apsley**, 1 Sid. 442; *St. Louis, etc.*, R. Co. v. *Miller*, 43 Ill. 199; *Fenton v. Garlick*, 6 Johns. (N. Y.) 287. See also *Holdipp v. Otway*, 2 Sand. 107, note 2.

In *Blackmore v. Flemyng*, 7 T. R. 442, it was held to be at the election of the plaintiff to have the clerk tax interest on the judgment on which the action of debt was brought, or to have the same assessed by a jury of inquiry. In *Nelson v. Sheridan*, 8 T. R. 395, the Court of King's Bench refused to grant a rule to refer a similar point to the master, and held that it should be left with a jury. These cases are not reconcilable with each other, but the former was held to be the better guide and the more correct decision in *Fenton v. Garlick*, 6 Johns. (N. Y.) 287, citing *Roe v. Apsley*, 1 Sid. 442, and *Holdipp v. Otway*, 2 Sand. 107. The last case is a strong decision on this very point. The Court of King's Bench there said that it is the whole course and practice of both courts, upon a judgment of

**Qualification of the Rule.** — In order that the assessment shall be so made, however, the amount to be assessed must be fully determined by the writing sued upon; and where such amount is not capable of exact computation, or depends upon evidence *dehors* the instrument, a writ of inquiry should be awarded to determine it.<sup>1</sup>

**2. Promissory Notes.** — In actions on promissory notes, the amount being ascertained by an instrument of writing and capa-

debt by default or confession, to tax the damages on occasion of detention of debt, as well as the cost of the suit; with the assent of the plaintiff, which is always entered upon the record, it shall conclude the defendant; or if the plaintiff will not assent to it, he shall have a writ of inquiry of damages on occasion of the detention of the debt, if he will; but it is in the election of the plaintiff, and not of the defendant. In *Longman v. Fenn*, 1 H. Bl. 541, the Court of C. B. said that the practice was clear in actions of debt to refer it to the prothonotary to ascertain the interest and costs.

*Fenton v. Garlick*, 6 Johns. (N. Y.) 287, was an action of debt on a judgment recovered against a defendant in the state of Vermont, and the question arose whether a writ of inquiry was necessary in such a case, or an assessment by the clerk. It was held by the court that such an action was distinguishable from *Messin v. Massareene*, 4 T. R. 493, since in the former case the plaintiff recovered the sum *in numero*, but the latter was an action sounding wholly in damages, and that in the former case the plaintiff need not issue a writ of inquiry, but the damages might be ascertained by the clerk and taxed with the costs; but the plaintiff must give notice of the taxation before the clerk, and if he neglects to do so the court will not set aside the judgment, but will order a retaxation and proper notice.

**1. Action of Covenant.** — Where the declaration set forth a covenant to pay one hundred and ninety-nine dollars in commonwealth bank paper, it was held that since the judgment depended upon the value of the bank paper a jury was indispensable. *Grace v. Park*, 5 J. J. Marsh. (Ky.) 57.

In *Goff v. Hawks*, 5 J. J. Marsh. (Ky.) 341, it was questioned whether, in any case in an action of covenant, the court might render judgment without a jury except where the defendant

had stipulated to pay money. See also *Jenkins v. Yeates*, 2 J. J. Marsh. (Ky.) 48; *Dicken v. Smith*, 1 Litt. (Ky.) 209.

In *Van Vleet v. Adair*, 1 Blackf. (Ind.) 345, an action of covenant was brought for the payment of a certain sum, one half in specie and the other in bankable paper. Upon judgment on demurrer for the plaintiff it was held that damages should be assessed by a jury, and not by the court.

**Foreign Money.** — In *Maunsell v. Massareene*, 5 T. R. 87, the court refused to make the rule absolute in an action upon a bill of exchange for foreign money the value of which was held to be uncertain and only to be ascertained by a jury.

**Certificate of Deposit.** — In *Swift v. Whitney*, 20 Ill. 144, it was held that the court might assess damages upon a certificate of deposit, payable in currency. Followed in *Trowbridge v. Seaman*, 21 Ill. 101; *Northern Bank v. Zepp*, 28 Ill. 180.

**Interest.** — In *Kentucky* the clerk was not authorized to calculate interest on single bills in pursuance of the Act of 1799, c. 17, p. 41, if the single bill was given prior to that act, but the interest was to be found by the jury. *Troxwell v. Fugate*, Hard. (Ky.) 2; *Russell v. Shepherd*, Hard. (Ky.) 48.

In *Taul v. Moore*, Hard. (Ky.) 96, it was held that if the jury, in an action of debt on a single bill, find nominal damages, the clerk should enter the judgment for the principal sum with interest from the time it became due, and the damages.

**Foreign Judgment.** — In *Messin v. Massareene*, 4 T. R. 493, the defendant having suffered judgment by default in an action of assumpsit on a foreign judgment, the court would not refer it to the master to see what was due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. See also *Wallace v. Henry*, 5 Ark. 108.

ble of exact computation, there is no necessity for the intervention of a jury, but the amount may be assessed by the court or clerk.<sup>1</sup> But where a note is made payable in the currency of another state,<sup>2</sup> or is payable in some other commodity than mere

1. *Alabama*. — *Malone v. Hathaway*, 3 Stew. (Ala.) 29; *Henderson v. Howard*, 2 Ala. 343; *Randolph v. Parish*, 9 Port. (Ala.) 76.

*Illinois*. — *Burlingame v. Turner*, 2 Ill. 589; *Wilcox v. Woods*, 4 Ill. 51; *Rives v. Kumler*, 27 Ill. 291; *Trowbridge v. Seaman*, 21 Ill. 101; *Smith v. Harris*, 12 Ill. 462.

*Indiana*. — *Tannehill v. Thomas*, 1 Blackf. (Ind.) 144.

*Iowa*. — *Parvin v. Hoopes*, 1 Morr. (Iowa) 294; *Rife v. Inghram*, 3 Greene (Iowa) 125.

*Michigan*. — *Mason v. Reynolds*, 33 Mich. 60; *Prentiss v. Spalding*, 2 Dougl. (Mich.) 90.

*Minnesota*. — *Kent v. Bown*, 3 Minn. 347.

*Mississippi*. — *Owen v. Little*, Walk. (Miss.) 326; *Sandford v. Campbell*, 7 Smed. & M. (Miss.) 107; *Gridley v. Briggs*, 2 How. (Miss.) 830; *Washington v. Planters' Bank*, 1 How. (Miss.) 230.

*New Hampshire*. — *West v. Whitney*, 26 N. H. 314; *Price v. Dearborn*, 34 N. H. 485; *Collins v. Walker*, 55 N. H. 438.

*New York*. — *Colden v. Knickerbacker*, 2 Cow. (N. Y.) 31; *American Exch. Bank v. Smith*, 6 Abb. Pr. (N. Y. Super. Ct.) 1; *Kreitz v. Frost*, 55 Barb. (N. Y.) 474.

*North Carolina*. — *Parker v. Smith*, 64 N. Car. 291; *Rogers v. Moore*, 86 N. Car. 85; *Hartsfield v. Jones*, 4 Jones L. (N. Car.) 312.

*South Carolina*. — *State Bank v. Vaughan*, 2 Hill L. (S. Car.) 556.

*Texas*. — *Wheeler v. Pope*, 5 Tex. 262; *Trabue v. Stonum*, 20 Tex. 453; *Graves v. Farquhar*, 20 Tex. 455; *Holland v. Cook*, 10 Tex. 244; *Harland v. Hendricks*, 19 Tex. 292; *Niblett v. Shelton*, 28 Tex. 548; *Guest v. Rhine*, 16 Tex. 549.

*Wisconsin*. — *Frankfort Bank v. Countryman*, 11 Wis. 398.

*England*. — *Pell v. Brown*, 1 B. & P. 369; *Rashleigh v. Salmon*, 1 H. Bl. 252; *Longman v. Fenn*, 1 H. Bl. 541; *Holdipp v. Otway*, 2 Saund. 107, note 2; *Shepherd v. Charter*, 4 T. R. 275; *Duperoy v. Johnson*, 7 T. R. 469; *Nelson v. Sheridan*, 8 T. R. 395.

In a proceeding by scire facias to foreclose a mortgage given to secure

the payment of certain bills of exchange of which the mortgagor was indorser, as well as a promissory note of which he was the maker, it is proper, as the damages rest in computation, for the court to direct the clerk to compute them. The court would instruct the clerk at what rate to compute them, both as to the interest and the legal damages for protest. *Russell v. Brown*, 41 Ill. 183.

In *Malone v. Hathaway*, 3 Stew. (Ala.) 29, quoted in *Henderson v. Howard*, 2 Ala. 343, it was held that in an action against the indorser of a promissory note under the statute of 1812, which imposed upon the holder the necessity of proving a demand and notice, judgment by default might be rendered without the intervention of a jury.

**Note Drawing Foreign Interest.** — In *Willard v. Conduit*, 10 Tex. 213, it was held that where a note draws interest according to the laws of another state, and the defendant suffers judgment to go by default, it is not necessary to impanel a jury to find the interest, but it may be found by the judge; and in the absence of a statement of facts it would be presumed that the proof was made to the judge and that the facts were found by him.

**Where the Maker and Indorser Are Sued Jointly**, and one defaults, it is competent for the plaintiff to have damages assessed against the defaulted party by the jury who tried the issue as to the other party, and upon their assessment and verdict to enter a joint judgment. *Storey v. Bird*, 8 Mich. 316.

2. In *Pollock v. Colglazure*, Sneed (Ky.) 2, it was held that where the debt demanded in the declaration was payable in the currency of another state, the interest being in the nature of damages, the court could not render judgment therefor without the intervention of a jury.

In *Fretwell v. Dinsmore*, Walk. (Miss.) 484, it was held, upon a judgment by default upon a note made in the District of Columbia, that a writ of inquiry was necessary to determine the rate and amount of interest.

Where a promissory note was made

money, a writ of inquiry should be executed to ascertain the amount due;<sup>1</sup> and where a declaration on a promissory note contains a common count, after a judgment for the plaintiff on demurrer a writ of inquiry should be awarded<sup>2</sup> unless the plaintiff enter a *vol. pros.* as to the money count.<sup>3</sup>

payable "with the current rate of exchange on Philadelphia when due," the amount due thereon did not appear upon the face of the note, and the court could not assess damages, but should order a jury for that purpose. *Guelbreth v. Watson*, 8 Mo. 663.

In *Farwell v. Kennett*, 7 Mo. 595, it was held that a bill payable in currency was not a liquidated demand, but required the intervention of a jury.

1. **Illustrations.**—In *McKiel v. Porter*, 4 Ark. 534, it was held that in an action of covenant on an instrument payable in current banknotes, in the state of Arkansas, it was error upon default to give judgment for the nominal amount of the note, but there should be a writ of inquiry to ascertain the value, since the plaintiff was only entitled to recover their value at the time they were to have been paid.

In *Martin v. Woodall*, 1 Stew. & P. (Ala.) 244, it was held that a paper promising to pay a certain sum of money for staves (subject to a deduction for any number not procured) at two dollars a thousand was not subject to the same rules of decision which regulate promissory notes, so as to authorize a court to give judgment without the intervention of a jury.

In *Driver v. Spence*, 3 Ala. 98, it was held that upon a contract for the payment of eight dollars per acre rent for a lot of ground supposed to contain ten acres, more or less, a final judgment by default could not be rendered for the rent of ten acres, but that a writ of inquiry should be entered.

So on a note for the payment of a certain amount of cotton at a certain price, final judgment by default could not be taken. *Phillips v. Malone*, Minor (Ala.) 110. But in *Vanhooser v. Logan*, 4 Ill. 389, it was held that a note for three hundred dollars and fifty cents, payable in cattle at a certain day, was a money demand after the expiration of such day, and in such an action the damages might be assessed by the court. So where, in an action of assumpsit against the acceptor of an order for a definite sum of money, conditioned to be paid upon the sale of cer-

tain real estate, the declaration averred that such real estate had been sold, and judgment was taken by default, it was held that the averment was admitted by the default, and that upon such sale the instrument became payable absolutely, and since the damages rested merely in computation they might be assessed by the clerk. *Phelps v. Reynolds*, 49 Ill. 210.

2. *Stanton v. Henderson*, 1 Ind. 71; *McFall v. Wilson*, 6 Blackf. (Ind.) 260; *Wood v. Lemon*, 1 Blackf. (Ind.) 198, note; *Starbuck v. Lazenby*, 7 Blackf. (Ind.) 268; *Wingate v. Ellis*, 1 Blackf. (Ind.) 563; *Carter v. Spencer*, 4 Ind. 78; *Kennon v. M'Rae*, 3 Stew. & P. (Ala.) 249.

Where the declaration contained special and common counts in the usual form, it was held proper to assess damages by a jury, since it could not be known but that there would be evidence admissible only under the common counts. *Barber v. Whitney*, 29 Ill. 440.

Where an action was brought on a promissory note and an open account for work and labor done, it was held error to render final judgment by default for the aggregate amount of the sums claimed, without the intervention of a jury or the execution of a writ of inquiry. *Beville v. Reese*, 25 Ala. 451.

3. *McFall v. Wilson*, 6 Blackf. (Ind.) 260; *Wood v. Lemon*, 1 Blackf. (Ind.) 198, note; *Carter v. Spencer*, 4 Ind. 78.

In *Moreland v. Ruffin*, Minor (Ala.) 18, it was held that, following the English practice upon action on bills of exchange and promissory notes, it should be referred to a master to compute the principal and interest due, and that if the declaration contained other counts for unliquidated demands, the plaintiff, before reference to the master, should enter a *vol. pros.* on all but the count on the bill or note, and thus limit his cause of action to the writing ascertaining his demand. This decision was, however, *overruled* in *Hanrick v. Farmers' Bank*, 8 Port. (Ala.) 545, where it was held that the plaintiff could not by any possibility be injured by the failure to enter a *vol. pros.* on

**3. Bills of Exchange.**—The same rule obtains as to actions upon bills of exchange which has been laid down as applicable to promissory notes, damages being usually assessed by the court or clerk without the intervention of a jury.<sup>1</sup>

**IX. ASSESSMENT BY STATUTORY METHODS.**—The practice of referring the assessment of damages to the clerk has become a matter of statutory enactment in many states,<sup>2</sup> while in others the old common-law writ of inquiry has fallen entirely into disuse, or such a modified form of the old practice has been adopted that it can no longer be called by such a name.<sup>3</sup>

the common counts, as the only effect of retaining them might be to debar the plaintiff below from obtaining any claim which might be obtained under the common counts.

1. *Grigsby v. Ford*, 3 How. (Miss.) 184; *Price v. Dearborn*, 34 N. H. 485; *Rogers v. Moore*, 86 N. Car. 85; *Hartsfield v. Jones*, 4 Jones L. (N. Car.) 312; *Sweet v. McDaniels*, 39 Vt. 272; *Brown v. Van Braam*, 3 Dall. (U. S.) 344; *Shepherd v. Charter*, 4 T. R. 275; *Andrews v. Blake*, 1 H. Bl. 529. See also *Byrom v. Johnson*, 8 T. R. 410; *McKenzie v. Clanton*, 33 Ala. 528.

In *Grigsby v. Ford*, 3 How. (Miss.) 184, it was held that damages which are allowable upon protested inland bills of exchange are as fixed in amount, and as readily calculated and assessed by the clerk, as interest, and that he is justified in assessing them without the intervention of a jury.

In *Randolph v. Parish*, 9 Port. (Ala.) 76, it was decided that where the drawer of a bill of exchange suffers judgment by default, there is no necessity for submitting the case to a jury to assess damages. Such judgment is an admission that the steps necessary to fix his liability have all been taken, and that he is chargeable for the amount of the bill.

2. *Colorado*.—*Jones v. Stevens*, 1 Colo. 69.

*Illinois*.—*Towner v. George*, 53 Ill. 170; *Robertson v. Hamet*, 19 Ill. 161; *Reed v. Horne*, 73 Ill. 599.

*Indiana*.—*Briggs v. Sneghan*, 45 Ind. 20.

*Iowa*.—*Taylor v. Barber*, 2 Greene (Iowa) 350; *Burlington, etc., R. Co. v. Shaw*, 5 Iowa 463; *Burlington, etc., R. Co. v. Marchand*, 5 Iowa 468; *Lind v. Adams*, 10 Iowa 398; *Swift v. Berry*, 9 Iowa 43; *Cook v. Watters*, 4 Iowa 72; *Parvin v. Hoopes*, 1 Morr. (Iowa) 294.

*Kentucky*.—*Shirley v. Landram*, 3 Bush (Ky.) 552.

*Michigan*.—*Prentiss v. Spalding*, 2 Doug. (Mich.) 90.

*Mississippi*.—*Owen v. Little, Walk. (Miss.)* 326; *Sandford v. Campbell*, 7 Smed. & M. (Miss.) 107; *Grigsby v. Ford*, 3 How. (Miss.) 188; *Girdley v. Brigs*, 2 How. (Miss.) 830; *Washington v. Planters' Bank*, 1 How. (Miss.) 230.

*Missouri*.—*Dent v. Morrison*, 1 Mo. 130; *Robinson v. Lawson*, 26 Mo. 71.

*New York*.—*Squire v. Elsworth*, 4 How. Pr. (N. Y. Supreme Ct.) 77; *Colden v. Knickerbacker*, 2 Cow. (N. Y.) 31; *American Exch. Bank v. Smith*, 6 Abb. Pr. (N. Y. Super. Ct.) 1; *Kreitz v. Frost*, 55 Barb. (N. Y.) 474; *Croden v. Drew*, 3 Duer (N. Y.) 652.

*North Carolina*.—*Parker v. Smith*, 64 N. Car. 291; *Rogers v. Moore*, 86 N. Car. 85; *Hartsfield v. Jones*, 4 Jones L. (N. Car.) 312; *Roulhac v. Miller*, 90 N. Car. 174.

*South Carolina*.—*Wilkie v. Walton*, 2 Spears L. (S. Car.) 473; *State Bank v. Vaughan*, 2 Hill L. (S. Car.) 556.

*Tennessee*.—*Masonic Educational Assoc. v. Cook*, 3 Head (Tenn.) 314.

*Texas*.—*Trabue v. Stonum*, 20 Tex. 453; *Graves v. Farquhar*, 20 Tex. 455; *Holland v. Cook*, 10 Tex. 244; *Harland v. Hendricks*, 19 Tex. 292; *Niblett v. Shelton*, 28 Tex. 548; *Guest v. Rhine*, 16 Tex. 549.

*Wisconsin*.—*Holmes v. Lewis*, 2 Wis. 83; *Coe v. Straus*, 11 Wis. 72; *Platt v. Robinson*, 10 Wis. 128; *Cahoon v. Wisconsin Cent. R. Co.*, 10 Wis. 290.

3. *Price v. Dearborn*, 34 N. H. 485; *West v. Whitney*, 26 N. H. 314; *Sincock v. Hosmer*, 97 Mich. 475; *Havens v. Hartford, etc., R. Co.*, 28 Conn. 91; *Lamphear v. Buckingham*, 33 Conn. 251; *Raymond v. Danbury, etc., R. Co.*, 43 Conn. 596. See *infra*, XV. *Connecticut Practice*; and XVI. *Kentucky Practice*.



**X. ASSESSMENT BY JURY—1. Generally.**—Where the amount of damages is an uncertain element and not capable of exact computation, a writ of inquiry should be executed to ascertain the exact amount.<sup>1</sup>

**In Vermont** it is not common to execute a writ of inquiry; the damages, in cases of default, judgment upon demurrer, and by *nil dicit* being usually assessed by the court, or by some person appointed by the court for that purpose. *Webb v. Webb*, 16 Vt. 636, *citing Hyde v. Moffat*, 16 Vt. 271.

**1. Alabama.**—*McPherson v. Robertson*, 82 Ala. 459; *Moreland v. Ruffin*, Minor (Ala.) 18; *Byrne v. Haines*, Minor (Ala.) 286.

**Arkansas.**—*Williams v. State*, 10 Ark. 258; *Evans v. Parks*, 10 Ark. 306; *Hodges v. Crawford*, 25 Ark. 565; *Wallace v. Henry*, 5 Ark. 108; *Ashley v. Brasil*, 1 Ark. 144; *Johnson v. Pierce*, 12 Ark. 599; *Lee v. Leech*, 9 Ark. 423.

**Colorado.**—*Colorado Springs Co. v. Hewitt*, 3 Colo. 275.

**Florida.**—*Parkhurst v. Stone*, 36 Fla. 466.

**Illinois.**—*Hopkins v. Ladd*, 35 Ill. 185; *Meyers v. Phillips*, 72 Ill. 460; *Vanlandingham v. Fellows*, 2 Ill. 234; *Towner v. George*, 53 Ill. 168.

**Indiana.**—*Linn v. Schmall*, 8 Blackf. (Ind.) 94; *Tannehill v. Thomas*, 1 Blackf. (Ind.) 144; *Van Vleet v. Adair*, 1 Blackf. (Ind.) 346; *Wood v. Lemon*, 1 Blackf. (Ind.) 198; *McKay v. Craig*, 6 Blackf. (Ind.) 168.

**Iowa.**—*Musser v. Hobart*, 14 Iowa 250; *Burlington, etc., R. Co. v. Shaw*, 5 Iowa 463; *Burlington, etc., R. Co. v. Marchand*, 5 Iowa 468; *Taylor v. Barber*, 2 Greene (Iowa) 350.

**Kentucky.**—*Demaree v. Jackson*, *Sneed* (Ky.) 56; *Grace v. Park*, 5 J. J. Marsh. (Ky.) 57; *Weathers v. Mudd*, 12-B. Mon. (Ky.) 112.

**Maryland.**—*Davidson v. Myers*, 24 Md. 538.

**Mississippi.**—*Grover v. Gaunt*, 6 Smed. & M. (Miss.) 317; *Sandford v. Campbell*, 7 Smed. & M. (Miss.) 107.

**Missouri.**—*Alexander v. Hayden*, 2 Mo. 211; *M'Cutchin v. Batterton*, 1 Mo. 342; *Pratte v. Corl*, 9 Mo. 163; *Evans v. Bowlin*, 9 Mo. 406; *Robinson v. Lawson*, 26 Mo. 69; *Guelbreth v. Watson*, 8 Mo. 663.

**New Hampshire.**—*West v. Whitney*, 26 N. H. 314; *Collins v. Walker*, 55 N. H. 438.

**New Jersey.**—*Peacock v. Haney*, 37 N. J. L. 179.

**New York.**—*Stanley v. Anderson*, 1 Code Rep. (N. Y.) 52; *Kreitz v. Frost*, 55 Barb. (N. Y.) 474; *Dutch Reformed Church v. Wood*, 8 Barb. (N. Y.) 421; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658.

**North Carolina.**—*Parker v. Smith*, 64 N. Car. 291; *Rogers v. Moore*, 86 N. Car. 85; *Hartsfield v. Jones*, 4 Jones L. (N. Car.) 309.

**Tennessee.**—*Masonic Educational Assoc. v. Cook*, 3 Head (Tenn.) 314.

**Texas.**—*Storey v. Nichols*, 22 Tex. 87; *Hurlock v. Reinhardt*, 41 Tex. 580; *Trabue v. Stonum*, 20 Tex. 453; *Niblett v. Shelton*, 28 Tex. 548; *Freeman v. Jordan*, 33 Tex. 428; *Cummings v. Butler*, Dall. (Tex.) 531; *Cross v. Huffaker*, 1 Tex. App. Civ. Cas., § 136.

**Vermont.**—*Webb v. Webb*, 16 Vt. 636; *Sheldon v. Sheldon*, 37 Vt. 154.

**Virginia.**—*Commercial Union Assurance Co. v. Everhart*, 88 Va. 952; *Metcalfe v. Battaile*, Gilmer (Va.) 191; *Hatcher v. Lewis*, 4 Rand. (Va.) 152; *Hunt v. M'Rea*, 6 Munf. (Va.) 454; *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326; *Shelton v. Welsh*, 7 Leigh (Va.) 175; *James River, etc., Co. v. Lee*, 16 Gratt. (Va.) 424.

**West Virginia.**—*Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 296.

**United States.**—*Brown v. Van Braam*, 3 Dall. (U. S.) 344.

**England.**—*Weald v. Brown*, 2 Crdmp. & J. 672; *Smith v. Nesbitt*, 2 C. B. 288, 52 E. C. L. 288; *Dennison v. Mair*, 14 East 622; *Cooke v. Pettit*, 2 Wils. 5; *Nelson v. Sheridan*, 8 T. R. 395; *Maunsell v. Massareene*, 5 T. R. 87; *Messin v. Massareene*, 4 T. R. 493.

Where a declaration contains both special and common counts, and a demurrer to the special count is overruled, it is erroneous to assess damages while the issues upon the common count are undetermined. The correct practice requires the court, when the defendant abides by his demurrer to the special count, to enter a judgment *nil dicit* on that count, and then impanel a jury to try the issues of fact under the common counts, and on that trial to submit the assessment of damages under the

**2. Penal Bonds.** — In actions on penal bonds, if the plaintiff obtains judgment by default or on demurrer the damages should be assessed by a jury.<sup>1</sup>

**3. Right to Demand Assessment by Jury** — *a.* **RIGHT OF PLAINTIFF.** — The right to demand an assessment by a jury, as a general rule, lies with the plaintiff,<sup>2</sup> or, in other words, where the damages may be assessed either by a court or by a jury, the option as to the mode of assessment lies with the party not in default.<sup>3</sup>

judgment *nil dicit* to the same jury. The court, or the clerk under its direction, has no power to assess damages while there is an issue of fact pending in the cause. *Keeler v. Campbell*, 24 Ill. 288; *Van Dusen v. Pomeroy*, 24 Ill. 289.

**In Actions of Tort** where, from the nature of the demand, damages are to be assessed, a jury must be summoned to assess them. The court alone cannot assess damages in such a case. *Oliver v. Cannon*, 18 La. 474.

**Interest.** — That a writ of inquiry to have the amount of interest on an open account ascertained by the jury is necessary, see *Mailhouse v. Inloes*, 18 Md. 328.

**A Confession of Judgment for No Certain Sum**, in an action sounding in damages, is not sufficient to authorize the court to assess the damages and enter judgment for a certain sum, but a writ of inquiry should be executed. *Dunbar v. Lindenberger*, 3 Munf. (Va.) 169.

**On Office Judgment.** — In *Virginia*, where a joint action was brought against the drawers and indorsers of a negotiable note, an office judgment could not be confirmed against all or either of them without a writ of inquiry. *Hatcher v. Lewis*, 4 Rand. (Va.) 152. See also *Metcalf v. Bat-taille*, *Gilmer* (Va.) 191.

In *James River, etc., Co. v. Lee*, 16 Gratt. (Va.) 433, it was held that an office judgment in an action of ejectment did not become final without the intervention of the court or jury, but that there ought in every such case to be an inquest of damages.

In *Hunt v. M'Rea*, 6 Munf. (Va.) 454, it was held that a judgment at rules in a clerk's office could not lawfully be made final, on a declaration in debt for money lent and not alleged to be founded on any specialty, bill, or note in writing, until a writ of inquiry had been awarded and executed.

1. *Tannehill v. Thomas*, 1 Blackf. (Ind.) 144.

**Administration Bond.** — In debt on an administration bond, it is error to render final judgment against the principal and his sureties without the intervention of a jury. *Amason v. Nash*, 24 Ala. 279.

**Bail Bond.** — In *Roulhac v. Miller*, 90 N. Car. 174, it was held that a judgment by default, final for want of an answer, in a suit upon a bail bond, could not be sustained, but the judgment should have been interlocutory and the damages inquired into by a jury.

**Upon a Bond with Collateral Condition** the damages must be assessed by a jury, and it is error to take judgment without a jury. *Henderson v. Stainton*, Hard. (Ky.) 125; *Keeton v. Scantland*, Hard. (Ky.) 156; *Ruffin v. Call*, 2 Wash. (Va.) 181.

**Delivery Bonds.** — The early *Arkansas* cases held that in a proceeding on a forfeited delivery bond, or a penal bond, a judgment by default could not be rendered without a writ of inquiry to assess the damages. *Pelham v. Page*, 6 Ark. 148; *Hawkins v. Nun-nelly*, 6 Ark. 150; *Jennings v. Ashley*, 5 Ark. 128; *Patton v. Walcott*, 4 Ark. 579; *Nelson v. Hubbard*, 8 Ark. 477; *McKisick v. Brodie*, 6 Ark. 375; *Johnson v. Pierce*, 12 Ark. 599. By a later statute, however, the court may assess damages in such cases. *Chapline v. Robertson*, 44 Ark. 206; *Calloway v. Roane*, 7 Ark. 357.

2. *Preston v. Wright*, 60 Iowa 353; *Burlington, etc., R. Co. v. Shaw*, 5 Iowa 463; *Burlington, etc., R. Co. v. Marchand*, 5 Iowa 471; *Jarvis v. Blanchard*, 6 Mass. 4; *Perry v. Goodwin*, 6 Mass. 499; *Storer v. White*, 7 Mass. 449; *Froust v. Bruton*, 15 Mo. 619; *Robinson v. Lawson*, 26 Mo. 69.

3. *Preston v. Wright*, 60 Iowa 353; *Wilkins v. Treynor*, 14 Iowa 391; *Bur-*

**b. RIGHT OF DEFENDANT.** — The rule just stated, however, is by no means uniform, and under the practice in some states the plaintiff or the defendant may have the damages assessed by a jury, either by virtue of some statute,<sup>1</sup> or by reason of some circumstance peculiar to the case at issue.<sup>2</sup> If neither party

lington, etc., *R. Co. v. Shaw*, 5 Iowa 465; *Carleton v. Byington*, 17 Iowa 580; *Wood v. Leach*, 69 Me. 560; *Hanley v. Sutherland*, 74 Me. 213; *Begg v. Whittier*, 48 Me. 315; *Holdipp v. Otway*, 2 Saund. 107; *Blackmore v. Flemyng*, 7 T. R. 442. See also *Jarvis v. Blanchard*, 6 Mass. 4; *Storer v. White*, 7 Mass. 449; *Cummings v. Smith*, 50 Me. 568.

Where, on the plaintiff's motion, an action of replevin was dismissed, and then reinstated on the defendant's motion for assessment of damages, the plaintiff was treated as a party in default and could not demand a jury. *Wilkins v. Treynor*, 14 Iowa 391.

In Iowa, after the defendant has defaulted he has no right to demand a jury. *Preston v. Wright*, 60 Iowa 353; *Wilkins v. Treynor*, 14 Iowa 391; *Carleton v. Byington*, 17 Iowa 579; *Clute v. Hazleton*, 51 Iowa 355; *Armstrong v. Catlin*, 17 Iowa 581.

1. In *Mayhew v. Thatcher*, 6 Wheat. (U. S.) 129, it was held that as by the laws of *Louisiana* questions of fact in civil cases are tried by the court unless either of the parties demands a jury, in an action of debt on a judgment the interest on the original judgment might be computed and made part of the judgment, in that state, without a writ of inquiry and the intervention of a jury.

The *Illinois Practice Act*, § 41, provides that "upon default \* \* \* either party may have the damages assessed by a jury." See *Palmer v. Harris*, 98 Ill. 507; *Meyers v. Phillips*, 72 Ill. 461; *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199. These words have been held imperative, and not open to construction, and when assessment by jury is demanded it is error to refuse. *Pinkel v. Domestic Sewing Mach. Co.*, 89 Ill. 277. It is the duty of a party, however, to demand a jury at the proper time. The statute has reference to causes pending, after the interlocutory judgment and before final judgment is rendered. *Palmer v. Harris*, 98 Ill. 507.

In *Vermont*, under an early statute, where the sum for which judgment was

to be rendered was uncertain, either party had the right to have the sum assessed by jury. *Webb v. Webb*, 16 Vt. 636, citing *Hyde v. Moffat*, 16 Vt. 271. And where such a motion was made and the application refused, a judgment rendered without the intervention of a jury was reversed. *Benham v. Sage*, 1 D. Chip. (Vt.) 247, holding that the uncertainty referred to by the statute was not an uncertainty as to the sum which the plaintiff was entitled to recover according to the strict rules of the common law, but an uncertainty as to the sum which he ought to recover in equity and good conscience.

2. In *O'Flynn v. Holmes*, 8 Mich. 97, it was contended that as the statute provides that in suits wherein the clerk cannot assess the plaintiff's damages, such damages may be assessed by a jury, the duty of referring the question to a jury was imperative, and that an assessment by the court without a jury was illegal and void. In passing upon the question the court said: "Such was undoubtedly the case before the adoption of the Constitution of 1850, and the subsequent legislation respecting juries. But by the 27th section of article 6 of the Constitution it is provided that the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law. By the provisions of the Act of 1853, Comp. L., § 3435, all issues and questions of fact shall be tried by the court unless a jury be demanded by one of the parties in a manner prescribed by the rules of court; and by the Circuit Court rules this demand is required to be made in writing. These provisions of the Constitution and statute evidently contemplate a dispensation, in all cases, with a jury, unless demanded by a party having a right to make such demand, or when ordered by the court. Now in cases of assessment after interlocutory judgment, the amount of damages to which the plaintiff is entitled, although not put in issue, is still a question of fact; and by suffering default the defendant has deprived

demands a jury the court may assess the damages, or order the clerk to do so under its direction.<sup>1</sup>

**4. Oath of Jury — In General.** — Upon an inquest of damages the jury should be sworn to ascertain the quantum of damages and not to try an issue joined.<sup>2</sup>

himself of the right of tendering an issue; but if he has appeared, he, as well as the plaintiff, may still demand a jury for the purposes of the assessment; while if he has not appeared, the plaintiff may, although the defendant has forfeited such right. To this extent the provision of the statute requiring the assessment to be made by a jury, which existed before the Constitution of 1850, is modified by it and subsequent legislation."

In Vermont, where the defendants mark their case "not for the jury" they practically consent to a judgment against them, unless they show good cause for continuance, and upon a judgment rendered against them they have no right to assessment of damages by a jury, except in the discretion of the court. *Chamberlin v. Murphy*, 41 Vt. 110; *Briggs v. Gleason*, 32 Vt. 472.

1. *Reed v. Horne*, 73 Ill. 599; *Towner v. George*, 53 Ill. 170; *Alexander v. Hayden*, 2 Mo. 211; *Robinson v. Lawson*, 26 Mo. 69; *Brown v. King*, 39 Mo. 380; *Loudon v. King*, 22 Mo. 336; *Jersey City v. Chase*, 30 N. J. L. 235.

Under the Maryland statute, where the defendant has not appeared in court and is in default, or, having appeared, waives his right to have, or fails to ask to have, his damages assessed by a jury, the court is empowered to assess them. *Knickerbocker L. Ins. Co. v. Hoeske*, 32 Md. 326.

In *Gemmell v. Davis*, 71 Md. 466, it was held that a delay on the part of the defendant in asking that his damages be assessed by a jury instead of by the court gave rise to the presumption that the question was of no practical importance to him, and that his right was waived when not claimed at the proper time.

In Texas, under the present practice, unless a jury is demanded the judge will determine all necessary facts required to be ascertained in order to assess the damages. *Johnson v. Dowling*, 1 Tex. App. Civ. Cas., § 1090.

2. *M'Million v. Dobbins*, 9 Leigh (Va.) 422.

An omission to swear the jury to inquire into the assessment of damages

is fatally defective. *McLain v. Taylor*, 9 Ark. 364. See, however, *Roberts v. Swearingen*, Hard. (Ky.) 128, where it was held that upon executing the writ, if the jury were sworn to try the issues joined, instead of to inquire of damages, this was an informality, but not a reversible error.

Where an order in the nature of a writ of inquiry charged the jury to inquire of the damages, omitting the words "and costs," and the requisition of the jury was for damages and "about ten dollars" for costs, it was held that these were merely formal defects which might have been amended in the inferior court, and would be amended in the court of appeals. *Kiersted v. Rogers*, 6 Har. & J. (Md.) 282. And in *Harris v. Jaffray*, 3 Har. & J. (Md.) 543, where the record stated that the jury, on an inquiry at bar under the Act of 1794, c. 46, were charged to inquire of the damages sustained by the plaintiff, the words "and costs" being omitted, and the inquiry was not stated to be on motion of the plaintiff, it was questioned whether these were fatal errors.

**Where There Are Several Parties.** — Where the plaintiff sued as administratrix and as a widow, and as a guardian of a minor child, alleging damages for obstruction of a way, and upon judgment by default the jury was impaneled and sworn to try and assess the damages "in the action now depending" between the plaintiff, administratrix, etc., and the defendant, it was held that the jury was sufficiently sworn to assess damages for an injury alleged in the declaration and covered by the judgment by default. *Forrester v. Sisco*, 49 Md. 586, holding also that it would be presumed that the proof was confined to the damages and injury to the deceased in his lifetime, and that the jury in their inquisition assessed them alone.

Where an action of assumpsit was brought against A and B, the former of whom pleaded in bar of the action and the latter failed to appear, it was held that a judgment by default should have been taken against B, and that the jury that tried the issue made on the plea

**XI. ISSUE AT INQUEST.** — Since a default admits all the material averments properly set forth in the declaration,<sup>1</sup> and establishes

filed by A should have been sworn to assess damages against B also. *Davis v. Graniss*, 5 Blackf. (Ind.) 79.

1. *Alabama*. — *Sterrett v. Kaster*, 37 Ala. 369; *Randolph v. Sharpe*, 42 Ala. 271.

*Illinois*. — *Cook v. Skelton*, 20 Ill. 111; *Massachusetts Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614; *Bridges v. Stephenson*, 10 Ill. App. 371.

*Indiana*. — *Briggs v. Sneghan*, 45 Ind. 14.

*Iowa*. — *Burlington, etc., R. Co. v. Shaw*, 5 Iowa 463; *Loeber v. Delahaye*, 7 Iowa 478.

*Kentucky*. — *Wood v. Morgan*, 6 Bush (Ky.) 507.

*Maryland*. — *Cooper v. Roche*, 36 Md. 563.

*Missouri*. — *Froust v. Bruton*, 15 Mo. 619.

*New Hampshire*. — *Willson v. Willson*, 25 N. H. 240.

*New Jersey*. — *Creamer v. Dikeman*, 39 N. J. L. 195; *White v. Hunt*, 6 N. J. L. 330.

*New York*. — *Bates v. Loomis*, 5 Wend. (N. Y.) 134; *Foster v. Smith*, 10 Wend. (N. Y.) 377.

*North Carolina*. — *Garrard v. Dollar*, 4 Jones L. (N. Car.) 177; *Parker v. Smith*, 64 N. Car. 291.

*South Carolina*. — *Lanneau v. Ervin*, 12 Rich. L. (S. Car.) 38; *Reigne v. Dewees*, 2 Bay. (S. Car.) 405; *State Bank v. Vaughan*, 2 Hill L. (S. Car.) 556.

*Tennessee*. — *Turner v. Carter*, 1 Head (Tenn.) 525.

*Texas*. — *Cartwright v. Roff*, 1 Tex. 78; *Long v. Wortham*, 4 Tex. 381; *Guest v. Rhine*, 16 Tex. 549; *Watson v. Newsham*, 17 Tex. 437; *Trabue v. Stonum*, 20 Tex. 454; *Ricks v. Pinson*, 21 Tex. 508; *Tarrant County v. Lively*, 25 Tex. Supp. 399; *Niblett v. Shelton*, 28 Tex. 551; *Johnson v. Dowling*, 1 Tex. Civ. App. Cas., § 1090.

*Vermont*. — *Webb v. Webb*, 16 Vt. 636; *Bradley v. Chamberlain*, 31 Vt. 468; *Sweet v. McDaniels*, 39 Vt. 272; *Morey v. King*, 49 Vt. 304.

*Virginia*. — *M'Million v. Dobbins*, 9 Leigh (Va.) 422.

*United States*. — *Brown v. Van Braam*, 3 Dall. (U. S.) 348; *Raymond v. Danbury, etc., R. Co.*, 14 Blatchf. (U. S.) 133.

*England*. — *Green v. Hearne*, 3 T. R.

301; *Stephens v. Pell*, 2 D. P. C. 629; *King v. Beak*, 4 Jur. 633.

In *Ricks v. Pinson*, 21 Tex. 508, the court, after laying down the rule that, on a judgment by default, the facts set out in the petition are to be taken as proved, went on to lay down some qualifications to this general rule, and said: "A judgment by default on liquidated demands admits the whole of the claim, and if there be a mistake or omission apparent upon the instrument, the clerk has competent authority and should make the correction." *Todd v. Caldwell*, 10 Tex. 241. Where the demand is unliquidated the judgment 'admits that something is due, but disputes the amount.' Hence in 'an action of assumpsit for goods sold or work done, and materials found on various occasions, a plaintiff is not, in strictness, by a judgment by default, relieved from the necessity of proving the delivery of each article, or the extent of the work done,' etc. 3 Chitty's Gen. Pr. 673. Formerly judgments by default, in England, were final only in an action of debt, but in other actions the courts were strict in limiting the cases in which reference to the master would be substituted for a writ of inquiry. It was allowed in actions on bills of exchange, promissory notes, etc., where it was only necessary to compute the amount of the principal and interest. But it was refused where the action was on a bill of exchange for foreign money, or on foreign judgments, etc. But by the common-law Procedure Act of 1852, in actions where the damages are substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the judge may direct the amount to be ascertained by a master of the court. *Wayne on Damages*, 320, 19 Law Library, 6th series."

**Damages Fixed.** — Where the plaintiff's claim for damages is precise and fixed by an agreement of the parties, or can be rendered certain by mere computation, there is no need for proof, as the judgment by default admits the claim. *Parker v. Smith*, 64 N. Car. 291. And so where the amount is shown in the written pleadings there is no necessity for a jury. *Tarrant County v. Lively*, 25 Tex. Supp. 399.

**Damages Uncertain.** — In the case of

the plaintiff's right to maintain an action and consequently to recover some damages,<sup>1</sup> the only debatable issue left for the examination or consideration of the jury is the amount of damages sustained.<sup>2</sup> Hence after a judgment by default the jury cannot, no matter what the proof, find for the defendant,<sup>3</sup> and upon the execution of the writ some damages at least must be found.<sup>4</sup>

**XII. RIGHTS OF PARTIES AT INQUEST — 1. Generally.** — The defendant is no more compromised by a judgment by default than to preclude him from denying the plaintiff's right to nominal damages.<sup>5</sup> Subject to this qualification both parties have a right to be heard,<sup>6</sup> and upon the execution of the writ matters

*Green v. Hearne*, 3 T. R. 301, the rule is laid down by Buller, J., that "when a defendant suffers judgment to go by default, he admits the cause of action. And thus far an action on a bill of exchange and an action for money had and received are alike; but beyond that there is no similarity. For in the latter the defendant only admits something to be due; and, as the demand is uncertain, the plaintiff must prove the debt before the jury. But in the former, as the bill of exchange is set out in the record, the defendant, by suffering judgment to go by default, admits that he is liable to the amount of it." See also *Webb v. Webb*, 16 Vt. 636; *Hyde v. Moffat*, 16 Vt. 271.

1. *Turner v. Carter*, 1 Head (Tenn.) 525; *Reigne v. Dewees*, 2 Bay (S. Car.) 405; *State Bank v. Vaughn*, 2 Hill L. (S. Car.) 556; *M'Million v. Dobbins*, 9 Leigh (Va.) 422.

2. *Alabama*. — *Randolph v. Sharpe*, 42 Ala. 271; *Sterrett v. Kaster*, 37 Ala. 369. *Illinois*. — *Cook v. Skelton*, 20 Ill. 111; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522.

*Indiana*. — *Briggs v. Sneghan*, 45 Ind. 21.

*New Jersey*. — *White v. Hunt*, 6 N. J. L. 330; *Creamer v. Dikeman*, 39 N. J. L. 195.

*New York*. — *Foster v. Smith*, 10 Wend. (N. Y.) 377.

*North Carolina*. — *Roulhac v. Miller*, 90 N. Car. 176; *Parker v. Smith*, 64 N. Car. 291; *Parker v. House*, 66 N. Car. 374.

*South Carolina*. — *State Bank v. Vaughn*, 2 Hill L. (S. Car.) 556; *Lanneau v. Ervin*, 12 Rich. L. (S. Car.) 38.

*Tennessee*. — *Fowlkes v. Webber*, 8 Humph. (Tenn.) 533; *Turner v. Carter*, 1 Head (Tenn.) 520.

*Vermont*. — *Bradley v. Chamberlain*, 31 Vt. 468.

*Virginia*. — *M'Million v. Dobbins*, 9 Leigh (Va.) 422.

*United States*. — *Brown v. Van Braam*, 3 Dall. (U. S.) 348.

In *Parker v. House*, 66 N. Car. 374, which was a suit upon a constable's bond, the complaint specifying the different claims and their amounts alleged to have been lost by negligence, an interlocutory judgment was rendered for want of an answer, and in assessing damages it was insisted that they were ascertained by the undenied specifications in the complaint and that other evidence before the jury was not required. But the court said that "the defendant, by failing to answer, admits this allegation [the want of due diligence in making the collection], but does not admit the amount of damages, for this is the question to be determined upon proofs." See also *Roulhac v. Miller*, 90 N. Car. 174; *Parker v. Smith*, 64 N. Car. 291.

3. *Ellis v. State*, 2 Ind. 265; *Reigne v. Dewees*, 2 Bay (S. Car.) 405; *Briggs v. Sneghan*, 45 Ind. 23.

4. *Loeber v. Delahaye*, 7 Iowa 478; *Bridges v. Stephenson*, 10 Ill. App. 371; *Hanks v. Evans*, Hard. (Ky.) 49; *Reigne v. Dewees*, 2 Bay (S. Car.) 405; *M'Million v. Dobbins*, 9 Leigh (Va.) 422; *Hickman v. Baltimore, etc., R. Co.*, 30 W. Va. 300; *Frazier v. Lomax*, 1 Cranch (C. C.) 328; *Dods v. Evans*, 15 C. B. N. S. 621, 109 E. C. L. 621.

Upon executing a writ of inquiry on a judgment by default, the jury must find at least one mill in damages. *Frazier v. Lomax*, 1 Cranch (C. C.) 328.

5. *Willson v. Willson*, 25 N. H. 229; *Briggs v. Sneghan*, 45 Ind. 23.

6. *Turner v. Carter*, 1 Head (Tenn.)

of mitigation on the one hand, and of aggravation on the other, become the very gist of the inquiry.<sup>1</sup> Either party may except to any legal opinion of the presiding judge instructing the jury upon what principles they should be governed,<sup>2</sup> and may preserve the rulings of the court upon a bill of exceptions.<sup>3</sup>

**2. Right of Plaintiff—Production of Proof.**—After a default the proceeding is substantially in the hands of the plaintiff. While the default continues he has nothing to do but prove his damages,<sup>4</sup> and in doing this his proof will, of course, vary according

520; *Briggs v. Sneghan*, 45 Ind. 21; *Parker v. Smith*, 64 N. Car. 291.

1. *Sterrett v. Kaster*, 37 Ala. 369.

2. *Crommett v. Pearson*, 18 Me. 345.

3. *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Cook v. Skelton*, 20 Ill. 107; *Briggs v. Sneghan*, 45 Ind. 14.

**Maryland.**—In *Green v. Hamilton*, 16 Md. 330, it was said that the Act of 1794, c. 46, placed the inquiry on the same footing with other jury trials; that "the evidence is to be given in open court in the same manner, and under the same regulations;" and that the parties may pray the opinion of the court and take bills of exception, and may appeal, as in other cases.

4. *Loeber v. Delahaye*, 7 Iowa 478; *Thompson v. Lumley*, 7 Daly (N. Y.) 80.

In *Lanneau v. Ervin*, 12 Rich. L. (S. Car.) 38, where the declaration contained counts against the defendant as maker of a note, drawer of a bill of exchange, guarantor, etc., it was held, on the execution of a writ of inquiry, that the plaintiff showed the amount of damages to which he was entitled by producing a sealed note, drawn by a third person and proved to have been indorsed by the defendant in blank.

**In an Action of Debt on a Replevin Bond**, where general performance was pleaded, the replication stated that a writ of replevin had been prosecuted, etc., and that a judgment was rendered *de retorno habendo*, etc. After a judgment by default against the defendant, there being no rejoinder to the replication, there was a writ of inquiry to assess damages, when the plaintiff offered to read from the record *oyer* of the replevin bond upon which the suit was brought, to which the defendant objected. It was held that the original bond need not be produced, but that it might be read from the record, because the original replevin bond was an office

paper in the county court, taken and filed by the clerk who issued the writ. *Reid v. Wethered*, 1 Har. & J. (Md.) 448.

**In Actions for Malicious Prosecution**, where the amount of the pecuniary equivalent for the plaintiff's loss of reputation and mental suffering is not susceptible of exact proof, it seems that the plaintiff, upon assessment of the damages—his cause of action being admitted—is not required to give evidence of damage, but the jury may give such damages as they think the injury warrants, including punitive damages; but if the plaintiff sees fit to give evidence as to such points, the defendant may controvert it. *Thompson v. Lumley*, 7 Daly (N. Y.) 74, *affirmed* in 64 N. Y. 631.

**In Assumpsit for Goods Sold and Delivered**, where the specific articles were not set forth in the declaration, it was held that upon a judgment by default the plaintiffs were entitled to nominal damages without introducing any proof, but in seeking substantial damages they were not relieved from the necessity of proving the delivery of each article and the value thereof. *Parker v. Smith*, 64 N. Car. 291.

**In a Suit upon an Account** for the recovery of money, where the defendant suffers default for the want of an affidavit of merits, and at the defendant's request a jury is called to assess the plaintiff's damages, the affidavit filed with the declaration is competent evidence, under section 37 of the *Illinois* Practice Act, to prove the amount due upon such account. *Central Illinois Coal Co. v. Field*, 17 Ill. App. 260.

**Production of Instrument.**—In *Guardians of Poor v. Robinson*, 4 Q. B. 919, 45 E. C. L. 919, the declaration alleged that the defendant became the purchaser "for a certain large sum of money, to wit, the sum of £172," and it was questioned whether, on the ex-

to the nature of his action. He may, unless contented with nominal damages, introduce evidence for the purpose of enhancing the damages.<sup>1</sup>

**Burden of Proof.** — And the onus of proof as to the amount of damages is upon the plaintiff.<sup>2</sup>

**Open and Close.** — The plaintiff is always entitled to the open and close in the argument, in all actions of open damages, let the state of the pleadings be what it will, on the ground that he must go forward in showing damages.<sup>3</sup>

**3. Right of Defendant** — *a.* **GENERALLY** — **Contesting Amount of Damages.** — The defendant at the inquest has the right to show

execution of a writ of inquiry, it was necessary to produce the contract for ascertaining the damages, or whether the allegation as to the sum was material and should be considered admitted by a demurrer.

So it was questioned in *King v. Beak*, 4 Jur. 633, whether it was necessary for the plaintiff to produce a promissory note at the inquest.

It was held in *Lane v. Mullins*, 2 Q. B. 254, 42 E. C. L. 662, that where the plaintiff in an action upon a bill of exchange had obtained judgment on demurrer to the plea, he might, upon execution of a writ of inquiry, recover the amount of the bill without producing it in court.

*Green v. Hearne*, 3 T. R. 301, was an action on a bill of exchange against the acceptor, who suffered judgment to go by default, and at the execution of the writ of inquiry the bill was produced, but it did not appear to have been accepted. Upon a rule to show cause the court stated the rule of law on the subject as follows: "When a defendant suffers judgment to go by default he admits the cause of action, and thus far an action on a bill of exchange and an action for money had and received are alike; but beyond that there is no similarity. For in the latter the defendant only admits something to be due; and as the demand is uncertain the plaintiff must prove the debt before the jury [of inquest]. But in the former, as the bill of exchange is set out on the record, the defendant, by suffering judgment to go by default, admits that he is liable to the amount of it; here, then, the defendant has admitted that he did accept the particular bill of exchange set out in the declaration; and the only reason for producing it to the jury, on executing the writ of inquiry, is to see whether or not any

part of it has been paid." *Quoted in Sweet v. McDaniels*, 39 Vt. 272.

1. See *Chicago, etc., R. Co. v. Ward*, 16 Ill. 531; *Morton v. Bailey*, 2 Ill. 213; *Hartness v. Boyd*, 5 Wend. (N. Y.) 563.

**No Evidence Necessary.** — After a default where the action is for the purpose of recovering a definite sum of money which is capable of being rendered certain, no evidence is necessary upon the assessment of damages. *Massachusetts Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614.

In an action against a sheriff for not paying over a collected execution the defendant set the case down "not for the jury," and applied for a continuance, which was refused, and after judgment another case was set down for an assessment of damages. Under such circumstances it was held that upon the assessment of damages it was not necessary for the plaintiff to show his right to recover by evidence, since such right had been decided by the judgment entered in his favor, and upon proof that the sheriff had collected the execution and had failed to pay the same over, he was entitled to recover the full amount of the execution. *Bradley v. Chamberlain*, 31 Vt. 468.

Where a defendant allows judgment to go by default in an action of assumpsit to recover a specified sum of money under a special count, the declaration containing also counts for labor and work and on an account stated, it is not necessary for the plaintiff, at the execution of a writ of inquiry, to give any evidence of the amount due him, as, in the absence of evidence, the jury ought to find for him for the amount claimed in the declaration. *King v. Beak*, 4 Jur. 633.

2. *Parker v. Smith*, 64 N. Car. 291.

3. *Webb v. Webb*, 16 Vt. 636; *Hyde v. Moffat*, 16 Vt. 271.



that the plaintiff is entitled to no more than nominal damages.<sup>1</sup> For such purpose he may call witnesses to show mitigating circumstances, or give any evidence which may, by reducing the amount of recovery, aid the jury in fixing a just and adequate amount.<sup>2</sup>

**Precluded from Contesting the Merits.** — After having permitted judgment by default to go against him he has no right, upon the

1. *Turner v. Carter*, 1 Head (Tenn.) 525.

Upon inquisition the defendant is at liberty, by cross-examining the plaintiff's witnesses, and by other evidence in reply, to disprove anything which was necessary for the plaintiffs to establish in order to ascertain their damages; and so it was held, where in an action of assumpsit the plaintiffs introduced evidence to prove the sale and delivery of goods, that the court erred in refusing to allow the defendant to introduce evidence in reply. *Parker v. Smith*, 64 N. Car. 291.

2. *Bridges v. Stephepson*, 10 Ill. App. 371; *Cook v. Skelton*, 20 Ill. 111; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *South Ottawa v. Foster*, 20 Ill. 296; *North v. Kizer*, 72 Ill. 173; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Briggs v. Sneghan*, 45 Ind. 14; *Saltus v. Kipp*, 5 Duer (N. Y.) 646; *Lane v. Gilbert*, 9 How. Pr. (N. Y. Supreme Ct.) 150; *Hays v. Berryman*, 6 Bosw. (N. Y.) 679; *Thompson v. Lumley*, 7 Daly (N. Y.) 80; *Bates v. Loomis*, 5 Wend. (N. Y.) 134; *Gilbert v. Rounds*, 14 How. Pr. (N. Y. Supreme Ct.) 46.

#### **Introduction of Evidence by Defendant.**

— It was held in *Green v. Willis*, 1 Wend. (N. Y.) 78, that upon an inquest the defendant loses his right to challenge or to produce testimony and examine witnesses on his behalf, but that he is entitled to appear, to cross-examine the plaintiff's witnesses, to raise objection to the plaintiff's right of recovery, and to take exceptions to the decisions and opinion of the judge. In commenting upon this decision in *Thompson v. Lumley*, 7 Daly (N. Y.) 78, Judge Daly said that so far as his knowledge extended it had not been the practice to allow the defendant to call witnesses.

**Under the New York Code** it was held that the same proceedings may be had in assessing damages upon a default for failure to answer as were allowed under the old practice of executing a writ of inquiry, and that a defendant

may call witnesses and prove any matter which properly goes to mitigate damages. *Saltus v. Kipp*, 5 Duer (N. Y.) 646.

**Assault and Battery.** — So it has been held that the defendant may give evidence of mitigating circumstances before the jury on an assessment in an action of assault and battery. *Lane v. Gilbert*, 9 How. Pr. (N. Y. Supreme Ct.) 150; *Hays v. Berryman*, 6 Bosw. (N. Y.) 679; *Saltus v. Kipp*, 5 Duer (N. Y.) 647.

**Action of Replevin.** — Where a replevin suit had been struck off upon the motion of the plaintiff and an action on the replevin bond instituted, and thereupon the defendant suffered judgment to go by default, it was held permissible, upon an inquest of damages, for him to show, in mitigation of damages, that he had title to the articles replevied. *Belt v. Worthington*, 3 Gill & J. (Md.) 247.

**Action of Libel.** — In *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 56, Spencer, J., said, in effect that the defendant was entitled to give evidence to mitigate the damages in an action of libel; that the plaintiff, in consequence of the default, was entitled to nominal damages; and that, as respects the real damages, the defendant was at liberty to urge to the jury that the innuendoes in the declaration were not warranted by the context. But this was a dissenting opinion, the majority of the court holding that the fact of the publication of the libel and the truth of the innuendoes was admitted upon the default. Quoted in *Thompson v. Lumley*, 7 Daly (N. Y.) 79, where the court held that in actions for defamation and malicious prosecution where the injury is to the reputation and character, and the cause of action is admitted, the jury are enabled to judge from the defamatory words, or the nature of the charge upon which the defendant was arrested and prosecuted, what damages ought to be given, but that if the plaintiff, upon the assessment, is unwilling

inquest, to offer any evidence in denial of the plaintiff's right of action,<sup>1</sup> or plead to the merits of the action,<sup>2</sup> or introduce any substantive defense.<sup>3</sup>

to leave the case with the jury upon the charge alone, but calls witnesses to prove all the facts and circumstances, then the defendant is equally entitled to call witnesses as to the facts and circumstances controverting such as may be so proved; in other words, whatever the plaintiff may prove the defendant is at liberty to disprove.

1. *Dunlap v. Horton*, 49 Ala. 412; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Cook v. Skelton*, 20 Ill. 107; *Bridges v. Stephenson*, 10 Ill. App. 371; *Briggs v. Sneghan*, 45 Ind. 14; *Froust v. Bruton*, 15 Mo. 619; *Hartness v. Boyd*, 5 Wend. (N. Y.) 563; *Foster v. Smith*, 10 Wend. (N. Y.) 377; *Garrard v. Dollar*, 4 Jones L. (N. Car.) 177; *Lanneau v. Ervin*, 12 Rich. L. (S. Car.) 38; *Bradley v. Chamberlain*, 31 Vt. 468; *Chamberlin v. Murphy*, 41 Vt. 110; *M'Million v. Dobbins*, 9 Leigh (Va.) 422; *Stephens v. Pell*, 2 D. P. C. 629.

In *Trover*, after judgment by default or *nil dicit*, evidence which can only mitigate the damages by subverting the judgment is inadmissible. *Curry v. Wilson*, 48 Ala. 638.

**Evidence Showing No Cause of Action.**—It seems that the defendant cannot, upon an assessment of damages, give evidence in mitigation thereof where the direct effect of such evidence is to disprove the facts alleged by the traversable allegations of the complaint and to show that no cause of action exists. *Thompson v. Lumley*, 7 Daly (N. Y.) 74, *affirmed* in 64 N. Y. 631.

**Evidence Showing No Contract.**—“When an action is brought upon a contract set out in the declaration, and there is a default on the assessment of damages, no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth, and concludes the defendants from questioning it.” *Foster v. Smith*, 10 Wend. (N. Y.) 377.

**Evidence in Discharge of Action.**—The defendant is restricted in his defense and evidence to the mitigation of damages, and cannot offer evidence in the discharge of the action which he has confessed, nor can he show payments

or rely upon discounts. *Lanneau v. Ervin*, 12 Rich. L. (S. Car.) 38; *Carleton v. Byington*, 17 Iowa 580.

Neither can the defendant show accord and satisfaction after the court has rendered interlocutory judgment and referred the assessment of damages to the clerk. *Seaver v. Wilder*, (Vt. 1897) 35 Atl. Rep. 351.

2. *Sterrett v. Kaster*, 37 Ala. 369; *Ewing v. Peck*, 17 Ala. 339; *Curry v. Wilson*, 48 Ala. 638.

**Evidence Amounting to a Plea in Bar.**—In an inquest of damages upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action can be given in evidence to reduce damages. *Garrard v. Dollar*, 4 Jones L. (N. Car.) 175.

3. *South Ottawa v. Foster*, 20 Ill. 296; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Briggs v. Sneghan*, 45 Ind. 22; *Turner v. Carter*, 1 Head (Tenn.) 520.

In *Hartness v. Boyd*, 5 Wend. (N. Y.) 563, in passing upon the question as to the right of the defendant at the inquest, the court said: “I am of opinion that the right of a defendant on an inquest does not extend so far as to allow him to introduce a substantive defense, that is, a defense which does not controvert the evidence given on the part of the plaintiff to sustain his action. If the defendant could have shown, by a cross-examination of the witness, that the note had not in fact been made, or made under circumstances which did not render it obligatory upon the maker, he had a right to do so; but he proposed to go further; he offered to show matter in defense. This is not allowed to a defendant when an inquest is taken. He may overthrow by a cross-examination what has been testified to by the witness on his direct examination; but he cannot, by the witness called by the plaintiff, establish a substantive defense. The very object of the rule in reference to inquests is to preclude a defense. If there be a defense, an inquest must be prevented by filing an affidavit of merits.”

**Evidence Constituting Partial Defense.**—A defendant who has demurred to a complaint, and whose demurrer has been overruled, cannot, on an assessment of damages, be permitted to

*b.* RIGHT OF CROSS-EXAMINATION. — The defendant is also at liberty to appear at the inquest and cross-examine witnesses called on behalf of the plaintiff,<sup>1</sup> and may overthrow by cross-examination what has been testified to by a witness in his direct examination.<sup>2</sup>

*c.* RIGHT TO INSTRUCTIONS. — Where the inquest is taken in open court the defendant may ask for instructions as to the proper measure of damages.<sup>3</sup> And should improper testimony or wrong instructions be given upon an inquest of damages, the proper course is to apply to the court to set aside the inquisition and grant a new inquest.<sup>4</sup>

**XIII. OBJECTION TO EXECUTION OF WRIT, AND SETTING ASIDE INQUEST** — 1. **Objection to Assessment** — *a.* **EXCESSIVE DAMAGES** — **As a Ground of Objection.** — The court, in setting aside an assessment on the ground that excessive damages have been awarded, is governed by somewhat the same rules as in setting aside verdicts for such cause.<sup>5</sup> Where the excessive finding in damages

prove matters in their nature giving a right to reduce the amount of the plaintiff's claim, and as such constituting a partial defense. To give a right to prove and be allowed the benefit of them, they must be set up by answer as a defense. *Ford v. David*, 1 Bosw. (N. Y.) 569.

**Evidence Affecting Validity of Contract.** — He will not be allowed to show matters in defense of the action, or affecting the validity of the contract upon which suit is brought. *Sweet v. McDaniels*, 39 Vt. 272; *Briggs v. Gleason*, 32 Vt. 472.

1. *Morton v. Bailey*, 2 Ill. 213; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Cook v. Skelton*, 20 Ill. 107; *South Ottawa v. Foster*, 20 Ill. 296; *North v. Kizer*, 72 Ill. 173; *Briggs v. Sneghan*, 45 Ind. 22; *Lyman v. Bechtell*, 58 Iowa 755; *Carleton v. Byington*, 17 Iowa 579; *Cook v. Watters*, 4 Iowa 72; *Loeber v. Delahaye*, 7 Iowa 478; *Wilkins v. Treynor*, 14 Iowa 393; *Keeney v. Lyon*, 10 Iowa 546; *Hutchinson v. Sangster*, 4 Greene (Iowa) 340; *Hartness v. Boyd*, 5 Wend. (N. Y.) 563; *Williams v. Cooper*, 3 D. P. C. 204.

An Iowa Statute provided that "the party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose." It was held that the defendant could not introduce evidence for the purpose of reducing the damages, nor address the jury, nor comment upon the evidence, nor was

he entitled to instructions. *Cook v. Watters*, 4 Iowa 72. See also *Loeber v. Delahaye*, 7 Iowa 478.

In *Hutchinson v. Sangster*, 4 Greene (Iowa) 343, where judgment was rendered as the result of a defective answer and not in default of any answer at all, it was held that the defendant's counsel had a right to address the jury on the question of damages, and had a right to claim instructions from the court as to the true measure of damages. The constitutionality of the statute being raised in that case, the court held that such a statute should be restrained to its closest limits, and should only be enforced where a case came fully within its requirements.

2. *South Ottawa v. Foster*, 20 Ill. 296; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Briggs v. Sneghan*, 45 Ind. 22; *Hartness v. Boyd*, 5 Wend. (N. Y.) 563.

2. *South Ottawa v. Foster*, 20 Ill. 296; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Cook v. Skelton*, 20 Ill. 107; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *Briggs v. Sneghan*, 45 Ind. 14.

4. *Morton v. Bailey*, 2 Ill. 213; *Cairo, etc., R. Co. v. Holbrook*, 72 Ill. 422; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Cook v. Skelton*, 20 Ill. 107.

5. In *Benson v. Frederick*, 3 Burr. 1845, the court refused to quash a writ of inquiry on the ground that the damages returned were excessive. This was probably a concession to the peculiar circumstances of the case.

is apparent, and beyond the amount allowed by law, the court should set it aside<sup>1</sup> unless the plaintiff will release the excess.<sup>2</sup>

**Motion on Affidavits.** — Motions to set aside an inquisition for excessive damages must be made on affidavits, to be produced at the time the rule is granted.<sup>3</sup>

*b.* MISTAKE. — If, in discharge of his duty in assessing damages, the clerk should allow too much or too little, the court under whose direction the assessment is made will, upon motion, correct the same;<sup>4</sup> and to that court, and not to the appellate

1. Where the court has a right to assess damages without the intervention of a jury, and yet calls one to "inform the conscience of the court," an excessive finding in damages should be set aside *ex officio* by the court. *Dicken v. Smith*, 1 Litt. (Ky.) 209. Likewise where the criterion of damages is fixed by law, and the jury, upon an inquiry after a judgment by default, return too great an amount. *White v. Green*, 3 T. B. Mon. (Ky.) 155.

**Nature of the Objection.** — The fact that the jury, on an inquisition in an action of trover, assessed more damages than the evidence would warrant is nothing but a reason for a new trial; it is no ground for striking out the judgment for fraud, deceit, surprise, or irregularity, under the statute. *Green v. Hamilton*, 16 Md. 318.

**Verdict Below Jurisdiction of Court.** — When a judgment by default has been entered it is error in the court to enter a judgment of *non pros*, because the verdict or inquisition of the jury was for a sum below the jurisdiction of the court. The judgment by default is conclusive of the question of jurisdiction. *Cooper v. Roche*, 36 Md. 563.

**Damages Beyond Amount Laid in Declaration.** — If the jury on a writ of inquiry assess more damages than are laid in the declaration, and judgment be entered accordingly, it is error. *Cheveley v. Morris*, 2 W. Bl. 1300.

So where the plaintiff, in his declaration and in his affidavit for attachment, set up a claim for one amount, but in the *ad damnum* clause of the declaration claimed damages for a much larger amount, he could recover, upon a writ of inquiry after default, only the former amount with interest. *Snow v. Grace*, 25 Ark. 570.

2. *Lewis v. Cooke*, 1 Har. & M. (Md.) 159.

In *Maryland*, under the Acts of 1809, c. 153, and 1811, c. 161, where, by an

inquisition on an inquiry at bar, the jury assessed a larger amount of damages than was laid in the declaration, and judgment was rendered for the sum found by the inquisition, on an appeal by the defendant the court of appeals permitted the plaintiff to release the excess and enter the release on the record, and the record was amended by entering a judgment for the damages laid in the declaration. *Harris v. Jaffray*, 3 Har. & J. (Md.) 543.

3. *Williams v. Reeves*, 2 Chit. Rep. 218, 18 E. C. L. 313. See also *Jennings v. Asten*, 5 Duer (N. Y.) 695.

Where a motion was made without affidavit on the last day of the term, and the rule was afterwards drawn up on an affidavit sworn before a judge in vacation, the court discharged the rule with costs. *Williams v. Reeves*, 2 Chit. Rep. 218, 18 E. C. L. 313.

4. *Sims v. Hugsby*, 1 Ill. 414; *Wilcox v. Woods*, 4 Ill. 51; *Smith v. Lusk*, 4 Ill. 411; *Clemson v. State Bank*, 2 Ill. 45; *Burt v. Hughes*, 11 Ala. 571; *Mechanics' Bank v. Minthorne*, 19 Johns. (N. Y.) 244.

Where the District Court ordered a judgment on a promissory note, the amount of which the clerk was directed to assess, and the clerk in making the judgment entry left a blank for the amount, which remained for fourteen months and was then filled up by the clerk in vacation, it was held that the filling of the blank at such a time could only be considered as an irregularity, and that the same could not be inquired into in a collateral proceeding. *Lind v. Adams*, 10 Iowa 398.

**Correction Nunc Pro Tunc.** — Under a statute authorizing the clerk to make an assessment of damages in certain actions upon default, etc., if a mistake is made by him in the sum of the judgment, whether he makes it too much or too little, the court may correct the

court, the application should be made.<sup>1</sup>

c. PRESUMPTION OF LEGAL ASSESSMENT. — A judgment by default will not be reversed because it does not appear by the record how the damages were assessed, the presumption of law being that they were legally assessed unless the record shows the contrary.<sup>2</sup>

2. Setting Aside Inquest — a. GROUNDS GENERALLY. — The grounds upon which an objection to the execution of a writ of inquiry will be allowed are somewhat analogous to the grounds for a new trial,<sup>3</sup> and where a party is dissatisfied with the amount of damages assessed, or where it appears that injustice has been done, he may move the court to set aside the assessment or inquisition,<sup>4</sup> or move the court for its cor-

error *nunc pro tunc*. *Burt v. Hughes*, 11 Ala. 571; *Mechanics' Bank v. Minthorne*, 19 Johns. (N. Y.) 244.

Ordering Reassessment. — The court may order the clerk to make another assessment. *Burr v. Reeves*, 1 Johns. (N. Y.) 507.

After an interlocutory judgment in an action against the indorser of a promissory note, the clerk of the court made a mistake in the assessment of the damages by calculating the interest for one year less than the actual time; and the attorney of the plaintiffs, without observing the mistake, filed the report of the assessment and entered final judgment thereon, and on receiving payment of the amount of the damages and costs, according to such assessment, acknowledged satisfaction of that judgment, which was entered of record. Afterwards, on paying over the money to the plaintiffs, the mistake was discovered, but the defendant refused to rectify it. The court, on motion for the purpose, ordered the entry of satisfaction of that judgment, and all proceedings in the cause subsequent to the interlocutory judgment, to be vacated, and the report of the clerk of the assessment of damages, the record of the judgment, and the satisfaction thereof, to be taken off the files of the court and canceled, and the damages to be reassessed by the clerk, allowing the defendant credit for the amount paid by him. *Mechanics' Bank v. Minthorne*, 19 Johns. (N. Y.) 244.

1. *Sims v. Hugsby*, 1 Ill. 414.

2. *Fairfield v. Burt*, 11 Pick. (Mass.) 244; *Jarvis v. Blanchard*, 6 Mass. 4; *Collins v. Walker*, 55 N. H. 438; *Howard v. Tomlinson*, 27 Mich. 168.

In *Phillips v. Kerr*, 26 Ill. 215, it was held that under the *Illinois Practice Act* the court below had the right, upon entering a default, to hear evidence on the assessment of damages without impaneling a jury for the purpose. And when a default is entered and the damages have been assessed by the court, the same presumptions must prevail that necessary evidence was heard to support the finding as if it had been made by a jury.

In *New York*, where an unverified complaint stated as a cause of action a promissory note made by the defendant, it was held not necessary that the judgment roll should state that the note was produced to the clerk, and that he assessed the amount due thereon. *American Exch. Bank v. Smith*, 6 Abb. Pr. (N. Y. Super. Ct.) 1. Compare *Dutch Reformed Church v. Wood*, 8 Barb. (N. Y.) 421, where it was held that unless so shown by the record, there could be no presumption that there was any inquisition or assessment of damages taken either by the court or by reference to a jury.

3. *Green v. Hamilton*, 16 Md. 330.

4. *Ward v. Haight*, 3 Johns. Cas. (N. Y.) 80; *Sharp v. Dusenbury*, 2 Johns. Cas. (N. Y.) 117; *Bossout v. Rome*, etc., R. Co., 131 N. Y. 40; *Green v. Hamilton*, 16 Md. 330; *Perry v. Goodwin*, 6 Mass. 499; *Beam v. Laycock*, 3 Ill. App. 44; *McCord v. Mechanics' Nat. Bank*, 84 Ill. 50; *Motsinger v. Coleman*, 16 Ill. 74; *Chicago*, etc., R. Co. v. *Ward*, 16 Ill. 522.

Should Any Irregularities Take Place, such as want of notice, improper persons impaneled as jurors, etc., the proper course is to apply, upon affidavit of the facts, to the Circuit Court

rection.<sup>1</sup> Such irregularities must be pointed out as will, in the opinion of the court, constitute an objection impairing the substantial rights of the parties at the inquest;<sup>2</sup> otherwise the court will disregard such objection.<sup>3</sup>

to set aside the inquest. *Vanlandingham v. Fellows*, 2 Ill. 234; *Moore v. Purple*, 8 Ill. 149.

**Failure to Return Writ.**—Where a writ of inquiry has been executed and the sheriff fails to return the same, the court will grant a rule absolute for the return of the writ. *Stockdale v. Hansard*, 3 Jur. 1174.

**Under the New York Practice**, after the completion of the trial, a motion may be made to set aside the inquisition. But the motion will not be granted upon the same ground as a new trial would be, for the mere admission of improper evidence. It is a motion addressed largely to the discretion of the court in which the proceeding takes place and when refused, as not tending to, the ends of justice, a judgment entered upon the inquisition does not become one which is reviewable by the court upon legal ground. *Bos-sout v. Rome*, etc., R. Co., 131 N. Y. 40, where the court said: "There would seem to be no doubt that under the well-established rule, an appeal might be taken from the order of the special term refusing the motion to set aside the inquisition to the general term of the court, as the judicial discretion exercised by the court in granting or refusing the motion is not confined to the special term. But we do not see that any provision is made for an appeal to this court from the order or judgment of the general term in such a proceeding."

**Entering a Plea for the Defendant**, upon setting aside a writ of inquiry, virtually sets aside the office judgment upon which the writ of inquiry had been awarded. *Adams v. Bradshaw*, Hard. (Ky.) 564.

1. *Riely v. Barton*, 32 Ill. App. 528; *Motsinger v. Coleman*, 16 Ill. 71; *Chicago*, etc., R. Co. v. *Ward*, 16 Ill. 522.

2. **For Misconduct** on the part of the sheriff or jurors an assessment of damages may be set aside. *Joannes v. Fisk*, 3 Robt. (N. Y.) 710.

**Where the Sheriff Refuses to Set Aside a Juror** against whom a valid objection is urged the inquest may be set aside. *Butler v. Kelsey*, 15 Johns. (N. Y.) 177.

**Private Objection to Jurors.**—If the

plaintiff has any objection to the jurors he must make it openly, and if he states it privately to the sheriff, who thereupon discharges a juror, the inquisition will be set aside. *Butler v. Kelsey*, 15 Johns. (N. Y.) 177.

**Sheriff's Instructions.**—The court will not set aside the inquest on the ground that the sheriff directed the jury to consider the poverty of the defendant in mitigation of damages. *Kingston v. Haychurch*, 1 Chit. Rep. 644, 18 E. C. L. 188.

If the sheriff, in executing the writ, misdirects the jury as to the amount of damages that will carry costs, it does not constitute such an error as will be sufficient to set aside the verdict. *Grater v. Collard*, 2 Jur. 568.

3. The verdict of the jury in the execution of a writ of inquiry by the sheriff, upon the defendant's failure to answer, will not be set aside merely because the persons summoned as jurors were not on the list of jurors selected by the commission of jurors, no objection having been made on executing the writ, and where it does not appear that such persons were not fit or competent jurors. *Jennings v. Asten*, 5 Duer (N. Y.) 695.

*M'Collum v. Barker*, 3 Johns. (N. Y.) 153, was an action in assumpsit. The defendant below suffered default, and the sheriff was commanded that he cause to come before the judges and assistant justices, at the court-house, etc., on a certain date, etc., twelve, etc., to inquire and assess damages, etc. On the same day both parties appeared before the judges, and, the jury being sworn, damages were assessed upon which final judgment was entered. It was assigned for error that there was no writ of inquiry or inquisition, or return thereto, on the record in the clerk's office of the said Court of Common Pleas. In passing upon this question the court said: "As the assessment of damages in the above case was only to inform the conscience of the court, who might themselves have assessed the damages without the intervention of a jury, we do not perceive any objection to the proceeding which took place. If the court might

**Admission and Exclusion of Testimony.** — Where improper testimony is admitted,<sup>1</sup> or where pertinent testimony is excluded, upon the assessment, the party aggrieved may file exceptions thereto.<sup>2</sup>

**b. OBJECTION, HOW TAKEN, AND PROCEEDING THEREON.** — The proper practice in such cases is to file affidavits showing all the evidence heard at the inquest, and ask that the inquisition be set aside and a new writ of inquiry be issued, or that the inquest and default be both set aside and the party let in to make his defense.<sup>3</sup> If, upon a proper case thus presented, the court below should refuse to set aside the inquest, the appellate court may correct such erroneous decision, where there is a bill of exceptions showing all the evidence heard at the inquest.<sup>4</sup>

**Writ of Error.** — As we have before seen, a party must object by motion to set aside the assignment, and in case of error or overestimate of the damages, a writ of error will not lie.<sup>5</sup>

have dispensed with the jury, they could, of course, have dispensed with an inquisition formally signed and sealed by the jury, who acted in their presence. The execution of the writ in the presence and under the direction of the court must afford at least equal satisfaction as if it had been executed before the sheriff alone; and if the court are willing to submit to the trouble of presiding at the inquest, it is the safer mode for the parties."

1. *Storer v. White*, 7 Mass. 449; *Begg v. Whittier*, 48 Me. 314.

In *Green v. Hamilton*, 16 Md. 318, it was held that the admission of inadmissible evidence, on an inquisition, was not ground for striking out the judgment under the Act of 1787, c. 9, § 6. If a party allows such evidence to go to the jury he is bound by the verdict; he must object when the testimony is offered, and the fact of his absence does not vary the principle.

In *State Bank v. Vaughan*, 2 Hill L. (S. Car.) 556, it was held that in making an assessment on a liquidated demand, under the Act of 1809, the clerk was substituted for the court and jury on a writ of inquiry; and if the defendant failed to attend, and incompetent evidence was acted upon by the clerk, the defendant could not object to it after judgment against him unless he was compelled to pay more than in justice he ought, in which case he could be relieved on the ground of fraud.

**Injustice Must Appear.** — An inquest will not be set aside on the ground that improper evidence was admitted unless it should appear that injustice has been

done. *Ward v. Haight*, 3 Johns. Cas. (N. Y.) 80.

A motion to set aside an inquisition under the *New York* practice will not be granted upon the same ground as a new trial would be, for the mere admission of improper evidence. *Bos-sout v. Rome*, etc., R. Co., 131 N. Y. 40.

**Complaint Read in Evidence.** — The verdict of the jury will not be set aside because the complaint was read in evidence where it does not appear that it was offered for a specific purpose for which it could not properly be read. *Jennings v. Asten*, 5 Duer (N. Y.) 695.

2. *Chamberlin v. Murphy*, 41 Vt. 110; *Storer v. White*, 7 Mass. 449.

3. *Motsinger v. Coleman*, 16 Ill. 74. See also *Chicago*, etc., R. Co. v. *Ward*, 16 Ill. 522.

**Sufficiency of Affidavit.** — Upon motion to set aside an inquest the affidavit should state that there is a defense. *Matthias v. Adams*, Col. & C. Cas. (N. Y.) 448. See also *Schenk v. Woolsey*, Col. & C. Cas. (N. Y.) 453.

4. *Motsinger v. Coleman*, 16 Ill. 74; *Chicago*, etc., R. Co. v. *Ward*, 16 Ill. 522; *Riely v. Barton*, 32 Ill. App. 528; *Smith v. Lusk*, 4 Ill. 411; *Beam v. Laycock*, 3 Ill. App. 44; *McCord v. Mechanics' Nat. Bank*, 84 Ill. 50.

**Objections First Made on Appeal.** — In *Motsinger v. Coleman*, 16 Ill. 73, it was held that a party cannot come into the Appellate Court and for the first time complain of the amount of damages assessed in the case of a default, especially where there is no bill of exceptions showing all of the evidence upon the inquiry of damages.

5. *West v. Whitney*, 26 N. H. 315;

**Case Made.** — Nor will an assessment by the clerk be reviewed in the Supreme Court on a case made.<sup>1</sup>

**XIV. AFTER DEMURRER TO EVIDENCE OVERRULED.** — Where a demurrer to evidence is overruled the jury may assess damages conditionally; or they may be discharged without such assessment. In the latter case the damages may be assessed by another jury upon a writ of inquiry,<sup>2</sup> or they may be assessed

Campbell *v.* Patterson, 7 Vt. 86; Whitwell *v.* Atkinson, 6 Mass. 272; Bossout *v.* Rome, etc., R. Co., 131 N. Y. 40; Creamer *v.* Dikeman, 39 N. J. L. 195. See also Moore *v.* Purple, 8 Ill. 149.

In Bossout *v.* Rome, etc., R. Co., 131 N. Y. 40, the court said: "The principles upon which the court would interfere with the result of an inquisition were well settled by the old Supreme Court. A writ of error did not lie, because it was not an ordinary trial in court and the review thereof was not provided for as upon a bill of exceptions. If improper evidence were admitted, and, in some other cases, if it appeared that injustice had been done, but not otherwise, the court on motion would set aside the inquisition. Ward *v.* Haight, 3 Johns. Cas. (N. Y.) 80; Sharp *v.* Dusenbury, 2 Johns. Cas. (N. Y.) 117. In the former of the above-cited cases the court observed that such assessment was intended to inform the conscience of the court, and the court will not interfere unless it appear that injustice has been done, or, in other words, unless the ends of justice require it."

In Creamer *v.* Dikeman, 39 N. J. L. 195, it was sought to vacate a judgment upon writ of error because the proceeding for assessment of damages by the clerk was irregular. The court held, however, that such assessment was not brought up by writ of error *proprio vigore*, and should be brought up by certiorari, if at all, but that the latter is not the usual practice, and the defendant should have moved the court below to vacate the assessment, or for a reassessment.

**Papers Filed in a Case and Used as Evidence** in ascertaining the plaintiff's damages after a default are no part of the record, and the appellate court cannot notice them upon a writ of error. Storer *v.* White, 7 Mass. 448.

1. Beeson *v.* Hollister, 11 Mich. 193, where the following reasons were assigned for the reversal of a judgment on a case made: (1) That the notice of

assessment of damages did not state the place where it would be made; and (2) that the assessment was not made by the clerk at his office, but in the court room (the court being in session), in the absence of the defendant's attorney. The court held that after having looked into these objections it found them insufficient, even if it had the power to review them upon a case made.

2. Andrews *v.* Hammond, 8 Blackf. (Ind.) 540; M'Creary *v.* Fike, 2 Blackf. (Ind.) 376; Lindley *v.* Kelley, 42 Ind. 294; Strough *v.* Gear, 48 Ind. 104; Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193; Obaugh *v.* Finn, 4 Ark. 110; Young *v.* Foster, 7 Port. (Ala.) 420; Humphreys *v.* West, 3 Rand. (Va.) 516. See article DEMURRER TO EVIDENCE, vol. 6, p. 451.

In Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 197, the court said: "The rule from the earliest reported cases in England to the present day, and which prevails in this country, is that upon a demurrer to evidence the court may, before discharging the jury, cause them to assess the damages conditionally, that is, to fix the amount of the recovery, provided that the judge finds the issues in favor of the plaintiffs; or that he may discharge the jury, and if he finds the issues in the evidence in favor of the plaintiffs he must call another jury to assess the damages upon a writ of inquiry. 1 Tidd's Pr. 575; 2 Tidd's Pr. 866."

In Young *v.* Foster, 7 Port. (Ala.) 420, it was said that when, upon overruling a demurrer by the defendant to the evidence, the court has no power to assess the plaintiff's damages, "the most ancient and perhaps the most correct course is to direct the jury to assess the damages at the time the demurrer is taken, to be imposed in the event the demurrer is overruled." In Boyd *v.* Gilchrist, 15 Ala. 856, it was held also proper where this has been omitted to impanel a jury after a decision on the demurrer to inquire what



by the court with the consent of the parties, or upon the failure of either party to demand a jury.<sup>1</sup>

**XV. CONNECTICUT PRACTICE — Assessment by the Court.** — In Connecticut it has never been the practice to have the damages upon a default assessed by a jury upon a writ of inquiry,<sup>2</sup> and upon a demurrer overruled or a judgment by default a judgment for nominal damages is entered and a hearing on the question of damages is then had before the court.<sup>3</sup>

damages the plaintiff has sustained. The former course, however, was recommended on account of its convenience.

In *Humphreys v. West*, 3 Rand. (Va.) 516, it was held that after a demurrer to evidence is joined the jury may either be discharged and (if the judgment be that the evidence does not support the issue) a writ of inquiry of damages be awarded, or the jury then impaneled may assess conditional damages.

**Actions of Tort — Actions on Contract.** — In *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180, it was held that in actions *ex contractu* where upon default final judgment might be rendered, a writ of inquiry would be unnecessary upon overruling a demurrer to evidence, but in actions *ex delicto*, though the tort grew out of a breach of duty, the only safe practice was to assess the damages by a jury.

1. *Strough v. Gear*, 48 Ind. 105.

2. *Havens v. Hartford, etc., R. Co.*, 28 Conn. 91; *Lamphear v. Buckingham*, 33 Conn. 251; *Seeley v. Bridgeport*, 53 Conn. 2; *Falken v. Housatonic R. Co.*, 63 Conn. 261; *Hollister v. Hollister*, 38 Conn. 178; *Raymond v. Danbury, etc., R. Co.*, 43 Conn. 596.

By Gen. Stat. Conn. 1888, § 1106, "in all cases where judgment is rendered otherwise than on verdict, in favor of the plaintiff, the court shall assess and award the damages which he shall recover." *Hollister v. Hollister*, 38 Conn. 178; *Lennon v. Rawitzer*, 57 Conn. 585. In *Raymond v. Danbury, etc., R. Co.*, 43 Conn. 599, 14 Blatchf. (U. S.) 133, the court said: "The practice in this state at the date of the adoption of the constitution, in regard to the assessment of damages, is easily ascertained. Judge Swift, in his System, published in 1796, says: 'Our courts possess the same power to assess damages as a jury in England, upon a writ of inquiry issued to the sheriff for that purpose. There,

in these cases, the court must issue a writ to the sheriff, commanding him by twelve men to inquire into the damages and make return to the court, which process is called a writ of inquiry. The sheriff sits as judge, and there is a regular trial by twelve jurors to assess the damages. This mode of proceeding must be productive of expense and delay, and the practice of this state, introduced by our courts without the authority of a statute, of assessing the damages themselves, without the intervention of a jury, is one of the many instances in which we have improved upon the common law of England.' 2 Swift's System 268. This practice of the courts was afterwards sanctioned by statute (Revision of 1821, § 59, p. 50), and has remained the law of the state ever since."

3. *Cafey v. Day*, 36 Conn. 155; *Lambert v. Sanford*, 55 Conn. 441; *Martin v. New York, etc., R. Co.*, 62 Conn. 336; *Falken v. Housatonic R. Co.*, 63 Conn. 261; *Gardner v. New London*, 63 Conn. 268; *Shepard v. New Haven, etc., Co.*, 45 Conn. 58; *Rowen v. New York, etc., R. Co.*, 59 Conn. 364; *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; *Daniels v. Saybrook*, 34 Conn. 377.

In *Batchelder v. Bartholomew*, 44 Conn. 501, the court said: "From a time early in the history of the jurisprudence of this state, the law has been that where, in an action on the case for the recovery of unliquidated damages, the defendant has suffered a default, that is, has omitted to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also, that by his omission to deny them, the defendant is held to have admitted the truth of all well-pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum, that is, for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law im-

**Evidence on the Hearing.** — Upon such hearing both parties may appear for the purpose of reducing or enhancing the damages.<sup>1</sup> Both parties must be confined to such questions of damage as would naturally arise from the facts stated in the complaint,<sup>2</sup> it being incumbent upon the plaintiff to show the extent to which he has been injured, although it is not necessary for him to prove any element of his cause of action.<sup>3</sup> On the other hand, in actions for negligent injuries it is competent for the defendant to prove any fact or circumstance tending to show that the injury was

putes the admission to him; but it does it with this limitation upon its meaning and effect; it does it for this special purpose and no other; and our courts have repeatedly explained that the admission found in a default is not the admission of which writers upon the law of evidence treat. The silent defendant having been subjected to a judgment for nominal damages from which no proof can relieve him, the default has practically exhausted its effect upon the case; for, if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above, and on the part of the defendant to keep them down to, that immovable basis of departure, the nominal point, precisely as if the general issue had been pleaded; and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that, the law perceives that he has all that the truth entitles him to, and therefore refuses to hear any objection from him. Of course the court might have said that if the defendant thus defaults he shall not thereafter be heard in proof or argument upon any other than the single question as to the extent of the injury inflicted; but it has contented itself with saying that if he stands silent the law will pronounce judgment upon him for nominal damages; in either form the rule, like all other rules of practice, is arbitrary in its nature; but in neither is there any inconsistency or want of logic. If in our courts the admission in a default had ever been used in the broadest sense of which that word is capable, then of course any limitation thereafter put upon it would have been an inconsistency; but from the earliest use the narrower meaning went with it."

1. *Lamphear v. Buckingham*, 33 Conn. 251; *Carey v. Day*, 36 Conn. 152; *Havens v. Hartford*, etc., R. Co., 28 Conn. 69; *Daniels v. Saybrook*, 34 Conn. 377.

**Upon a Hearing in Damages, After the Overruling of a Demurrer**, the case stands, with reference to the evidence necessary for the plaintiff and admissible for the defendant, precisely as it would have stood upon a default. In the absence of proof of actual damage on such a hearing, the plaintiff is entitled to nominal damages only. *Havens v. Hartford*, etc., R. Co., 28 Conn. 69.

In *Rose v. Gallup*, 33 Conn. 346, the court said: "It would seem to follow, as a necessary consequence, that if nominal damages only can be given without further proof, the defendant may contest his liability so far as the plaintiff seeks by proof to enhance the damages beyond a nominal sum." *Quoted in Gardner v. New London*, 63 Conn. 275.

2. *Regan v. New York*, etc., R. Co., 60 Conn. 125.

3. *Daniels v. Saybrook*, 34 Conn. 381.

In *Crane v. Eastern Transp. Line*, 48 Conn. 364, the court said: "It would seem to follow from this long-continued practice of the legal profession in cases of this character, from that of *Havens v. Hartford*, etc., R. Co., 28 Conn. 69, down to that of *Batchelder v. Bartholomew*, 44 Conn. 494, that the opinion of the profession has been that on a hearing in damages after a demurrer overruled, when the plaintiff shows by evidence the extent of his injury, the cause of action admitted by the demurrer and extending only to nominal damages where they are unliquidated, *prima facie* covers the whole injury which the plaintiff has proved. This practice well accords with what must be the correct doctrine in principle." *Lamphear v. Buckingham*, 33 Conn. 250.

not occasioned wholly or at all by his negligence, but was so caused by the negligence of the plaintiff;<sup>1</sup> and the burden of proof as to the nonexistence of contributory negligence is on the defendant.<sup>2</sup>

1. *Daniels v. Saybrook*, 34 Conn. 381.

The defendant under the *Connecticut* practice, upon a hearing in damages after a default or demurrer overruled may, for the purpose of keeping the damages down to a nominal sum, contest his liability for any damages whatsoever; may show, if he can, that the plaintiff is entitled to nominal damages only, because in reality and but for the default or demurrer he is entitled to none; may offer evidence of any fact tending to prove such nonliability as if no demurrer had been interposed or default suffered, although such fact as the basis of a judgment for nominal damages has been conclusively admitted. *Gardner v. New London*, 63 Conn. 274, where the court said: "For the purpose indicated, and after a default suffered or demurrer overruled, the defendant has been permitted to show that an assault by the servants of a railroad company was justifiable, and so was in law no assault, *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; that the defendant was not guilty of negligence and that the plaintiff was guilty of contributory negligence, *Daniels v. Saybrook*, 34 Conn. 377; that a highway was not in fact defective and out of repair, *Taylor v. Monroe*, 43 Conn. 36; that the defendant in fact committed no trespass either to the real or personal property of the plaintiff, *Rose v. Gallup*, 33 Conn. 338; that the injury happened through inevitable accident, *Batchelder v. Bartholomew*, 44 Conn. 494; that a claimed trespass was in law no trespass, because the acts were done under a contract with the plaintiff which amounted to a license, *Merriam v. Meriden*, 43 Conn. 173; that the wrong and injury proved were not the wrong and injury alleged in the complaint, *Shepard v. New Haven, etc., Co.*, 45 Conn. 54. In all these cases evidence was received which went directly in denial of the defendant's liability for any damages whatsoever, and the defendant was not limited to evidence relevant merely upon the amount of injury or damage which the plaintiff had sustained."

In *Lamphear v. Buckingham*, 33

Conn. 251, the court said: "If, in proving the extent to which he was in fault, the defendant prove he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admission on the record."

**Offsets.**—In a hearing in damages upon default the court cannot make an offset of a demand which the defendant has against the plaintiff, although it may arise out of the same cause of action. *Branch v. Riley*, 1 Root (Conn.) 541. So on such hearing the court will not offset mutual covenants in a deed. *Cockran v. Leister*, 2 Root (Conn.) 348.

2. *Crane v. Eastern Transp. Line*, 48 Conn. 364; *Daily v. New York, etc., R. Co.*, 32 Conn. 356; *Carey v. Day*, 36 Conn. 152. See also *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; *Batchelder v. Bartholomew*, 44 Conn. 494.

In *Crane v. Eastern Transp. Line*, 48 Conn. 363, the court said: "It has been settled by a long course of decisions in this state, that, on a hearing in damages in cases like the present, it may be shown whether or not the defendant was guilty of negligence which caused the injury complained of; and if it should be found that he was free from negligence, nominal damages only will be awarded by the court, however great may be the damages in fact; but it has in no case been definitely determined on which party rests the burden of proof in such cases. As a matter of fact, however, in every case which has come before this court, where it appears which party went forward, the defendant has assumed the burden of proving that the injury did not occur in consequence of his own negligence, and the only controversy has been respecting the defendant's right to offer such proof; the plaintiff claiming that the default, involving a nondenial of the facts, or the demurrer overruled and the neglect to plead over, as the case happened to be, con-

**XVI. KENTUCKY PRACTICE.**— Under the Kentucky practice, in actions *ex contractu*, if the amount claimed is specifically set out in the petition, no proof or assessment of damages is necessary to enable the court to pronounce judgment where there has been a failure to answer or an insufficient answer has been put in.<sup>1</sup> The statute confers upon the court the power not only to render judgment upon failure to answer, but even to assess the damages, and for this purpose it may hear proof where proof is necessary.<sup>2</sup> It must appear, however, in such a case, that there has been a trial by court, so that it may at least impliedly appear that the allegations of value or amount of damages contained in the plaintiff's petition have not been exclusively relied upon to ascertain and determine the amount of the judgment.<sup>3</sup>

clusively admitted the cause of action to the extent of the injury received."

1. *Lambert v. Ingram*, 15 B. Mon. (Ky.) 265; *Harris v. Ray*, 15 B. Mon. (Ky.) 630; *Field v. Montmollin*, 5 Bush (Ky.) 455; *Wills v. Brown*, 2 Metc. (Ky.) 404; *Francis v. Francis*, 18 B. Mon. (Ky.) 60; *Marr v. Prather*, 3 Metc. (Ky.) 196. See also *Slope v. Slope*, 2 Metc. (Ky.) 341; *Smith v. Curtis*, 1 Duv. (Ky.) 281.

The fact that the defendant appeared does not at all affect the principle. It is his failure to answer, which, under the provisions of the code, authorizes the court to render judgment without the intervention of a jury or proof of the plaintiff's demand. *Francis v. Francis*, 18 B. Mon. (Ky.) 60.

On this subject, however, the Code of 1854 has been changed by the Code of 1895 in two respects: (1) section 153 of the former declared that "allegations of value, or of amount of damage, shall not be considered as true by the failure to controvert them;" whilst § 126 of the latter declares that allegations concerning value or amount of damage, accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage, need not be proved unless traversed; and (2) section 409 of the former declared that, "if the taking of an account, or the proof of a fact, or the assessment of damages, is necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may take the account, hear the proof, and, in actions founded on contract, assess the dam-

ages," etc., whilst section 379 of the latter omits the words "in actions founded on contract." Therefore, under the present code, though, if a plaintiff whose property the defendant has wrongfully converted to his own use, sue for the tort, he must prove the damages, upon a judgment by default; yet they may be assessed by the court, which could not have been done under the Code of 1854; and, if, as he may do, such plaintiff waive the tort and sue on an implied contract to pay the value of the property, he may take judgment by default therefor. Ky. Code 1895, p. 294.

2. *Francis v. Francis*, 18 B. Mon. (Ky.) 60; *Marr v. Prather*, 3 Metc. (Ky.) 196; *Daniel v. Judy*, 14 B. Mon. (Ky.) 316. See also *Babcock Printing-Press Mfg. Co. v. Gains*, (Ky. 1897) 39 S. W. Rep. 829.

3. *Daniel v. Judy*, 14 B. Mon. (Ky.) 316; *Marr v. Prather*, 3 Metc. (Ky.) 196; *Smith v. Curtis*, 1 Duv. (Ky.) 281.

In *Dehoney v. Sandford*, 2 Bush (Ky.) 169, it was held that a judgment by default would not be reversed by the appellate court upon the alleged ground that no proof was heard in the court below, where a deposition was copied in the record and the judgment recited that the cause was heard.

But in *Mead v. Nevill*, 2 Duv. (Ky.) 280, it was held that where the record of an action for tort failed to show that the case was heard, or to state anything from which it might be inferred that the court assessed the damages on proof, or if it showed that the judgment was by default, the case would be reversed.

# INQUISITION.

See article *INQUESTS AND INQUIRIES*, *ante*, p. 1134.

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*Divorce of Insane Persons*, see article *DIVORCE*, vol. 7, p. 62.  
*Expert Witnesses in Insanity Cases*, see article *EXPERT WITNESSES*, vol. 8, p. 743.  
*Issues to Jury Out of Chancery*, see article *ISSUES TO JURY*.  
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*Defaults Against*, see article *DEFAULTS*, vol. 6, p. 13.  
*Ejectment for Lands of a Lunatic*, see article *EJECTMENT*, vol. 7, p. 291.



**I. INTRODUCTORY.** — This article is intended to embrace all questions of pleading and practice relating to insane persons, except such as pertain to the appointment of guardians or committees for them, and the general management of their estates and affairs.<sup>1</sup> As a rule, no notice has been taken of the various distinctions formerly prevailing between insanity, lunacy, idiocy, and the like. Attention is further directed to the differences in practice before courts of chancery and those of probate nature; it has been difficult to note these clearly in the analysis, and sometimes in the body of the article. State statutes should, of course, be primarily resorted to by the investigator.

**II. INSANITY AS THE PRINCIPAL ISSUE** — **1. Jurisdiction of Proceedings** — *a. OVER RESIDENTS IN GENERAL.* — In *England* jurisdiction of proceedings in lunacy was vested in the Court of Chancery by warrant of the king, but whether this was a power exercised by the court as a branch of its inherent equity jurisdiction, or by the chancellor in a capacity separate from his general chancery powers, is a subject of much discussion among the authorities.<sup>2</sup> So in this country some of the courts have followed the one doctrine and held that, independent of any statutory authorization, courts of chancery possessed this jurisdiction as a part of their general equity powers,<sup>3</sup> while others have decided that such powers could not be so assumed and must be

1. See, for a discussion of this subject, article *GUARDIANS*, vol. 9, p. 886, which should be consulted freely in connection with this one.

2. See Buswell on Insanity, p. 40.

3. *Indiana*. — McCord v. Ochiltree, 8 Blackf. (Ind.) 15.

*Kentucky*. — Nailor v. Nailor, 4 Dana (Ky.) 340.

**In Maryland** "it has always been admitted, apparently without any reference to the sources from which the chancellor of England had derived his authority, that the chancellor of Maryland was invested with all the powers in relation to infants and lunatics with which the chancellor of England had been clothed, as founded on an obvious necessity that the law should place somewhere the care of individuals who could not take care of themselves, particularly in cases where it was clear that some care should be thrown around them. And consequently the broad principle may be safely assumed here, that the chancellor is that judicial officer by whom the state discharges its duties in the care of its infants and lunatics in all cases where the care of them has not been otherwise specially and expressly provided for." *Per*

Bland, C., in *Corrie's Case*, 2 Bland (Md.) 488.

In a later case it was said: "Whatever may be the true origin of the jurisdiction of the Chancery Court in England over the estates and persons of idiots and lunatics, it is certain that the authority of the Court of Chancery in this state to take charge of their estates and persons is now derived from the 6th section of the Act of 1785, c. 72, which confers upon the chancellor full power and authority in all cases to superintend, direct, and govern their affairs and concerns, both as to the care of their persons and management of their estates, and to appoint a committee, trustee, or trustees for such persons, and to make such orders and decrees respecting their persons and estates as to him may seem proper." *Per* Johnson, C., in *Matter of Colvin*, 3 Md. Ch. 278.

**In South Carolina** the care of the persons and property of lunatics and idiots has always been considered and acted upon as a branch of equity jurisdiction and not as a duty imposed upon the chancellor apart from his powers as a judge of the Court of Equity. *Ashley v. Holman*, 15 S. Car. 97.

conferred by statute.<sup>1</sup> At any rate, this chancery jurisdiction has been given by statute in a number of instances, but at the present day it is believed that in the majority of states lunacy jurisdiction has been granted to probate courts, or courts of that nature, courts of ordinary, orphans' courts, etc.; and, it being impossible to lay down any general rule on the subject, the practitioner is referred to the statutory provision of his own state and to the decisions collected in the notes.<sup>2</sup>

1. *Oakley v. Long*, 10 Humph. (Tenn.) 254; *Fentress v. Fentress*, 7 Heisk. (Tenn.) 428.

2. **Jurisdiction.** — To appoint guardian, see article GUARDIANS, vol. 9, p. 886. To tax costs, see *infra*, II. 20. *Costs.* To dispose of property, see *infra*, VI. 1. b. (1) *Power of Court to Authorize — Jurisdiction.* Venue of inquisition or trial, see *infra*, II. 9. *Venue of Inquisition or Trial.*

**Alabama.** — The jurisdiction of causes for the inquiry into lunacy and idiocy, and into such mental incapacity as renders a party incompetent to manage his own affairs and requires the assistance of a guardian, has been transferred by law from the chancellor to the judge of probate, which latter officer exercises the same jurisdiction that the chancellor did before this change, but in the manner prescribed by the statute; and the proceedings before the judge of probate must have the same effect, to the extent they go, that the like proceedings would have had before the chancellor. *Fore v. Fore*, 44 Ala. 478.

**Illinois.** — By the Act of 1877, § 5, all matters concerning the trial of a person for insanity and the appointment of a guardian or conservator therefor were transferred from the County to the Probate Court in every county where such latter court existed. *Snyder v. Snyder*, 142 Ill. 60.

**Indiana.** — The courts of equity of Indiana possess the power, in addition to the usual jurisdiction of a court of chancery, of taking cognizance of and protecting the persons, rights, and property of infants, idiots, and lunatics. *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15.

The Circuit Court has exclusive jurisdiction, in a proceeding under the statute of Indiana, to have a person adjudged of unsound mind. *Martin v. Motsinger*, 130 Ind. 555.

**Iowa.** — The jurisdiction over the estates of insane persons conferred upon

the Circuit Court does not exclude the jurisdiction of the District Court upon questions of right between insane persons and others. *Flock v. Wyatt*, 49 Iowa 466.

**Kentucky.** — By the statute of 1793 the Court of Chancery was vested with jurisdiction in lunacy cases. *Nailor v. Nailor*, 4 Dana (Ky.) 340.

**Louisiana.** — Suits for the interdiction of idiots or insane persons must be brought in the Probate Court and all the proceedings had there. The Parish Court, although the same judge presides, is without jurisdiction to try such cases. *Segur v. Pellerin*, 16 La. 63.

**Maine.** — By the statute of 1847, c. 33, the selectmen of towns were constituted a board of examiners whose duty it was, upon the application in writing of any relative of an insane person, etc., to inquire into the condition of such person. *Eastport v. Belfast*, 40 Me. 262.

And it was provided that if the selectmen of any town refused to examine and decide on any case of insanity, after a complaint made to them in writing, two justices of the peace, one of whom should be of the quorum, had jurisdiction to try and determine the issue of insanity in the same manner as the selectmen. The jurisdiction of the justices was, therefore, dependent upon such refusal or neglect by the selectmen, after a complaint or application made to them in writing. *Insane Hospital v. Belgrade*, 35 Me. 497.

**Maryland.** — The Chancery Court was considered to possess this jurisdiction independent of statute, *Corrie's Case*, 2 Bland (Md.) 488; and was expressly clothed therewith by Act of 1785, c. 72, § 6, *Matter of Colvin*, 3 Md. Ch. 278. But this did not oust the courts of common law of jurisdiction in such cases, and hence in this state the common law and chancery courts possess it concurrently. *Tomlinson v. Devore*, 1 Gill (Md.) 345.

**Minnesota.** — The Constitution of

**b. OVER NONRESIDENTS.** — An absent insane person being domiciled abroad, and having no property within the state, there

Minnesota, § 7, art. 6, provides that "a Probate Court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction except as prescribed by this constitution." The acts of the legislature authorizing judges of probate to examine and commit insane persons to the hospital for the insane merely regulate the exercise of this jurisdiction and are valid. *State v. Wilcox*, 24 Minn. 143.

**Missouri.** — By Rev. Stat. Mo. (1889), § 5513, the Probate Court in each county is vested with jurisdiction *de lunatico inquirendo* as to any person in such county charged by information in writing to be of unsound mind. This jurisdiction is not dependent on the length of time prior to the inquisition that the person has resided in the county. *Cox v. Osage County*, 103 Mo. 385.

**Montana.** — By statute it was provided that it should be the duty of the probate judge, or, in his absence or inability to act, the chairmen of the boards of county commissioners of the several counties, upon the application of any person, setting forth under oath that any person, by reason of insanity, is unsafe to be at large, or is suffering under mental derangement, to cause the said person to be brought before him, etc. *Territory v. Gallatin County*, 6 Mont. 297.

By Comp. Stat., div. 5, § 1215, these duties are placed on the district judge. *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

**New Hampshire.** — The Probate Court is the tribunal selected by law in New Hampshire to settle the question of the party's insanity, and when once settled there it is settled for all other places and all other courts. This must be so from the nature of the case, for if it were not so, the same man might be held both sane and insane at the same time. *Hawkins v. Learned*, 54 N. H. 333.

**New York.** — The Chancery Court formerly exercised the jurisdiction in lunacy cases. *Matter of Tracy*, 1 Paige (N. Y.) 580; *Matter of Mason*, 1 Barb. (N. Y.) 436. But by § 1, tit. 2, c. 446, Laws of 1874, the Supreme Court is vested with general jurisdiction over the persons and property of lunatics and

persons of unsound mind, and, except as restrained and limited by the provisions of the statute, has power and authority to direct the place and method of their custody, and such disposition of their property as in its judgment is for the best interest of the lunatic. This jurisdiction is in no sense a limited jurisdiction, to be exercised as in the case of special proceedings authorized by statute, but pertains to the general jurisdiction of the court and is limited only by the special requirements of the statute. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

It is apprehended that the New York Superior Court was not clothed with jurisdiction to issue a commission of lunacy, and it could not take jurisdiction in such case. *Matter of Brown*, 4 Duer (N. Y.) 613.

**North Carolina.** — A court of equity in North Carolina has no authority or jurisdiction to make an order for an inquisition by a jury as to the lunacy of the party, this jurisdiction being exclusively in the County Court. *Dowell v. Jacks*, 5 Jones Eq. (N. Car.) 417.

**Pennsylvania.** — The power exercised by the Court of Chancery (in England) over the estates of idiots and lunatics is vested in the Supreme Court and several Courts of Common Pleas by the constitution and laws of this state. *M'Elroy's Case*, 6 W. & S. (Pa.) 451; *Yaple v. Titus*, 41 Pa. St. 195; *Matter of O'Brien*, 1 Ashm. (Pa.) 82.

Where the proceedings to have a person adjudged insane were properly commenced in the Court of Sessions, but the commission was, by mistake, issued out of the Court of Common Pleas, and all the subsequent proceedings were entered in that court, it was held that such error was a mere clerical mistake which the court below could correct, and that such formal defect could not be assigned for error. *Shenango Tp. v. Wayne Tp.*, 34 Pa. St. 184.

Under Act of Pennsylvania, May 14, 1874 (P. L. 160), providing for the custody of insane persons charged with and acquitted or convicted of crime, the court or law judge of that county only in which there could be a lawful trial of the prisoner, or in which the prisoner was convicted, has jurisdiction to appoint a commission for the removal of a prisoner from the penitentiary to

is nothing upon which jurisdiction can attach, and no commission can be issued against him.<sup>1</sup> But though a party be a non-resident, yet if he have property within the state,<sup>2</sup> or be person-

the hospital. *Clarion County v. Western Pennsylvania Hospital*, 111 Pa. St. 339.

**South Carolina.** — Lunacy jurisdiction is here considered as a branch of equity. *Ashley v. Holman*, 15 S. Car. 97. And though section 20 of art. 4 of the Constitution conferred jurisdiction "in cases of idiocy and lunacy and persons *non compos mentis*" on the Probate Court, yet this was not exclusive, but concurrent with that of the Court of Common Pleas. *Walker v. Russell*, 10 S. Car. 82.

**Tennessee.** — In this state it was considered that an inquisition by the Court of Chancery was void, jurisdiction not having been given by statute and the entire branch of the judicial power belonging to the County Court. *Oakley v. Long*, 10 Humph. (Tenn.) 254. But afterwards the Chancery Court was, by statute, vested with jurisdiction of inquisition. *Fentress v. Fentress*, 7 Heisk. (Tenn.) 428. However, the Act of 1797, c. 41, § 1, conferring upon the County Courts jurisdiction over the estates and persons of idiots and lunatics, was held not to extend to persons disabled by age or bodily infirmity. Such jurisdiction was held to belong to the Chancery Courts under the Act of 1852, c. 163, by which the Chancery Courts have also concurrent jurisdiction with the County Courts over the persons and estates of idiots and lunatics. *Cooper v. Summers*, 1 Sneed (Tenn.) 453.

By the Tennessee Code the jurisdiction of the County Court is concurrent with that of the Chancery Court in inquisitions of lunacy where the estate of the alleged lunatic exceeds five hundred dollars in value, and the mode of proceeding in the County Court, where the jurisdiction is concurrent, shall be as near as may be according to the rules and regulations of such Chancery Court. *Davis v. Norvell*, 87 Tenn. 36; *Albright v. Rader*, 13 Lea (Tenn.) 574.

**Vermont.** — The statutes of this state place the jurisdiction in lunacy cases with the judge of probate. *Shumway v. Shumway*, 2 Vt. 339.

**Virginia.** — By the laws of Virginia, Circuit Courts have no jurisdiction to try questions of insanity. *Harrison v. Garnett*, 86 Va. 763.

### 1. Allegation of Ownership of Property.

— The Court of Chancery has no jurisdiction to issue a commission unless the alleged lunatic resides in the state or owns property there, and in case of his nonresidence the fact of his owning property there must be stated in the petition. It is not sufficient to set it forth in the affidavits. *Matter of Fowler*, 2 Barb. Ch. (N. Y.) 205.

**Louisiana.** — The courts of Louisiana must deal with an absent insane person whose domicile is in a foreign jurisdiction as a sane person, until the courts of his domicile have interdicted him. *Hansell v. Hansell*, 44 La. Ann. 548.

**2. If the Nonresident Have Property Within the State** a commission may be issued against him. *In re Devausney*, 52 N. J. Eq. 502; *Matter of Petit*, 2 Paige (N. Y.) 174; *Ex p. Southcot*, 2 Ves. 402. And hence, where a person had left his residence while in a state of mental alienation, leaving personal property there, and had gone to some unknown place, it was held that for the purpose of a petition to the Court of Chancery for a commission of lunacy the lunatic must still be considered as a citizen of the state where he was domiciled at the time he was deprived of his reason. *Matter of Ganse*, 9 Paige (N. Y.) 416.

An inquisition in lunacy was objected to on the ground that at the time of the inquisition the person was a resident of the state of Illinois, and had ceased to be a resident of New York. The County Court before which the proceedings were had was vested with jurisdiction of the custody of a lunatic residing within the county by Code Pro., § 30; and the question of its jurisdiction was to be determined upon the facts which appeared to the court to which the application was made. Under this it was held that where it appeared to the court that the party had been for nine years a resident of the county, that he had personal property there, and that his family were still there, but that while he was insane from drink he left his home and his whereabouts were unknown, the legal conclusion was that he had not ceased to be a resident of his former county, since a man does not lose his residence

ally within the jurisdiction of its courts, it is proper and at times necessary that his sanity be inquired into by a commission issued for that purpose.<sup>1</sup>

*c. COURTS OF CO-ORDINATE JURISDICTION.* — Where an inquisition has been commenced or had in one court, no other court of co-ordinate jurisdiction should in any way interfere therewith.<sup>2</sup> And mere irregularity in the exercise of the court's legal authority in these proceedings will not justify a court of co-ordinate jurisdiction in considering its acts as nullities; they can only be corrected by review in a superior court.<sup>3</sup>

**2. Application** — *a. INSTITUTION OF PROCEEDINGS BY.* — The institution of proceedings for an inquisition of lunacy should be by petition or application in writing to the court having jurisdiction thereof.<sup>4</sup>

in a place until he abandons it with the intention not to return. Such an intent did not appear to the County Court, and the jurisdiction it exercised was held legal and the inquisition valid. *Southern Tier Masonic Relief Assoc. v. Laudenbach*, (Supreme Ct.) 5 N. Y. Supp. 901.

**1.** *Matter of Bariatinski*, 1 Phil. 375; *Matter of Perkins*, 2 Johns. Ch. (N. Y.) 124. Thus an East Indian coming to New York, shortly afterward became insane, and a commission was ordered so to adjudge. *Matter of Colah*, 3 Daly (N. Y.) 529.

A person found a lunatic in Jamaica, where his property was situated, came to England for his health, accompanied by one of his committees. It was held that the existence of the commission in Jamaica did not prevent the issuance of one in England, so as to give the courts of the latter country authority over him and his property while he remained there. *Matter of Houstoun*, 1 Russ. 312.

**2. Two Commissions Issued** — *Subsequent One Superseded.* — Where a commission of lunacy was issued out of the Common Pleas of Cumberland county on the 8th of November, 1824, and the party found to be of unsound mind, which finding was confirmed by the court and a committee of the person and estate of the lunatic appointed, and afterwards, on the 24th of December, 1824, on the application of the son-in-law of the lunatic, a commission was issued out of the Common Pleas of Philadelphia county against the same person, and a committee of the person and estate of the lunatic appointed, the court, upon the application of the Cum-

berland committee, superseded the second commission, and set aside its own proceedings as null and void. *Matter of O'Brien*, 1 Ashm. (Pa.) 82.

**Commission Outstanding Without Action Thereon.** — An inquisition, however, will not be quashed because of another commission outstanding for five years before, it appearing that the first commissioner had never qualified and nothing had been done. *Davidson v. Fry*, 11 Lanc. (Pa.) 357.

**3.** *Matter of O'Brien*, 1 Ashm. (Pa.) 82.

**4. Connecticut.** — *Hayden v. Smith*, 49 Conn. 83.

**Florida.** — *Whitlock v. Smith*, 13 Fla. 385.

**Kentucky.** — *Nailor v. Nailor*, 4 Dana (Ky.) 340; *Coleman v. Lunatic Asylum*, 6 B. Mon. (Ky.) 241.

**Maine.** — *Insane Hospital v. Belgrade*, 35 Me. 497.

**Maryland.** — *Boarman's Case*, 2 Bland (Md.) 89; *Morgan's Case*, 3 Bland (Md.) 336.

**Missouri.** — *Cox v. Osage County*, 103 Mo. 385.

**New York.** — *Matter of Church*, 64 How. Pr. (Rensselaer County Ct.) 393.

**Pennsylvania.** — *Shenango Tp. v. Wayne Tp.*, 34 Pa. St. 184.

For application for restraining order to protect property pending inquisition, see *infra*, II. 5. *b. Petition and Affidavits for.* For supersedeas of commission on restoration, see *infra*, II. 21. *a. Petition.* For sale of lunatic's property, see *infra*, VI. 1. *b. (3) Application for Order of Sale.*

**In Kansas** there are two methods of instituting an inquest of insanity. One, where an unofficial person gives

b. WHO MAY APPLY. — The proper party to present this application or petition is, in most of the states, pointed out by statute. In some of them any person may apply, and it is said that such is the law in the absence of statute.<sup>1</sup> In general, however, a mere stranger, without any interest in the matter, is not a competent party to sue out the commission.<sup>2</sup> In some of the

information in writing to the Probate Court that any one is insane, and asks that an inquiry be had; and if the court finds that there is good cause for the exercise of its jurisdiction, it shall cause the facts to be inquired into by a jury. (Gen. Stat. (1897), c. 131, § 38.) The other, where any judge of the Probate Court, justice of the peace, sheriff, coroner, or constable shall discover any person, a resident of his county, to be of unsound mind; it is made his duty to apply to the Probate Court for the exercise of its jurisdiction, and the same proceeding shall be had as in the case of an information by unofficial persons. (Gen. Stat. (1897), c. 131, § 39.) Under the latter mode the information is not specially required to be in writing, but it is safer that it should be so; and if the information is sufficient substantially to inform the court that there is good cause for the exercise of its jurisdiction, and also fairly to inform the party and his friends of the nature and purpose of the inquest, it is sufficient though it be irregular and defective in form. Matter of Latta, 43 Kan. 533.

**Necessity of Parties Other than Petitioner.** — The petition is *ex parte*, and in general there should be no parties to it other than the petitioner. Nailor v. Nailor, 4 Dana (Ky.) 340. Thus it is not required that persons who have had dealings with the party alleged to be a lunatic, during the period of his alleged lunacy, should be made parties, and when the proceeding is thus had it is not conclusive upon their rights. Whitlock v. Smith, 13 Fla. 385.

**Proper Place for Filing Petition.** — It is held that a petition for the appointment of a guardian can only be filed in the county where the alleged incompetent resides. North v. Joslin, 59 Mich. 624.

**Second Commission on Original Petition.** — A second commission cannot be issued upon the original petition where the proceedings under the first are set aside. *In re Hinchman*, Bright. (Pa.) 181, 7 Pa. L. J. 268. But if the first commission fail to agree, an alias commission may be appointed on the original petition. Com. v. Eldridge, 2

Chest. Co. Rep. (Pa.) 333. And see *infra*, II. 17. *New Commission on Trial*.

1. Woerner on Guardianship, § 117; Baker v. Searle, 2 R. I. 115.

In Montana any person may make the application. Territory v. Gallatin County, 6 Mont. 297.

In Indiana any person may file a petition to have another person declared of unsound mind and to have a guardian of his person and property appointed. Such petitioner is a party to such proceeding only for the purpose of instituting the proceeding, and such a petitioner need not be made a party in a subsequent proceeding attacking the former judgment of the court therein. Jessup v. Jessup, 7 Ind. App. 573.

In Pennsylvania, likewise, the Act of 1845 authorizes "any person" to make application to have an insane person committed to the state lunatic hospital; and hence it can be made by a married woman, the mother of the insane party. Shenango Tp. v. Wayne Tp., 34 Pa. St. 184.

2. **Must Have Interest.** — A stranger cannot sue out a commission in the nature of a writ *de lunatico inquirendo*, nor can he make himself a party to it by application to the court; he has no right to interfere in a proceeding of this nature. The party who seeks to quash the inquisition, or traverse the finding of the jury, should have an actual interest, legal or equitable, which would be endangered by the finding of the jury, and that should be manifested to the court; in such cases the application will be granted. Covenhoven's Case, 1 N. J. Eq. 19.

**Interest Pertaining to Wife and Children.** — The wife and children of a person of alleged unsound mind, in this case, filed their petition in equity, charging that their home, his only property, had been sold under execution at an enormous sacrifice, in consequence of his recklessness and neglect resulting from unsoundness of mind, positively and specifically alleged; and praying, therefore, for a vacation of the sale, and for general relief. The

states the application is to be made by relatives or friends,<sup>1</sup> and in some cases the selectmen of the town or the overseers of the poor may make the application.<sup>2</sup>

c. REQUISITES OF. — The petition should allege the insanity or mental incompetency under which the person suffers, and, if a guardian or committee be desired, should show such facts and circumstances as make the appointment thereof necessary or desirable.<sup>3</sup>

Circuit Court, sustaining a demurrer to the petition, dismissed it. On appeal that judgment was reversed, and it was held that the appellants, the wife and children, "have not such certain and proximate interest in the property as to entitle them to the specific relief sought by their petition, yet they had, on the allegations admitted by the demurrer, an unquestionable right to require an inquisition and curator, and their general prayer entitles them to relief to that extent." *Shaw v. Dixon*, 6 Bush (Ky.) 644.

1. *Hayden v. Smith*, 49 Conn. 83.

Under Pa. Act of June 13, 1836, providing for the institution of lunacy proceedings on application of a relation, by blood or marriage, of the person named, the term "related by marriage" applies only to one who, because of the marriage bond, would be entitled under the statute to distribution, and does not include the surviving husband of a deceased cousin of an alleged lunatic. *Com. v. Metz*, 17 Pa. Co. Ct. Rep. 541.

**Petition by Friend.** — In *Massachusetts* one not a relative of a supposed insane person, and not describing himself as the friend of such person, represented the case to a Probate Court and prayed for an inquisition. The court issued an order of inquest, reciting therein that the application was by a friend, etc. It was held that the application was well enough, especially as the Probate Court had certified that it was by a friend. *Cleveland v. Hopkins*, 2 Aik. (Vt.) 394.

**Petition by Wife** — *Alabama*. — By Code Ala., § 2750, the petition may be by any of the relatives or friends of the alleged lunatic; and the court in this case said that no doubt the wife of the lunatic comes within this description of persons authorized to present the petition. But it was held that as she is not *sui juris*, and no judgment for costs could be rendered against her, the petition must be presented not in her

own name alone, but by her next friend. *Campbell v. Campbell*, 39 Ala. 313.

In *Maine* a complaint in writing made to the selectmen by the wife of a person alleged to be insane is a sufficient basis for their action, she being a relative within the intendment of Maine Stat. 1847, c. 33. *Insane Hospital v. Belgrade*, 35 Me. 497.

In *Kentucky* the wife and children were held to have a sufficient interest to authorize them to apply for an inquisition. *Shaw v. Dixon*, 6 Bush (Ky.) 644.

2. *Hayden v. Smith*, 49 Conn. 83; *Lord v. Walker*, 61 N. H. 261.

3. For the requisites of the petition for the appointment of a guardian or committee, see article GUARDIANS, vol. 9, p. 897.

**The Sufficiency of the Allegations** of the petition for commission of lunacy cannot be questioned after the return of an inquisition finding sufficient facts. *Matter of Zimmer*, 15 Hun (N. Y.) 214.

**For Defect or Informality** in the petition, the court will not set aside the proceedings if it appears from them that the supposed lunatic is indeed insane and is entitled to the protection of the court, and that he will be benefited by the court's interference. *Matter of Dey*, 9 N. J. Eq. 181. See *infra*, II. 16. b. (2) *Defect or Irregularity*.

**Reference as to Prior Application.** — A rule of the court which requires an *ex parte* application for an order to state whether any prior application has been made refers to applications in a pending action, and does not apply to those for which a special proceeding, such as a commission in lunacy, is commenced. But however this may be, the omission to comply with the rule is an irregularity which must be taken advantage of on the first opportunity, and where a party has delayed raising the objection until much labor and expense have been incurred, and has also taken the chance

d. VERIFICATION AND AFFIDAVITS. — The question of verification and affidavits is also largely regulated by statute, but in general it may be said that the petition should be sworn to, and accompanied by affidavits averring the truth of the matters therein stated or showing such facts to the court as will satisfy it of the propriety of issuing a commission.<sup>1</sup> This matter, however, rests generally, to a large extent, within the discretion of the court, which may dispense with the affidavits, if it thinks proper, or issue the commission upon affidavits which are not strictly regular or according to the most approved practice.<sup>2</sup>

3. Method of Determination — a. NECESSITY OF INQUISITION OR JURY TRIAL. — As a general rule, aided oftentimes by the express provisions of statutes, no person should be adjudged insane, and his person or property disposed of, without an inquisition of lunacy or a trial by jury.<sup>3</sup> But it is held that a

of a favorable result, he cannot avail himself of such objection in an appellate court. *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

1. *Matter of Church*, 64 How. Pr. (Rensselaer County Ct.) 393.

**Pennsylvania.** — Act of 1836, § 4 (P. L. 589; P. & L. Dig. 2813, pl. 6), provides that no commission *de lunatico inquirendo* shall be issued except upon an application in writing, accompanied by affidavits of the truth of the facts therein stated. A petition sworn to by the petitioner but unsupported by other affidavits will be refused. *Metz's Case*, 5 Pa. Dist. Rep. 132.

If this objection be taken in time it is a conclusive reason for setting aside a commission; but by going to trial without objection this defect or irregularity is waived. *In re Lincoln*, 1 Brews. (Pa.) 392.

**New Jersey.** — The petition for a commission of lunacy should be accompanied by affidavits evincing the lunacy of the party; this may be by setting forth the unsound state of the mind of the person against whom the commission is prayed, and mentioning such instances of incoherent conduct or expression as prove him unfit to continue in the management of his own affairs. So an affidavit setting forth no particular act or expression of the alleged lunatic from which the court could form an opinion of the propriety of granting the commission, but stating expressly that for the space of six or seven years last past the deponent has, by frequently observing the behavior and actions of the alleged lunatic, considered him to be deprived of his reason

and understanding, so as to be incapable of the government of himself and incompetent to manage his own affairs, is sufficient, after inquisition returned, to sustain it as regularly issued. *Covenhoven's Case*, 1 N. J. Eq. 19.

**Wisconsin** — *Jurat Not Signed by Judge.* — Under the statute of Wisconsin a petition for an inquisition of lunacy, the jurat of which is not signed by the judge of the County Court, is insufficient to confer jurisdiction upon the County Court in the original action, or on the Circuit Court on appeal. *Royston's Appeal*, 53 Wis. 612.

2. *Bethea v. McLennon*, 1 Ired. L. (N. Car.) 523; *Birbeck's Estate*, 11 Pa. Co. Ct. Rep. 336.

**Affidavit of Physician Dispensed With.** — Though a petition should usually be accompanied by the affidavit of a physician as to the condition of a person's mind before the court will direct a writ *de lunatico inquirendo* to issue, yet the court may, in its discretion, dispense with such affidavit and issue the writ upon the affidavit of a layman. *Matter of Zimmer*, 15 Hun (N. Y.) 214.

**Affidavit Not Conforming to Practice of Court.** — Although the affidavits accompanying the petition do not come quite up to the requirements of the rule and practice of the court, the court will not, on this account, quash an inquisition by which the affidavits themselves were entirely confirmed. *Matter of Dey*, 9 N. J. Eq. 181.

3. *Burke v. Wheaton*, 3 Cranch (C. C.) 341; *Eslava v. Lepretre*, 21 Ala. 504; *Matter of Dey*, 9 N. J. Eq. 181; *Kiehne v. Wessell*, 53 Mo. App. 667; *State v. Baird*, 47 Mo. 301.



trial by jury in lunacy cases is not always an indefeasible right.<sup>1</sup> And although a Court of Chancery cannot usually dispose of the person or estate of a lunatic without his having been found to be such by a regular inquisition, yet it may, under particular circumstances, extend its protection without any such previous inquest.<sup>2</sup>

b. COMMISSION IN CHANCERY. — The method of determination of insanity in courts of chancery is by a commission issued for the purpose.<sup>3</sup>

c. TRIAL IN COURTS OTHER THAN CHANCERY. — Where the lunacy jurisdiction is vested in courts other than courts of chancery, such as probate courts, etc., there is usually no commission, but the inquiry is had before the court as in a regular trial.<sup>4</sup> This practice, however, does not always obtain, and in some of the states the probate judge convenes a commission and proceedings are had similar to those in the Court of Chancery.<sup>5</sup>

4. Issuance of Commission — a. WHEN ISSUED — In General. — Upon presentation of the petition and affidavits the Court of Chancery may issue a commission in the nature of a writ *de lunatico inquirendo*.<sup>6</sup>

Discretion in Issuing. — But the awarding of it is not at all a matter of right, on the mere fact of lunacy, but rests in the sound discretion of the chancellor, to be exercised for the benefit of the lunatic.<sup>7</sup>

1. The provision of the Iowa Constitution, art. 1, § 10, that in all cases involving life and liberty the accused shall have a speedy trial before an impartial jury, applies only to accusation for offenses against the law, and does not apply to an inquest of lunacy by a board of commissioners as provided by statute. Such an inquisition is in no sense a criminal proceeding, and the restraint of an insane person by virtue of such adjudication is not unconstitutional because he has not been tried by a jury. *Black Hawk County v. Springer*, 58 Iowa 417. See *infra*, III. 1. *In Suits in Chancery*; and IV. 5. *In Criminal Cases*.

2. *Owings' Case*, 1 Bland (Md.) 372; *Post v. Mackall*, 3 Bland (Md.) 486. See *infra*, II. 5. *Restraining Orders to Protect Property Pending Inquisition*; V. 1. b. (1) *Where Insanity Not Adjudicated, and No Committee Appointed*; and V. 2. c. (4) (d) *Determination of Insanity Before Appointment*.

3. See *infra*, the various subdivisions under this section.

4. *Territory v. Gallatin County*, 6 Mont. 297; *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

In Alabama, under the statute of 1821, an inquisition of lunacy might

have been had before the sheriff; but the Code of Alabama has changed this, and the trial in a case of insanity must in all cases be had before the judge of probate. He must preside at the trial, administer the oath to the jury, and receive their verdict when rendered. Hence where the writ was directed to the sheriff, not only to summon a jury but to organize and qualify it, and to take the inquisition, the proceeding was undoubtedly erroneous and void. *Laughinghouse v. Laughinghouse*, 38 Ala. 257.

5. See *Shumway v. Shumway*, 2 Vt. 339; *H. v. S.*, 4 N. H. 60; *Eastport v. Belfast*, 40 Me. 262.

6. *Campbell's Case*, 2 Bland (Md.) 209; *Boarman's Case*, 2 Bland (Md.) 89; *Morgan's Case*, 3 Bland (Md.) 332; *Ex p. Drayton*, 1 Desaus. (S. Car.) 116; *Hovey v. Harmon*, 49 Me. 269.

7. *Ex p. Tomlinson*, 1 Ves. & B. 57; *Matter of Chattin*, 16 N. J. Eq. 496; *Owings' Case*, 1 Bland (Md.) 372; *Post v. Mackall*, 3 Bland (Md.) 486.

Effect of Inquisition or Motives of Party Not Regarded. — In determining whether it is proper that a commission of lunacy should issue, the court is governed solely by the consideration of what is necessary for the protection

**Court Satisfied as to Insanity.** — Nor should a Court of Chancery allow the commission until reasonably satisfied of the insanity of the party, and by statute in several states this is made a requirement as to the allowance of an inquiry by courts of a probate nature.<sup>1</sup>

**The Mental Incapacity** for which a commission of lunacy will issue must amount to unsoundness of mind such as to deprive the person concerning whom the inquiry is to be made, of ability to manage his person or estate.<sup>2</sup>

**b. DIRECTIONS AND REQUIREMENTS.** — The commission out of chancery is issued either to special or permanent commissioners in lunacy, directing them to impanel a jury of good and lawful men, and inquire into the sanity of the alleged incompetent.<sup>3</sup>

of the person and property of the party, and has no regard to the possible result of the commission upon the validity of his antecedent acts, or the motives which have actuated the proceeding. *Matter of J. B.*, 1 Myl. & C. 538.

**Discretion of Probate Judge.** — It is held that the action of a probate judge in issuing a citation to an alleged mentally incompetent person, upon a petition alleging such incompetency and praying for the appointment of a guardian, does not involve the exercise of judicial discretion, and the fact that the petitioner prays for the appointment as such guardian, of a corporation in which the probate judge is a stockholder, will not disqualify him from issuing such citation. *Matter of Leonard's Estate*, 95 Mich. 295.

1. *Ex p. Persse*, 1 Molloy 219; *In re Cope*, 7 Pa. Co. Ct. Rep. 406. See the statutes of *Arkansas, Kansas, Mississippi, Missouri, Texas, Wyoming*, etc.

2. *Matter of Collins*, 18 N. J. Eq. 253; *In re Lindsley*, 43 N. J. Eq. 9. See generally upon this subject Am. and Eng. Encyc. of Law, title *Insanity*.

**It Is Not, However, Restricted to Cases of Idiocy or Lunacy** strictly speaking, it being held also to extend to the case of every person who, in consequence of old age, disease, or any other cause, is in such a state of imbecility as to be incapable of taking care of his affairs with prudence, and is rendered liable to become the victim of his own folly or the fraud of others. *Ridgeway v. Darwin*, 8 Ves. Jr. 65; *Nailor v. Nailor*, 4 Dana (Ky.) 340; *Shaw v. Dixon*, 6 Bush (Ky.) 644.

Utter and unmitigated madness or absolute and hopeless idiocy, resulting from cerebral injury or disease, or

want of intellect from nativity, are not the only tests of incapacity which subject a person to a commission of lunacy and the restraint of a committee. That state of unsoundness of mind which incapacitates a person from taking care of his person or business is the condition prescribed by the Act of Assembly of *Pennsylvania*, providing for the issuance of a commission. *Com. v. Schneider*, 59 Pa. St. 328, citing *M'Elroy's Case*, 6 W. & S. (Pa.) 451, and *distinguishing and modifying Matter of Beaumont*, 1 Whart. (Pa.) 52.

3. *M'Elroy's Case*, 6 W. & S. (Pa.) 451; *Matter of Church*, 64 How. Pr. (Rensselaer County Ct.) 393.

**Order Signed on Advisory Certificate of Vice-Chancellor.** — An objection that the order for the commission in lunacy was signed on the advisory certificate of a vice-chancellor is untenable, since such order is not the order of the vice-chancellor but of the chancellor himself. *Matter of James*, 35 N. J. Eq. 58.

**Inquiry by Judge Substituted for Commission.** — In *Pennsylvania*, under the Act of June 13, 1836, if the estate of the alleged lunatic is so small that the costs of an inquisition will be an undue burden upon it, the court may direct an inquest to be impaneled from the jurors attending court, and that the inquest be held by one of the judges thereof at such convenient time and place as shall be ordered. This was allowed in *In re Cusick*, 15 W. N. C. (Pa.) 469, where the lunatic's estate amounted to \$1,300.

**Physician as Commissioner.** — The Act of *Georgia*, 1834, providing that in an inquisition of lunacy one of the commissioners shall be a physician, con-

It further directs them to make due return of their proceedings to the court, and should name a return day.<sup>1</sup>

**5. Restraining Orders to Protect Property Pending Inquisition** — *a.* **AUTHORITY OF COURT TO ISSUE.** — The court may make any order, or issue any injunction, which may be necessary for preserving the property during the progress of an inquisition of lunacy, and to provide for the support of the lunatic, allowing him the means of defending and traversing the inquisition.<sup>2</sup>

*b.* **PETITION AND AFFIDAVITS FOR** — **Petition.** — The method of obtaining this restraining order to protect the alleged lunatic's property, or to suspend the control thereof, is by petition to the court issuing the commission.<sup>3</sup>

**Affidavits.** — Since the petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon them for its foundation, the affidavits upon which the lunacy proceedings are founded may be used in aid of this application.<sup>4</sup>

templates a person who has been licensed as a physician by the board of physicians of the state. *Norwood v. Hardy*, 17 Ga. 595.

**The Fact that a New Commissioner Was Substituted for One Appointed by the Chancellor**, without his approval or confirmation, and that no one of the commissioners was a master of the court, was an irregularity that would have set aside the inquisition if it had been urged for that purpose at or before the motion for confirmation, but this irregularity cannot affect the inquisition in a collateral way. *Matter of Collins*, 18 N. J. Eq. 253.

**1. Lunatick Petitions**, 2 Atk. 52; *In re Lincoln*, 1 Brews. (Pa.) 392; *Hambright's Estate*, 10 Lanc. (Pa.) 161.

For return of proceedings, see *infra*, II. 15. *a. Return of Proceedings and Action of Court Thereon.*

**2. Nailor v. Nailor**, 4 Dana (Ky.) 340; *Matter of Dey*, 9 N. J. Eq. 181.

The Court of Chancery in *Delaware*, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is finally and definitely ascertained, and has the power to suspend or supersede the control of the supposed insane person over his property *ad interim*. *In re Harris*, (Del. Ch. 1893) 28 Atl. Rep. 329.

At the time of directing the issue, when there is occasion for such course, the court will make a provisional order for the care of the lunatic's estate. *In re Wendell*, 1 Johns. Ch. (N. Y.) 600.

**3. Allegations of Petition.** — The sworn statement, in the petition for a restraining order, that the respondent has parted with several thousand dollars without receiving a visible equivalent therefor, is *prima facie* evidence of the incompetency of the respondent to govern himself and manage his estate, and justifies the Court of Chancery in granting an order suspending his control over his property during the proceedings in lunacy. *In re Harris*, (Del. Ch. 1893) 28 Atl. Rep. 329.

**Parties Defendant.** — If, pending an inquisition of insanity, a restraining order is required to prevent persons having possession of property belonging to persons of unsound mind from removing the property, they should be made defendants to the petition. *Nailor v. Nailor*, 4 Dana (Ky.) 340.

**Converting Petition into Bill in Chancery.** — The Court of Chancery has power to make a provisional order to protect the lunatic's property pending the proceedings under the commission of lunacy, but there is no precedent for converting the petition into a bill in chancery, making a case against third persons, and in this way invoking the action of the court upon matters involving the rights of others not parties to the proceedings, and such practice will not be approved unless it can be shown that it has received the deliberate sanction of the court. *Matter of Dey*, 9 N. J. Eq. 181.

**4. In re Harris**, (Del. Ch. 1893) 28 Atl. Rep. 329. See *supra*, II. 2. *Application.*

**6. Notice of Proceedings — a. NECESSITY FOR, TO ALLEGED LUNATIC — Doctrine that Notice Is Necessary.** — In most of the states it is considered that an alleged lunatic is entitled to reasonable notice of the inquisition and the consequent opportunity of appearing in defense.<sup>1</sup>

**Reason of Rule.** — If the party were in fact a lunatic, the notice would undoubtedly be useless, but that is the very question to be tried, and until a regular trial is had, or inquest made, the presumption is in favor of his sanity.<sup>2</sup>

**Counter Affidavits.** — When petitioned to restrain a supposed insane person from control over his property during the pendency of lunacy proceedings, the Court of Chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate, and therefore counter affidavits negating the allegations contained in the sworn statements of the petitioner will not be heard. *In re Harris*, (Del. Ch. 1893) 28 Atl. Rep. 329.

1. *Alabama.* — *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Molton v. Henderson*, 62 Ala. 426.

*Arkansas.* — *Arrington v. Arrington*, 32 Ark. 674.

*Illinois.* — *Eddy v. People*, 15 Ill. 386.

*Kansas.* — *Matter of Wellman*, 3 Kan. App. 100.

*New Hampshire.* — *Kimball v. Fisk*, 39 N. H. 110.

*New Jersey.* — *Matter of Whiteneck*, 3 N. J. Eq. 252.

*Pennsylvania.* — *Com. v. Groh*, 10 Pa. Co. Ct. Rep. 557; *May's Case*, 10 Pa. Co. Ct. Rep. 283.

*Vermont.* — *Shumway v. Shumway*, 2 Vt. 339.

*West Virginia.* — *Evans v. Johnson*, 39 W. Va. 299; *Lance v. McCoy*, 34 W. Va. 416.

For appearance of and presence of party, see *infra*, II. 11. *Presence of Party.*

In *Indiana* a proceeding to have a person declared of unsound mind and incapable of managing his own estate, and to have a guardian of his person and property appointed, is an adversary proceeding, and the party charged with such incapacity must either be produced in open court during the pendency of the proceeding, or, in default thereof, must be duly served with process, otherwise the court cannot acquire

jurisdiction of the person, and the judgment will be void as denying to the defendant due process of law. *Jessup v. Jessup*, 7 Ind. App. 573; *Martin v. Motsinger*, 130 Ind. 555. Compare *Hutts v. Hutts*, 62 Ind. 214.

In *Missouri* the alleged insane person should have notice of the proceeding, or the court should cause him to be brought before it, or it should appear upon the record of such proceeding why such notice was not given or such attendance required. *Dutcher v. Hill*, 29 Mo. 271.

**Order of Court Requiring Notice — Pennsylvania.** — On granting a commission it is the duty of the court to make an order for notice to the party or to his near relatives not concerned in the application. If no such order be made the omission of notice is not to be imputed as a neglect to the persons suing out the commission. *Hinchman v. Richie*, Bright. (Pa.) 143.

The *Pennsylvania Act of October 28, 1851*, § 7 (Bright. *Purd. Dig.* 1280), providing for proceedings to declare an individual a lunatic without notice, is unconstitutional under the declaration of rights as to personal liberty and private property in art. 1, § 1, of the United States Constitution. *May's Case*, 10 Pa. Co. Ct. Rep. 283.

In *Massachusetts*, likewise, when a commission issues from the Probate Court it should contain an order that notice be given to the party who is the subject of the inquisition, that he may appear before the selectmen. *Chase v. Hathaway*, 14 Mass. 222.

2. *Eddy v. People*, 15 Ill. 386.

Sentence of interdiction cannot be pronounced on *ex parte* evidence. "If, indeed, the party interdicted is in reality insane the examination must necessarily be *ex parte*, although he is cited to hear it. But if, on the contrary, the petition of interdiction is solicited from malice, or through error, against one

**Doctrine that Notice Is Unnecessary.** — In some of the states, however, it has been held that notice is not a necessity, and in some cases it has been dispensed with.<sup>1</sup>

**Statutory Regulations.** — The matter is largely regulated by statute in the United States, some of them directly requiring personal notice to be served on the alleged lunatic,<sup>2</sup> while others

of sound mind, it is not perceived by us why the proceedings should be carried on without his knowledge. So far from it that we think it indispensable he should have the opportunity afforded him to hear and confront those who, by their evidence, are about to deprive him of all control over his actions, and take from him the enjoyment of his property." *Stafford v. Stafford*, 1 Martin N. S. (La.) 551.

1. In South Carolina notice to the alleged lunatic was early held to be unnecessary. *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477.

In Vermont it was held that as the statute did not direct notice of the inquisition to be given, and as the guardianship had existed for a long time without objection on the part of the lunatic, this exception as to notice could not avail the defendant. *Smith v. Burnham*, 1 Aik. (Vt.) 84.

In Iowa, by Code of 1897, § 2265, it is provided that the commissioners of lunacy may require that the person alleged to be insane be brought before them and an examination be had in his presence; but if, after making preliminary inquiries, they determine that the presence of such person during the examination would be injurious to him, or without advantage, his presence may be dispensed with. No service of notice is provided for, but in all cases a personal examination of the party must be made by a physician, who must certify his finding to the commissioners. Any person may appear and contest the question of sanity. It was held that one who is thus adjudged insane and committed to an asylum under this statute and without notice is not deprived of his liberty without due process of law. *Chavannes v. Priestley*, 80 Iowa 316.

**New Notice Not Necessary on Adjournment.** — Where a person who has due notice of an application to the Probate Court to place him under guardianship as a person *non compos mentis* attends the court and resists the application, and the court after the hearing ad-

journs the case from time to time, it is not necessary to the validity of the decree adjudging him to be *non compos mentis* and appointing a guardian over him that notice should be again given him before passing such decree. *Davison v. Johannot*, 7 Met. (Mass.) 388.

2. The cases preceding, it will be observed, were regulated to a large extent by statute.

**Illinois.** — Notice of an inquisition of insanity was required to be given to the supposed insane person before the statute was passed on the subject; and Rev. Stat., c. 86, § 2, provides that in these proceedings the summons shall be issued and served upon the party in the same manner as summonses are issued and served in cases of chancery. Under this, service is required to be made by delivering a copy of the summons at least ten days before the hearing, and unless this reasonable notice be given the proceedings on the inquisition will be void for want of jurisdiction. *Behrensmeyer v. Kreitz*, 135 Ill. 591.

**New Jersey.** — By rule of court in New Jersey, it is required that ten days' notice of an inquisition of lunacy shall be given to the alleged lunatic, unless for special reason the chancellor orders otherwise. Eleven days before the date of the inquisition notice was attempted to be served on the party, but not being able to gain access to her, the constable left notice with her brother, and also served notice upon her attorney. The counsel appeared for her without protest, and it was held that in the absence of proof that notice was not actually received by the alleged lunatic, and that she was thereby prejudiced, such notice was sufficient. *Matter of Lindsley*, 46 N. J. Eq. 358.

**Tennessee.** — The provisions of the Code of Tennessee, regulating the practice in the County Courts in inquisitions of lunacy, do not in terms require that notice accompanied by the petition of inquisition must be served on the alleged lunatic; but since it is

make it a matter of discretion with the court issuing the commission.<sup>1</sup>

*b. NECESSITY FOR, TO OTHER PERSONS.* — Whether or not any one other than the lunatic, such as his relatives, heirs, etc., are entitled to notice, is usually a matter of statutory regulation, which must, of course, be followed.<sup>2</sup>

provided by the code that in cases of concurrent jurisdiction with the Chancery Court the practice of the County Court shall conform to the chancery practice as near as may be, it is held that in cases of this concurrent jurisdiction service of notice and copy of the petition is necessary. *Davis v. Norvell*, 87 Tenn. 36; *Ex p. Dozier*, 4 Baxt. (Tenn.) 81; *Albright v. Rader*, 13 Lea (Tenn.) 574.

*Manner of Service — Connecticut.* — A statute in force in 1868 provided that service of the notice should be made by leaving a copy at the usual place of abode of the party. He being in the county jail at the time, and his house, his usual place of abode, having been sold by the trustee of his insolvent estate, it was held that notice served upon him at the jail was sufficient. *Dunn's Appeal*, 35 Conn. 82.

*Personal Notice.* — The preceding cases, it is apprehended, contemplate a notice to the lunatic in person.

In *Louisiana* the law requires this personal notice of the suit to interdict the party, and that he have the opportunity to employ his own counsel before one is appointed by the judge. *Segur v. Pellerin*, 16 La. 63; *Stafford v. Stafford*, 1 Martin N. S. (La.) 551.

It is not sufficient for the attorney appointed to defend him to accept service. *Segur v. Pellerin*, 16 La. 63. And he cannot be cited through a curator *ad hoc*. *Gernon v. Dubois*, 23 La. Ann. 26.

In *Pennsylvania* the notice must be served on the party personally, and the service cannot be made upon a friend who was not concerned in the application. *Com. v. Groh*, 10 Pa. Co. Ct. Rep. 557.

In *Georgia* section 1855 of the Code provides for notice to be served on three of the nearest adult relatives of the alleged lunatic, but does not contemplate a personal service on the lunatic, unless he has no such adult relatives in the state. *Morton v. Sims*, 64 Ga. 298.

In *New York* it was held that the lunatic need not be personally served

with notice where it is evident that he keeps out of the way to prevent the service. In this state, however, the entire question of notice is discretionary with the court. *In re Russell*, 1 Barb. Ch. (N. Y.) 38.

*1. New York.* — Whether or not notice shall be required in proceedings *in rem*, depends upon the statute. No question of constitutional power is involved, and the fifth amendment to the Constitution of the United States has nothing to do with it. In this state there were no statutory provisions regulating proceedings *de lunatico* until 1874. These provisions have been substantially incorporated into the Code of Civil Procedure. Before that, while it was usual to give the alleged lunatic notice of the execution of the commission, it was for the court to say whether notice should be dispensed with, and that is the rule now by Code of Civil Procedure, § 2325. Before the code, as now, giving of notice was discretionary, and neglect to give it is simply irregularity which does not avoid the proceedings. *Southern Tier Masonic Relief Assoc. v. Laudenbach*, (Supreme Ct.) 5 N. Y. Supp. 901.

Under this discretionary provision, however, the alleged lunatic should be notified, unless, upon a clear case showing it improper or unsafe to give such notice, order has been made by the court dispensing with it. *Matter of Blewitt*, 131 N. Y. 541.

And if the peculiar circumstances do render it improper or unsafe to give the notice they should be stated in the petition to the court, so that the special provision dispensing with it may be inserted in the commission. *Matter of Tracy*, 1 Paige (N. Y.) 580.

Although the lunatic resides out of the state, commissioners may be required to give the lunatic due notice of the time and place of executing the commission. *Matter of Petit*, 2 Paige (N. Y.) 174.

*2. Notice to Three Nearest Relatives.* — By *Georgia* Code, § 1855, notice is required to be given to three of the near-

c. **TIME OF GIVING.** — In many states the time of giving notice of the inquisition or commission is prescribed by statute or rule of court,<sup>1</sup> but in the absence of express provisions the notice must be a reasonable one in point of time, so that the party may have opportunity for preparing evidence, making objection for legal cause to the commission, etc.<sup>2</sup>

est adult relatives of the alleged lunatic. If they be the petitioners the notice should be given to the three next nearest relatives. If there are no such adult relatives within the state, the notice should be given to the alleged *non compos* himself, or to a guardian *ad litem* appointed to receive it for him. *Morton v. Sims*, 64 Ga. 298.

**Notice to Next of Kin.** — Under the statute of *Michigan* (How. Stat., § 6314) it is necessary to give the alleged insane party notice, and also his next of kin; and where all the next of kin residing in the state are notified the decree adjudging him incompetent is not void because no notice was given to nonresident heirs. *Munger v. Probate Judge*, 86 Mich. 363.

**Notice to One or More Relatives.** — Section 2325 of the *New York Code of Civ. Pro.* requires notice of the application for the commission of lunacy to be served on one or more of the relatives of the alleged lunatic, but notice to all the relatives is not required to be given. Where, therefore, one of the heirs at law of the person tried for lunacy objected that he had had no notice of it, it was held that in the first place he had no absolute right to notice; that he, having had actual knowledge of the proceeding, and being present on the taking of the inquisition, had waived any irregularity in the notice; that at any rate, if he had desired to raise objection on this ground, he should have moved it immediately upon learning of the proceeding and should not have waited until after the inquisition had been filed. Certainly he could not be heard on appeal in this objection without showing that he had suffered some wrong or injury by reason of the want of notice, or that if notice had been given to him he might and would have been able to prevent the proceeding, or to show it unnecessary or wrongful. *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

The jurisdiction of the county judge does not depend upon notice given to all of the next of kin; and, in the ab-

sence of any suggestion of injury to the lunatic because of nonservice upon one of them, the objection should be disregarded. *In re Cook*, (Supreme Ct.) 6 N. Y. Supp. 720. And under this provision the failure of the court to require such notice to be given is not a jurisdictional error, but an irregularity which may be cured or disregarded. The court has the power to waive the notice for reasons satisfactory, which would not be reasonable if service of the notice went to the jurisdiction. *Matter of Demelt*, 27 Hun (N. Y.) 480.

**Notice to Persons Counseling Adverse Finding.** — In *Pennsylvania* it is held that such persons as counsel a finding against the alleged lunatic are not competent to receive notice. *In re Hinchman*, Bright. (Pa.) 181, 7 Pa. L. J. 268.

1. In *New Jersey*, by rule of court, ten days' notice of the inquisition is required to be given the alleged lunatic, unless for special reason the chancellor orders otherwise. *Matter of Lindsley*, 46 N. J. Eq. 358.

2. *Eddy v. People*, 15 Ill. 386; *May's Case*, 10 Pa. Co. Ct. Rep. 283.

**Execution of Commission on Day After Issuance.** — A commission issued without reasonable notice, and neither preceded nor followed by the appointment of a guardian *ad litem*, is not aided by the presence of the imbecile and his representation by counsel, even where the counsel gives his consent to the judgment appointing the guardian, it appearing that the commission was executed on the next day after it was issued and that the judgment followed immediately. *Morton v. Sims*, 64 Ga. 298.

**Refusal to Adjourn Inquisition for Preparation When Notice Insufficient.** — And a refusal to adjourn an inquisition for a reasonable time, that the party may make the necessary preparation for trial, when he has been prevented from making that preparation by insufficient notice as to time, is good ground for setting aside the commission and ordering a new one. *Matter of Jewell*, 26 N. J. Eq. 298.

*d. EFFECT OF FAILURE TO GIVE.*—The effect that a failure to give notice will have on the inquisition, it is apprehended, depends on the doctrine obtaining in the particular state as to whether notice is necessary, unnecessary, or discretionary. In some cases this failure of notice has been held to nullify and render the proceedings void; while in others it is deemed to make them only voidable. In other words, non-notice is sometimes considered a jurisdictional error and sometimes a mere irregularity.<sup>1</sup>

*e. APPEARANCE AS A CURE OR WAIVER OF.*—The object of notice being to give the alleged *non compos* opportunity of appearing before the trial court and presenting his defense, it has been held in many quarters that if the party appears before the court in person or by counsel, and proceeds to trial, a want or defect of notice will be thereby cured or waived, since the object of the notice has been satisfied.<sup>2</sup> But an appearance has not in all cases

**Waiver of Insufficient Notice.**—Formerly, in *New Jersey*, no specific time for giving notice was fixed by the practice of the court, yet a reasonable notice was required. Thus a notice given on Saturday of the execution of a commission on Tuesday following was considered insufficient. But where the lunatic appeared by counsel upon such notice, and made no objection but consented to an adjournment to a future day, the insufficiency of the notice was held to have been waived. *Matter of Vanauken*, 10 N. J. Eq. 186.

But the defect of an unreasonable notice is not always cured or waived by the appearance of the party and his attempt at a defense. And where a lunatic or a man of doubtful capacity is called upon to act suddenly in a matter involving the control of his person or property, and attempts a defense, it is not such an acquiescence in the proceedings as should bind him, and he should have an opportunity for re-investigation. *Matter of Whitenack*, 3 N. J. Eq. 252. See *infra*, II. 6. *v. Appearance as a Cure or Waiver of.*

1. In *Alabama* an inquisition had without notice is null and void. *McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504; *Molton v. Henderson*, 62 Ala. 426.

In *Arkansas* and *Kansas* the same result follows. *Arrington v. Arrington*, 32 Ark. 674; *Matter of Wellman*, 3 Kan. App. 100.

In *Illinois* and *New Jersey* an inquisition without notice will be set aside and a new commission awarded. *Eddy*

*v. People*, 15 Ill. 386; *Matter of Whitenack*, 3 N. J. Eq. 252.

In *New Hampshire* want of notice renders the proceedings voidable by parties injured, but not void as to everybody. *Kimball v. Fisk*, 39 N. H. 110.

In *Pennsylvania* an inquisition cannot be avoided collaterally for want of notice; and that defect is cured by a subsequent traverse. *Rogers v. Walker*, 6 Pa. St. 371.

In *New York* the giving of notice is discretionary with the court, and a failure to cause it to be given is simple irregularity which does not avoid the proceedings. *Southern Tier Masonic Relief Assoc. v. Laudenbach*, (Supreme Ct.) 5 N. Y. Supp. 901; *In re Cook*, (Supreme Ct.) 6 N. Y. Supp. 720; *Matter of Demelt*, 27 Hun (N. Y.) 460.

2. *Matter of Vanauken*, 10 N. J. Eq. 186; *Matter of Lindsley*, 46 N. J. Eq. 358; *Matter of Wellman*, 3 Kan. App. 100; *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141. See *infra*, II. 11. *Presence of Party.*

**Appearance in Open Court.**—When a defendant in an inquisition of lunacy is brought into court, and the inquisition held in open court, there is no necessity for either notice or writ. The chancellor is the protector of persons of unsound mind, and it will be presumed that he has done his duty. *Lackey v. Lackey*, 8 B. Mon. (Ky.) 107.

**Alabama—Writ of Arrest Sufficient Without Other Notice.**—Under the statute of Alabama the writ of arrest of a



been considered a waiver of a defective or an unreasonable notice; the decisions depending frequently upon the particular circumstances or hardships of the case.<sup>1</sup>

*f. RECORD OF.* — A notice to one of a proceeding against him to have him adjudged a lunatic and incapable of managing his affairs corresponds generally to a summons in an ordinary action, and like the latter forms a part of the record proper.<sup>2</sup> Therefore, it should appear on the record that the requisite notice had been given, and if it does not so appear the proceedings may be set aside.<sup>3</sup> And where the finding and judgment of the court recite

lunatic or alleged incompetent served upon him completes the jurisdiction of the court when it brings the defendant into court, and no other notice of the proceeding is required by the statute. *Fore v. Fore*, 44 Ala. 478.

**Indiana.** — The statute of Indiana concerning proceedings in lunacy does not in terms require notice to the alleged lunatic, and the proceedings may be regular and valid without the service of any notice upon the party if he appear in court. The proceedings, however, cannot be *ex parte* without either notice or appearance; but where a party appears by an attorney who represented her throughout the trial and upon appeal, such appearance is a waiver of notice, it not being claimed to have been unauthorized. *Martin v. Motsinger*, 130 Ind. 555; *Nyce v. Hamilton*, 90 Ind. 417.

**Tennessee—Service of Copy of Petition.** — Under the Tennessee Code an alleged lunatic must be served with a copy of the petition praying for a writ of inquisition against him; but if he was duly served with notice of the time, place, and object of the inquisition, and did not object because no copy of the petition was served upon him, the irregularity will be treated as waived. *Davis v. Norvell*, 87 Tenn. 36.

**1. Defective or Unreasonable Notice Not Always Cured by Appearance.** — Thus the issuance of a commission without reasonable notice, neither preceded nor followed by the appointment of a guardian *ad litem*, will not be aided by the appearance of the lunatic and his representation by counsel, even where the counsel consents to the appointment of the guardian, it appearing that the commission was executed the next day after its issuance and that judgment immediately followed. *Morton v. Sims*, 64 Ga. 298.

So in another state it has been held

that the want or defect of notice is not in all cases aided by the party's appearing before the jury and attempting a defense. In this case the court remarked: "In ordinary cases an appearance cures a defective service of notice. And it is a very proper rule, where the appearance precedes for a considerable length of time the trial or investigation, or where the investigation is preliminary or of but minor importance. But it appears to me that it should have little or no effect in this case, where a man, lunatic or of doubtful capacity, is called upon suddenly to act upon a matter involving the control of his person and property. If, under such circumstances, he should attempt a defense, it is not such an acquiescence in the proceeding as should bind him, and he should have an opportunity for re-investigation." *Matter of Whitenack*, 3 N. J. Eq. 252.

2. *Crow v. Meyersieck*, 88 Mo. 411.

3. *Morton v. Sims*, 64 Ga. 298; *Eddy v. People*, 15 Ill. 386. See *infra*, II. 16. *Setting Aside Inquisition.*

In Missouri it is sufficient ground for setting aside a judgment declaring a person insane, that it does not appear from the record that the alleged insane person was notified of the proceedings against him, or, if not notified, the reason therefor. *Matter of Marquis*, 85 Mo. 615; *Dutcher v. Hill*, 29 Mo. 271.

In Massachusetts, also, a decree by a judge of probate that a person is *non compos mentis*, or appointing a guardian over him for that cause, without notice, is absolutely void; and where the probate records are apparently entire, and no loss of papers in the probate office is suggested, it cannot be presumed, even after the lapse of thirty years, that any decree was passed adjudging a person to be *non compos mentis* by any notice given which does not appear. *Hathaway v. Clark*, 5 Pick. (Mass.) 490.

that "due notice" was given, it seems that it is competent to contradict such recital by showing by the record that the notice admitted to have been given was fatally defective and void.<sup>1</sup>

**7. Execution of Commission — Trial — a. GENERAL DUTIES OF COMMISSIONERS.** — Obedient to the directions issued to them the commissioners should cause the jury to be summoned and proceed with the hearing of the case.<sup>2</sup>

**b. MATTERS PERTAINING TO JURY — Number of Jurors.** — In the Chancery Court, the commission is to be executed in general by a jury not less than twelve nor more than twenty-three in number, and in the probate courts, in the absence of statute, a common-law jury of twelve seems to be the one contemplated. In both these cases, however, the number is apt to be and has often been pointed out by statute.<sup>3</sup>

In Pennsylvania the record must show a reasonable notice; want of it is fatal to the proceedings. But where the suit under which the proceedings are taken does not provide for notice, it will be presumed that reasonable notice was intended to be given. *May's Case*, 10 Pa. Co. Ct. Rep. 283.

**New York — Court of General Jurisdiction.** — The Court of Common Pleas of New York being a court of general jurisdiction as far as proceedings in commissions of lunacy are concerned, to uphold its jurisdiction when collaterally attacked it may be presumed that all proper notices were served upon the lunatic, in the absence of anything in the record showing that they were not served. *Gridley v. Xavier*, 137 N. Y. 327.

1. *Crow v. Meyersieck*, 88 Mo. 411.

2. See *Matter of Arnhout*, 1 Paige (N. Y.) 497.

**Manner of Summoning Jury.** — It is the duty of the sheriff, in executing a commission, to select such jurors as he thinks proper, and who are indifferent in relation to the matter; and it is irregular and improper for the commissioners to dictate to the sheriff what jurors he should summon. For this irregularity the proceedings would be set aside and a new commission directed to be issued. *Matter of Wager*, 6 Paige (N. Y.) 11.

But in another case, after the return of the precept for the jury, issued by a commissioner in a lunacy proceeding, an order was served upon him staying the proceedings until the hearing of a motion to set aside such proceeding. No adjournment was taken. The motion having been denied, the court

made an order directing the commissioner to issue a precept requiring the sheriff to notify the same jurors to attend at a time and place to be named therein. It was held that, under the peculiar circumstances of the case, the order was proper. *Matter of Dunn*, (Supreme Ct.) 37 N. Y. St. Rep. 802.

**Duties and Manner of Procedure of Commissioners.** — A commission appointed by the Supreme Court to try the question of the competency or incompetency of an alleged lunatic is subject to the direction of the court as to the manner in which they shall proceed. *Matter of Baird*, (Supreme Ct.) 8 N. Y. St. Rep. 493; *Matter of Mason*, 1 Barb. (N. Y.) 436.

**3. Finding by Twelve Jurors.** — Twelve jurors should usually concur in the finding, and the concurrence by twelve out of a greater number is sufficient, though the others refuse to join. *Ex p. Wragg*, 5 Ves. Jr. 450. See *Matter of Arnhout*, 1 Paige (N. Y.) 497.

Accordingly, in *New Jersey*, it is considered that the concurrence of twelve is sufficient under the statute of that state, and does not violate the right of trial guaranteed by the constitution, art. 1, § 7, prescribing the trial by from twelve to twenty-four, since such a provision does not require the concurrence of more than twelve to constitute a sufficient verdict. *Matter of Lindsley*, 46 N. J. Eq. 358. And so it is held in this state that a statute directing a commission *de lunatico* to be executed before a jury of twelve is constitutional. *De Hart v. Condit*, 51 N. J. Eq. 611.

**More than Twelve — Georgia.** — The Act of Georgia requires a commission

**Qualifications and Conduct of Jurors.** — The jurors should be absolutely free from bias or previously formed opinion,<sup>1</sup> and there should be no improper interference with the jury while they are deliberating on their verdict.<sup>2</sup>

**8. Issue to Be Tried.** — The issue in a proceeding of lunacy is whether the defendant has been so far deprived of his reason and understanding as to be unable to govern himself or to manage his affairs, and to this issue the commissioners and jury should confine themselves.<sup>3</sup>

of lunacy to be directed to eighteen men, any twelve of whom shall execute it. Under this, the fact that thirteen acted does not vitiate the proceeding. The court, *per* Lumpkin, J., remarked: "This is not one of the cases where the cabalistic number twelve, in imitation of the twelve signs of the zodiac, twelve months in the year, twelve patriarchs, twelve apostles, etc., must be strictly observed. Had all eighteen united in the report, perhaps it would have strengthened" instead of destroying the report. They do not find a verdict, that mystic thing that requires to be so strictly observed. They report only." *Field v. Lucas*, 21 Ga. 447.

**Less than Twelve.** — By statutes in *Colorado*, *Illinois*, and *Kansas*, a jury of six is prescribed. *Mills's Annot. Stat. Colo.* (1891), § 2935; *Starr & Curt. Annot. Ill. Stat.* (1896), c. 85, § 7; *Gen. Stat. Kan.* (1897), c. 131, § 42.

And in *Pennsylvania* the jury is to consist of not less than six nor more than twelve. *Bright. Purd. Dig. Pa.* 1885, p. 1126, §§ 6, 8.

In *Montana* provision is made for a jury of three citizens, one of whom shall be a licensed practicing physician. *Territory v. Gallatin County*, 6 Mont. 297; *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

**Proceedings Before Part of Jury Sworn.** — Where more jurors are sworn on an inquisition of lunacy than are absolutely necessary, and the proceeding is commenced before all, it is irregular to discharge a part. Whatever number commences on the inquisition should be maintained throughout, and if on some occasion they are not all present the commissioners should adjourn the proceedings until another day. *Tebout's Case*, 9 Abb. Pr. (N. Y. Supreme Ct.) 211.

**1. Challenging Jurors.** — A contesting party upon a hearing before a commissioner of lunacy should be allowed to

challenge the jurors in accordance with the practice prescribed for the guidance and government of courts in obtaining an impartial jury. *Matter of Klock*, 49 Hun (N. Y.) 450.

**Juror Admitting Bias.** — Great care and caution should prevail, and a juror should not be allowed to sit who confesses that he has formed an opinion and "that it would require some little evidence to overcome it." *Matter of Klock*, 49 Hun (N. Y.) 450.

**Finding Induced by Bias.** — And if the finding has been induced by any bias or previously formed opinion, a new trial should be granted to the person against whom the writ issued. *Tebout's Case*, 9 Abb. Pr. (N. Y. Supreme Ct.) 211.

**Juror Serving on Former Inquisition.** — But the fact that a juror has served on a former inquisition as to the lunacy of the party on the present inquisition is not objectionable, and is waived where no bias or misconduct is charged to him, and where the same attorney who represented the alleged lunatic on her former trial fails to object and proceeds with the trial after that fact has appeared. *Matter of Lindsley*, 46 N. J. Eq. 358.

**2. Sheriff Conversing with Jury.** — It is improper for the sheriff who summons the jury in a commission to be in the room or to converse on the subject with the jury while they are deliberating on their verdict; and where there was such improper interference, the inquisition should be set aside and a new commission issued. *Matter of Arnhout*, 1 Paige (N. Y.) 497.

**3. Com. v. Haskell**, 2 Brews. (Pa.) 491.

**Ascertainment of Probable Cause.** — Under Act of *Pennsylvania*, June 13, 1836, § 9, the ascertainment of probable cause for a proceeding in lunacy is a special function to be exercised by the judge holding the inquest, or, by parity of reasoning, by the commis-

**9. Venue of Inquisition or Trial.** — In *England* the usual practice was to have the commission executed at the residence or place of abode of the party;<sup>1</sup> though if sufficient reason was shown it might be executed in another county.<sup>2</sup> In this country the practice of the Court of Chancery is about the same.<sup>3</sup>

Where Courts of a Probate Nature Have Jurisdiction of the proceeding, the venue of the inquisition or trial is dependent on statutes which, for the most part, fix it in the county or district in which the alleged incompetent resides.<sup>4</sup>

sioner performing the same duty; but this is only to be done after a finding that the party is not a lunatic, and if, by reason of the death of the lunatic, there is no such adjudication, the court has no such duty to perform. It is error for the jury to find as to the existence of probable cause. *Ebling's Estate*, 134 Pa. St. 227.

**Title to Lands** is not involved in proceedings to adjudge a party a lunatic, and a commission appointed therefor has no power to settle the question in regard thereto. *Hughes v. Jones*, 116 N. Y. 67.

**Issue in Action to Review Proceeding.** — Where an action is brought to review the proceedings of the Court of Common Pleas, declaring the plaintiff a person of unsound mind, the question in legal effect is as to the validity of such proceeding, and a verdict finding that the plaintiff is a person of sound mind and capable of managing his estate is not responsive to the issue presented. *Meharry v. Meharry*, 59 Ind. 257.

1. *Ex p. Baker*, 19 Ves. Jr. 340; *Ex p. Smith*, 1 Swanst. 4.

Though if the commission be not executed at or near the abode of the party, it seems that the inquisition will not be quashed for this reason. *Ex p. Hall*, 7 Ves. Jr. 261.

2. *In re Waters*, 2 Myl. & C. 38.

3. *Castleman v. Castleman*, 6 Dana (Ky.) 55; *Coleman v. Lunatic Asylum*, 6 B. Mon. (Ky.) 241; *Campbell's Case*, 2 Bland (Md.) 209.

**In New Jersey** it was decided that where the alleged lunatic is in an asylum the commission should be executed in the county where his mansion and estate are, or where he last resided before he was sent to the asylum. *Matter of Child*, 16 N. J. Eq. 498.

**Execution in Neighborhood of Residence.** — Inquisitions of lunacy are usually executed at the residence of

the supposed lunatic or in the vicinage; but that is a matter within the discretion of the judge or chancellor ordering the commission; he may order it to be executed in another district. *Ex p. Wilson*, 11 Rich. Eq. (S. Car.) 445.

**Venue in Case of Nonresident.** — A commission may issue to ascertain the lunacy of a nonresident; but the commission cannot be executed beyond the limits of the state. In such a case the inquisition may be executed in the county most convenient. *Matter of Petit*, 2 Paige (N. Y.) 174.

4. See *North v. Joslin*, 59 Mich. 624; *Cox v. Osage County*, 103 Mo. 385; *Sears v. Terry*, 26 Conn. 273; *Dumas's Interdiction*, 32 La. Ann. 679.

**Actual Residence in Contradistinction to Mere Domicil.** — Under the statute (Rev. Stat. Conn., c. 25, tit. 1) relative to the investigation of insanity and the appointment of conservators by courts of probate, it is essential that the person over whom the conservator is to be appointed shall have an actual residence in the probate district. A mere domicil in the district is insufficient. *Sears v. Terry*, 26 Conn. 273.

And likewise art. 392, R. C. C. La., providing that "every interdiction shall be pronounced by the judge of the domicil or residence of the person to be interdicted," contemplates an actual domicil and not merely a legal or constructive one. *Dumas's Interdiction*, 32 La. Ann. 679.

**Length of Residence.** — But the jurisdiction of the Probate Court is not dependent on the length of time the person has been in the county, under *Missouri Rev. Stat.* (1889), § 5513, giving the court jurisdiction *de lunatico inquirendo*, "if information in writing be given to the Probate Court that any person in its county is an idiot, lunatic," etc. *Cox v. Osage County*, 103 Mo. 385.

**10. Representation by Counsel or Next Friend.**—The alleged lunatic may and perhaps should be allowed counsel or next friend to represent his case, but it is doubtful whether the counsel has the absolute right to be heard in argument.<sup>1</sup>

**11. Presence of Party**—*a. RIGHT TO BE PRESENT.*—The right of a party alleged to be insane, to be present at the inquisition and defend his rights, is a corollary to that of notice, and it is error to deny him this right.<sup>2</sup>

*b. PRESENCE BY ORDER OF COURT.*—It is also desirable to have the party present, that a personal examination of him may be had, and if necessary the court may and should order him to be brought into the court or before the jury for this purpose.<sup>3</sup>

**1. Presence of Counsel.**—Where counsel prosecuting an inquisition of lunacy is granted permission to be present at the examination provided the adverse counsel does not object, the latter, having objected thereto, cannot complain of the inquisition on account of his own exclusion, especially if it does not appear that he claimed the right to attend, but accepted the exclusion of the prosecuting counsel as conclusive on himself. *Matter of Lindsley*, 46 N. J. Eq. 358.

**Argument of Counsel.**—In an early *New York* case the court said that there should be no argument of counsel on either side in a lunacy proceeding. *Matter of Arnhout*, 1 Paige (N. Y.) 497. But later it was decided that counsel might be allowed to sum up his case before the jury. *Matter of Dickie*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 417. And in another case, at the close of the evidence, counsel for the alleged lunatic insisted upon the right to address the jury, but the commissioners refused to allow it. On motion to confirm it was held that this refusal was error, and fatal to the motion for confirmation. *Matter of Church*, 64 How. Pr. (Rensselaer County Ct.) 393.

**Next Friend.**—The executor of the will of an alleged lunatic's deceased husband is not incapacitated from acting as her next friend in the lunacy proceeding. *Hambricht's Estate*, 10 Lanc. (Pa.) 161.

**2. Matter of Dickie**, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 417; *In re Lincoln*, 1 Brews. (Pa.) 392.

For the right to notice and appearance as a cure or waiver thereof, see *supra*, II. 6. *a. Necessity for, to Alleged Lunatic*; and II. 6. *e. Appearance as a Cure or Waiver of.*

#### Effect of Denial of Right to Be Present.

—The alleged lunatic is entitled to be present before the jury, and if they deny him this right it will be sufficient cause for setting aside the inquisition; but these irregularities will not so entirely avoid the inquisition that all persons may treat it as *ipso facto* null; and, the court having jurisdiction to issue the writ, the jury has authority to make the inquiry, and their inquisition, returned and confirmed by the court, must be regarded with the respect due to such solemn proceedings until it be reversed or superseded. *Bethea v. McLennon*, 1 Ired. L. (N. Car.) 523.

**Objection to Nonappearance After Confirmation.**—An inquest of lunacy which appeared to have been taken by the coroner and twelve freeholders and returned to the County Court, and by it confirmed, and from which it did not appear that the lunatic was present, was offered in evidence to support the plea of *non compos mentis*. It was held that, having been received by the County Court as an inquest, and the guardian having been appointed under it, it was too late to question it as an inquest. *Arrington v. Short*, 3 Hawks (N. Car.) 71.

**Appearance as Waiver of Defects.**—By *Pennsylvania* Act of June 13, 1836, a commission in lunacy was required to name a return day. But where the party appeared before the jury, and no objection was made by the counsel, but they took their chances and did not move to quash, it was held too late to object after verdict that there was no return day named. *In re Lincoln*, 1 Brews. (Pa.) 392. See *supra*, II. 6. *e. Appearance as a Cure or Waiver of.*

**3. See *infra*, II. 12. Personal Examination.**

*c.* PRESENCE NOT ABSOLUTELY NECESSARY. — But however desirable may be the presence of the party, yet it is not absolutely essential to the validity of the proceedings, if he had due notice thereof.<sup>1</sup>

*d.* PRESENCE DISPENSED WITH. — And as an accompaniment to the authority of the court to have the party produced, his presence may also be dispensed with if such a course is deemed advisable.<sup>2</sup>

**12. Personal Examination** — *a.* MATTER OF DISCRETION. — Whether or not the commissioners or jury shall have a personal examination of the alleged lunatic, is usually discretionary with them or the court.<sup>3</sup>

*b.* WHEN MADE. — But it is obvious that this must oftentimes be highly desirable, and the personal inspection and examination of the alleged lunatic should be made in every case where such a course would promote the settlement of the question.<sup>4</sup>

*Indiana.* — *Jones v. Van Gundy*, 16 Ind. 490; *Martin v. Motsinger*, 130 Ind. 555; *Fiscus v. Turner*, 125 Ind. 46.

*Montana.* — *Territory v. Gallatin County*, 6 Mont. 297; *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

*New Jersey.* — *Matter of Child*, 16 N. J. Eq. 498.

*Pennsylvania.* — *Draper's Estate*, 46 W. N. C. (Pa.) 218.

It is in general proper, and in some cases necessary, that the person alleged to be of unsound mind should be brought before the jury who are convened by the sheriff to ascertain his mental condition, and for that reason a writ is usually directed to the sheriff of the county in which the person said to be insane resides or may at the time be placed. *Campbell's Case*, 2 Bland (Md.) 209.

Under the *Kentucky* statute of 1840, the idiot or lunatic shall be brought into court unless it shall appear to the court, by written affidavits filed, that he cannot safely be brought into court. *McAfee v. Com.*, 3 B. Mon. (Ky.) 305.

**Party Preventing Attendance.** — Where an order is made, either by the court or commissioners, for the presence of the lunatic, the person who prevents his attendance before the commissioners and jury does so at his peril. *In re Russell*, 1 Barb. Ch. (N. Y.) 38.

**Preliminary Examination.** — The court may order preliminary examination of an alleged lunatic, either as evidence *per se* or for the purpose of enabling the court to ascertain how far it may be safe and proper to bring the party

before the court in person. *Draper's Estate*, 26 W. N. C. (Pa.) 218.

1. *Jessup v. Jessup*, 7 Ind. App. 573; *Martin v. Motsinger*, 130 Ind. 555.

2. *Matter of Child*, 16 N. J. Eq. 498; *Campbell's Case*, 2 Bland (Md.) 209; *McAfee v. Com.*, 3 B. Mon. (Ky.) 305.

*In Indiana*, by Rev. Stat. 1881, § 2547, "if the court shall be satisfied that such person, alleged to be of unsound mind, cannot without injury to his health be produced in court, such personal appearance may be dispensed with." *Martin v. Motsinger*, 130 Ind. 555.

3. *Matter of O'Brien*, 1 Ashm. (Pa.) 82.

**There Is No Rule** which requires the commissioners or jury to place the party under examination. *In re Lincoln*, 1 Brews. (Pa.) 392.

**Where None of the Triers Desires the Examination** it is no abuse of discretion for the court to refuse an application of the person bringing the information to have the examination made. *Jones v. Van Gundy*, 16 Ind. 490.

**Statement of Lunatic.** — Under the Code of *Tennessee*, if a statement of the alleged lunatic is offered in his behalf the jury are bound to receive it, and the clerk to take it down in writing and return it to the chancellor with their verdict; and this they may do on their own motion, but unless such an examination is offered they are not bound to make it. *Fentress v. Fentress*, 7 Heisk. (Tenn.) 428.

4. *In re Lincoln*, 1 Brews. (Pa.) 392; *In re Russell*, 1 Barb. Ch. (N. Y.) 38.

*In H. v. S.*, 4 N. H. 60, it is said that

c. PRESENCE OF PARTY BY ORDER OF COURT. — As we have seen, the court may, and should, cause the production of the party before the commissioners or jury whenever necessary, but the presence of the party at the inquisition may be dispensed with if advisable.<sup>1</sup>

13. **Finding and Verdict.** — Formerly the distinctions between idiocy, lunacy, insanity, etc., were very closely drawn and rigorously insisted on, and the inquisition was required to preserve these distinctions and to find, without inconsistencies, under what class the party belonged.<sup>2</sup> But by the modern practice and statutes, such technical accuracy, either in the finding of a commission from chancery, or in the verdict of the jury in probate courts, is not required, and since the purpose of the proceedings is to find whether or not the party is so mentally incompetent as to require the appointment of a guardian or committee, any finding distinctly showing the existence or nonexistence of this fact should in general be sufficient.<sup>3</sup> The inquisition must, however,

it is clearly the duty of selectmen, in examining into questions of insanity, to go to the person to whom the inquisition relates and there diligently inquire as to his capacity. In many cases there can be no difficulty in ascertaining the fact. But in some cases there may be doubt. The state of a man's mind can be known only from what he does and what he says. Generally, a conversation for a short time with a person would enable selectmen to settle the fact. Where that is found not satisfactory they should inquire of witnesses under oath as to his conduct and his management of affairs. When they have found the fact, whether *compos* or *non compos mentis*, they should distinctly return it to the judge of probate.

**Examination by Order of Court.** — The court may, of its own motion, order an examination of the alleged lunatic before the jury; and ordinarily it would not be erroneous to make such order on motion of persons interested. *Jones v. Van Gundy*, 16 Ind. 490.

**Examination by Part of Jury.** — The fact that only a part of the jurors in a commission of lunacy visited the alleged lunatic for personal examination of him is not sufficient ground for setting aside the inquisition. *De Hart v. Condit*, 51 N. J. Eq. 611.

**Examination at Party's Residence by Jury and Two Commissioners.** — And where the inquisition is held at a place not so remote as to preclude the jury from inspecting the lunatic, it is sufficient. In this case the inquisition was

held at a public house seven miles distant, and the jury and two of the commissioners went to the dwelling-house of the lunatic and inspected him, and it was considered that the inquisition was properly made. *Covenhoven's Case*, 1 N. J. Eq. 19.

**Weight Given to Inspection and Examination.** — It was not error to instruct the jury, in a proceeding charging a party with insanity, that they were to determine the facts in the case from the evidence alone. The *Indiana* statute (R. S. 1881, § 2547) requiring the party charged with insanity to be produced in open court when possible was designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard. It does not permit the jury to make their verdict upon the appearance and conduct of such person. Where, however, the party charged with insanity testifies in the cause, his conduct is to be considered by the jury as the conduct of any other witness is considered. *Fiscus v. Turner*, 125 Ind. 46.

1. See *supra*, II. II. *Presence of Party*.

2. *Buswell on Insanity*, § 66; *Woerner on Guardianship*, § 125.

3. **Finding as to State of Mind.** — Although it is better to adhere to the technical language of the statute in the finding of an inquisition, yet if enough appears to enable the court to adjudge the party to be within some one of the classes of persons over whom the stat-

conform substantially to the requirements of the statute governing it, and be responsive to the issue presented, which is, in general, whether or not the person is of unsound mind and incapable of managing his person and estate.<sup>1</sup>

ute has given it jurisdiction, it is sufficient. *Matter of Mason*, 1 Barb. (N. Y.) 436.

The Code Civ. Pro. of *New York* has made no change as regards the meaning of the word "lunatic," which embraces every description of unsoundness of mind except idiocy. Hence, in an inquisition, it is not necessary to state that the person is a "lunatic;" the finding that the person "at the time of taking the inquisition is of unsound mind, and mentally incapable of governing himself or his affairs, and that he has been in the same state since \* \* \* occasioned by old age and infirmity," is sufficient. *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

An inquisition which merely states that the person is "of unsound mind" is insufficient to show that he is an idiot. *Christmas v. Mitchell*, 3 Ired. Eq. (N. Car.) 535. And it is most proper that it should distinctly find the party to be a lunatic or an idiot, but it will be sufficient if an equivalent expression be used, as that he is "of insane mind." *Armstrong v. Short*, 1 Hawks (N. Car.) 11. Hence the technical and precise finding that a person is of "insane mind" is sufficient to support the inquisition, and all other statements as to whether the party is *non compos*, lunatic, or an idiot, etc., may be regarded as surplusage. *Bethea v. Mc-Lennon*, 1 Ired. L. (N. Car.) 523. So a finding that a person is mentally incapable is a sufficient finding of mental incompetency. *Matter of Leonard's Estate*, 95 Mich. 295.

**Finding as to Lucid Intervals.**—It is not necessary that an inquisition finding a person a lunatic should state whether or not he has lucid intervals. *Ex p. Wragg*, 5 Ves. Jr. 450. Therefore a return that a party "is a lunatic and of unsound mind, and does enjoy lucid intervals, so that he is not capable of the government of himself, his lands, tenements, goods, and chattels" is not objectionable either in form or fact. The words "and does enjoy lucid intervals" are unnecessary, and may be read parenthetically. *Matter of Hill*, 31 N. J. Eq. 203.

#### **Finding as to the Capacity for Management.**

—A return to an inquisition is sufficient if it is shown in substance that the selectmen and civil authority find the fact of his insanity, without stating specifically in the language of the statute that they judge him to be incapable of taking care of himself. *Smith v. Burnham*, 1 Aik. (Vt.) 84. So an inquisition finding the alleged lunatic "of unsound mind, so that he is not capable of the government of his lands, tenements, goods, and chattels," is sufficient, although it does not state that he is also incapable of governing himself. *Matter of James*, 35 N. J. Eq. 58. And a verdict by a jury of an inquisition of lunacy under Gen. Stat. Mo. (1865), p. 235, § 5, that the subject of the inquiry was insane, while informal, sufficiently implied an incapacity on his part of managing his own affairs, so as to warrant the appointment of a guardian for him so far as third persons were concerned. *Kiehne v. Wessell*, 53 Mo. App. 667.

**Recommendation of Jury.**—The jury found that the person was not insane, but recommended that from long confinement and divers circumstances she might require temporary guardianship. This recommendation was held to be proper and not to impair the legal effect of the verdict. *Matter of Dickie*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 417.

#### **Right to Traverse Affecting Strictness in Inquisition.**

—The reason of the greater strictness which prevails in the English Court of Chancery in relation to the form of the inquisition upon a commission in the nature of a writ *de lunatico inquirendo* has no connection, it seems, with the question of jurisdiction. But such reason is to be found in the fact that, by the English statutes, a person found to be a lunatic has a right to traverse the finding of the jury. In *New York* the right to traverse the inquisition does not exist; it is a matter of discretion with the court, and therefore there is not the same reason for insisting upon a particular form in the finding of the jury. *Matter of Mason*, 1 Barb. (N. Y.) 436.

**1. Finding as to the Unsoundness of Mind Generally.**—The jury must find



**Incapacity to Manage Estate.**— And it is not sufficient, in most of the states, to find that a person, in consequence of mental imbecility and weakness, is incapable of the management of his person or estate, without a more direct finding of the unsoundness of mind. There are many sane persons not capable of successfully managing their affairs.<sup>1</sup>

**14. Adjournment, Suspension, and Dismissal of Proceedings—By Action of Court.**— The court may adjourn, suspend, or dismiss the proceedings in any proper case.<sup>2</sup>

whether the party is of unsound mind or not, although they might not find that he is a lunatic in the popular sense of the word. *Matter of Conover*, 28 N. J. Eq. 330. And a finding that he is "imbecile" is not a sufficient compliance with the statute of *Pennsylvania*. *Gaul's Estate*, 7 W. N. C. (Pa.) 522. But a verdict reading, "We, the jury, find that E. C. is a person of unsound mind and incapable of managing her estate," is responsive to the issues and covers the entire case. *Cochran v. Amsden*, 104 Ind. 282.

**Finding as to Different Periods of Insanity.**— In *Florida*, where the issue was as to the insanity of the party at two named periods of time, and did not embrace the question of general insanity, a verdict finding the defendant generally insane, but capable of managing his business at those particular dates, is inconsistent and absurd. *Whitlock v. Smith*, 13 Fla. 385.

In *New York* the Code of Civil Procedure, § 235, provides that the adjudication as to lunacy must be limited to the fact as it exists at the time of the inquiry, and changes the form of practice in regard to adjudicating upon insanity at a previous time. *In re Cook*, (Supreme Court) 6 N. Y. Supp. 720; *Matter of Demelt*, 27 Hun (N. Y.) 480; *Southern Tier Masonic Relief Assoc. v. Laudenbach*, (Supreme Ct.) 5 N. Y. Supp. 901. For former practice as to previous time, see *Dominick v. Dominick*, (Supreme Ct.) 10 N. Y. St. Rep. 32.

**Finding as to Reason of Incompetency and Value of Estate—Kentucky.**— By §§ 2155, 2162, of the Kentucky Statutes it is provided that the jury, in an inquiry of lunacy, shall ascertain by the verdict for what reason the incompetency exists, and the value of the estate owned by the subject of the inquiry; and it is held that the omissions in the verdict and the judgment rendered thereon, of a reason for the in-

competency and of what the estate consists of, render the verdict and judgment fatally defective. The statute authorizing such proceedings should be strictly pursued and literally followed. *Menifee v. Ends*, 97 Ky. 388.

1. *New Jersey.*— *In re Lindsley*, 43 N. J. Eq. 9.

*New York.*— *Matter of Morgan*, 7 Paige (N. Y.) 236.

*North Carolina.*— *Armstrong v. Short*, 1 Hawks (N. Car.) 11.

*Pennsylvania.*— *Matter of Beaumont*, 1 Whart. (Pa.) 52; *Com. v. Reeves*, 140 Pa. St. 258.

For return of proceedings, see *infra*, II. 15. *Return of Proceedings and Action of Court Thereon.*

**Presumption of Determination of Insanity by Appointment of Guardian.**— The appointment of a special guardian for a lunatic defendant is a mere matter of routine, and not an adjudication of insanity. *Spencer v. Popham*, 5 Redf. (N. Y.) 425. Though it is held that where the record in insanity proceedings shows the appointment of a general guardian it must be considered that the fact of insanity has been determined upon, and the proceedings were in compliance with the forms of law. *Ockendon v. Barnes*, 43 Iowa 615.

In *Ohio*, however, by Act of 1872, 9 Ohio Laws 174, the appointment of a guardian for an imbecile was only *prima facie* evidence of the imbecility, and hence the question of competence could be inquired into by the ward in an action to enjoin the guardian from interfering with his property. *Messenger v. Bliss*, 35 Ohio St. 587.

**2. Adjournment for Procuring Evidence.**— Where it appeared that the alleged lunatic had been in confinement for upwards of three years, and that during that period he had been visited principally by those who petitioned for his confinement and physicians who were employed by them, it was held that the

**By Death of Party.** — The death of the party pending an inquiry into his sanity will suspend or abate the proceeding.<sup>1</sup>

**15. Return of Proceedings and Action of Court Thereon — Return.** — The commissioners and jury having disposed of the case, a return of their proceedings and finding is to be made to the court,<sup>2</sup> which must sometimes be under oath and under their hands and seals.<sup>3</sup>

commission should be ordered to adjourn after the petitioners had put in their evidence, to give the alleged lunatic a reasonable time to procure evidence as to his competency to transact his own business. *Matter of Baird*, (Supreme Ct.) 8 N. Y. St. Rep. 493.

**Dismissal Over Objection of Alleged Lunatic.** — A proceeding under Rev. Stat. Ind. (1881), § 2545, to have a person declared of unsound mind, is not a civil action in the meaning of the Civil Code, and the person instituting such proceeding has no right to dismiss the same without the consent of the court; and as a rule the court ought not to consent to the dismissal of such proceeding over the objections of the person alleged to be of unsound mind. Such person is entitled to a verdict that he is not of unsound mind if he can so prove. *Galbreath v. Black*, 89 Ind. 300.

**1. The Death of the lunatic pending or during an inquisition** puts an end to any further proceedings, and after that no inquisition can be taken, no finding made by the commissioner and jury, and no decree upon the lunacy of the party granted by the court. The proceeding is a purely personal one, and necessarily terminates on the death of the party. It becomes the duty of the commissioner and jury to make known to the court from which the commission issued the fact of the party's death and the reason for the suspension of their further proceedings. They should further report what had been done before them up to the death of the party, in order that the court may know whether any inquest had been found. But with this information their duties and powers cease, and they should not proceed further and make a finding of the party's mental capacity, and that there was probable cause for the filing of the petition, and the commencement of the proceedings. *Ebling's Estate*, 134 Pa. St. 227.

**2. Hovey v. Harmon**, 49 Me. 269; *H. v. S.*, 4 N. H. 60; *Shumway v. Shumway*, 2 Vt. 339.

Where the jurisdiction of the County Court in inquisitions of lunacy is concurrent with that of the Chancery Court, the Code of *Tennessee* provides that the practice of the County Court must conform as nearly as possible to the practice of the Chancery Court, and hence in such case the County Court clerk must preside over the deliberations of the jury, reduce to writing the examination of the defendant and the testimony of the witnesses, and return the same into court with the verdict of the jury. *Davis v. Norvell*, 87 Tenn. 36.

**Return of Evidence.** — In *New Jersey* and *Pennsylvania* it is not necessary that the evidence taken before the jury should be reduced to writing and returned with the inquisition. *Covenhoven's Case*, 1 N. J. Eq. 19; *In re Lincoln*, 1 Brews. (Pa.) 392; *In re Weaver*, 116 Pa. St. 225. But in *Tennessee* the contrary is the rule. *Davis v. Norvell*, 87 Tenn. 36.

**Death of Party Pending Inquisition.** — Where a person dies pending the investigation into his alleged lunacy, it is the duty of the commissioners and jury to make known to the court from which the commission issued, the fact of his death and the reason for the suspension of their further proceedings. They should further report what had been done before them up to the time of the death of the person, in order that the court may know whether any inquest had been found. *Ebling's Estate*, 134 Pa. St. 227.

**The Form of the return** is only important in so far as it is necessary to satisfy the conscience of the court. *Matter of Mason*, 1 Barb. (N. Y.) 436.

**3. Certifying Under Oath.** — Under the statute of *Montana* it was held that where it appears that the jury who examined the party failed to certify upon oath that the charge of insanity was correct, and only two jurors qualified to do so signed the verdict, the party will be discharged from custody on habeas corpus. *Territory v. Gallatin*

**Action of Court.**—The court will, thereupon, take such action relative to the affirmance or disaffirmance of the inquisition, the granting of a new commission or trial, the appointment of a committee or guardian, etc., as it may consider necessary and within its authority.<sup>1</sup>

**16. Setting Aside Inquisition**—*a. AUTHORITY FOR.*—The power to set aside an inquisition of lunacy, whether because of illegal or erroneous proceedings, or because of incorrectness in the finding itself, is inherent in the Court of Chancery.<sup>2</sup> But in those states where lunacy jurisdiction is vested in courts other than courts of chancery, this power, it is apprehended, is regulated by the statutes relating thereto and the construction placed upon them.<sup>3</sup>

County, 6 Mont. 297. But in a later case it was considered that where the jury acted under oath, and gave their verdict of insanity in clear language, this was a sufficient certifying upon oath that the charge of insanity was correct, under Comp. Stat. Mont. 1887, div. 5, § 1215. *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

**Under Hands and Seals.**—In *Pennsylvania* it was held that the inquisition must be returned under the hands and seals of at least six of the jurors. *Com. v. Roberts*, 1 Chest. Co. Rep. (Pa.) 24.

In *Kentucky* it was decided that when a writ of idiocy issues and the sheriff holds the inquest in the county it is necessary that the jury sign and seal the return. But when the inquisition is held in open court it is not necessary that the jury's finding should be under their hands and seals. *Lackey v. Lackey*, 8 B. Mon. (Ky.) 107.

1. See *In re Abbey*, (Supreme Ct.) 6 N. Y. Supp. 437; *Matter of Mason*, 51 Hun (N. Y.) 138; *Jackson v. Jackson*, 37 Hun (N. Y.) 306; *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

**Setting Aside Inquisition**, see the following section.

**New Commission on Trial**, see *infra*, II. 17. *New Commission on Trial*.

**As to Traverse.**—See also *infra*, II. 18. *Traverse*.

**Appointment of Committee or Guardian**,—See article GUARDIANS, vol. 9, p. 886.

2. *Matter of Collins*, 18 N. J. Eq. 254; *Matter of Lawrence*, 28 N. J. Eq. 331; *Matter of Lasher*, 2 Barb. Ch. (N. Y.) 97; *Matter of Arnhout*, 1 Paige (N. Y.) 497; *Matter of Wager*, 6 Paige (N. Y.) 11.

**Discharge of Inquisition as Substitute for Issue on Traverse.**—The Court of

Chancery has an undoubted right to discharge an inquisition of lunacy upon the mere examination of the supposed lunatic in connection with the evidence produced before the jury, without subjecting him to the expense of an issue or a traverse, where it is perfectly evident that the jury erred in finding him to be a lunatic. But to authorize the court to dispose of the case thus summarily, where there had been no change in the situation of the alleged lunatic subsequent to the finding of the inquisition, it must be a very clear case of mistake or undoubted prejudice on the part of the jury. It is also improper to discharge the inquisition upon *ex parte* affidavits contradicting the finding of the jury, where there is no reasonable excuse given for the neglect to produce deponents before the commissioners and the jury for examination as witnesses. *In re Russell*, 1 Barb. Ch. (N. Y.) 38.

3. **Pennsylvania.**—By statute in Pennsylvania, no commission in lunacy is to be issued unless such application be accompanied by affidavits of the truth of the facts therein stated, and if this objection be taken in time it is conclusive reason for setting aside a commission. But by going to trial without objection, this defect or irregularity is waived. *In re Lincoln*, 1 Brews. (Pa.) 392. So a finding that the party is "imbecile" is not a compliance with the statute; such an inquisition will be quashed. *Gaul's Estate*, 7 W. N. C. (Pa.) 522. But in this state the Court of Common Pleas cannot set aside an inquisition because it considers it contrary to the evidence. *In re Weaver*, 116 Pa. St. 225.

**New York.**—It was well settled before the adoption of the Code of Civil

*b. GROUNDS FOR* — (1) *Error or Illegality*. — Where the proceedings are infected with material error or illegality they will be set aside.<sup>1</sup>

(2) *Defect or Irregularity*. — But this will not be done for mere defects or irregularities, where there is no doubt as to the sanity or insanity of the party concerned.<sup>2</sup>

Procedure that an inquisition of lunacy might be set aside by the court for irregularity, as where it did not conform to the requirements of the statute, or where the facts did not justify the finding of the jury. This rule has not been changed by the provisions of the code. The court possessed the power, in its discretion, to set aside such inquisition and to grant a new trial therein, and this power to grant a new trial in a case in which a proper inquisition has not been returned to the court has not been restricted. *Matter of Mason*, 51 Hun (N. Y.) 138; *Jackson v. Jackson*, 37 Hun (N. Y.) 306; *In re Abbey*, (Supreme Ct.) 6 N. Y. Supp. 437.

**1. Error in Constitution of Commission.** — The facts that a new commissioner was substituted for one appointed by the chancellor, without his approval or confirmation, and that no one of the commissioners was a master of the court, were irregularities that would have set aside the inquisition if they had been urged for that purpose at or before the motion for confirmation, but these irregularities cannot affect the inquisition in a collateral way. *Matter of Collins*, 18 N. J. Eq. 253.

**Irregularity in Summoning Jury.** — It is the duty of a sheriff, in executing a commission, to select such jurors as he thinks proper, and who are indifferent in relation to the matter; and it is irregular and improper for the commissioners to dictate to the sheriff what jurors he should summon. For this irregularity the proceedings would be set aside, and a new commission directed to be issued. *Matter of Wager*, 6 Paige (N. Y.) 11.

**Improper Interference with Jury.** — It is improper for the sheriff who summons the jury in a commission to be in the room or to converse on the subject with the jury while they are deliberating on their verdict; and where there was such improper interference, the inquisition should be set aside and a new commission issued. *Matter of Arnhout*, 1 Paige (N. Y.) 497.

**Bias or Previously Formed Opinion.** — The proceedings will be set aside where the finding was induced by any biased or previously formed opinion. *Tebout's Case*, 9 Abb. Pr. (N. Y. Supreme Ct.) 211.

**Finding of Insanity Antedating Inquisition.** — In *New York* an inquisition finding a party a lunatic for a period prior to the time of taking the inquisition is unauthorized by Code Civ. Pro., § 2335, and it should not be confirmed as to so much of the finding as relates to the lunatic's infirmity prior to the time of the inquisition. *In re Cook*, (Supreme Ct.) 6 N. Y. Supp. 720; *Matter of Demelt*, 27 Hun (N. Y.) 480.

**Refusal to Allow Argument of Counsel.** — The refusal of the commissioner to allow the counsel for the alleged lunatic to address the jury upon the evidence is error, and fatal to the motion to confirm the finding. *Matter of Church*, 64 How. Pr. (Rensselaer County Ct.) 393.

**Court Setting Aside Its Judgment at Subsequent Term.** — A Probate Court can, at a subsequent term, set aside its judgment adjudging a person insane and appointing a guardian for him. *Matter of Marquis*, 85 Mo. 615. See also *Dutcher v. Hill*, 29 Mo. 275.

**2. Matter of Rogers**, 9 Abb. N. Cas. (N. Y. Supreme Ct.) 141.

Hence if it appear that the finding is correct it will not be vacated for immaterial defects or informalities therein, *Ex p. Glen*, 4 Desaus. (S. Car.) 546; *Kimball v. Fisk*, 39 N. H. 110; nor for defect or informality in the petition, *Matter of Dey*, 9 N. J. Eq. 181; nor for noncompliance with a rule of court requiring ten days' notice to be given to the alleged lunatic and his next friend of the time and place of taking the inquisition, *Hambright's Estate*, 10 Lanc. (Pa.) 161.

And so the finding and confirmation thereof should not be set aside for mere irregularity where there is no room for doubt as to the lunacy of the person. *Lamoree's Case*, 11 Abb. Pr. (N. Y. Supreme Ct.) 274.

(3) *Finding Contrary to Evidence.*—Where it appears to the court that the finding of the commission is incorrect or contrary to the evidence, the inquisition and proceedings may be vacated.<sup>1</sup>

(4) *Finding Not Responsive to Issue.*—The return to a commission should correspond to the issue presented, and if it does not do this, or is evasive or ambiguous, it will be set aside.<sup>2</sup>

17. *New Commission on Trial.*—The court, having the power to set aside an inquisition, may also, in its discretion, order a new commission on trial to determine the issues presented on the original one.<sup>3</sup> The grounds for this alias proceeding are about

1. *Matter of Lawrence*, 28 N. J. Eq. 331; *Matter of Collins*, 18 N. J. Eq. 254.

Where, on a motion to set aside an inquisition, the chancellor finds, after personally examining him, that the party is probably a lunatic and of unsound mind, an inquisition finding him not a lunatic will be set aside and a new commission ordered. *Matter of Fitzgerald*, 30 N. J. Eq. 59.

An inquisition found that a deaf-mute sixty-five years old, who had been such since she was two or three years old, who was ignorant, and could neither read nor write, nor communicate her ideas to others by signs or otherwise, and who could not be made to understand an ordinary business transaction, was "of sound mind and capable of controlling her property by her own selection of a proper person to act for her." Such a finding was held contrary to evidence and was set aside. *Matter of Perrine*, 41 N. J. Eq. 409.

Prior to the adoption of the *New York Code of Civil Procedure* the court might set aside an inquisition on the ground of its contrariety to the evidence. *Matter of Lasher*, 2 Barb. Ch. (N. Y.) 97. And the rule was not changed by the Code. *Matter of Mason*, 51 Hun (N. Y.) 138; *Jackson v. Jackson*, 37 Hun (N. Y.) 306.

Thus, upon the return of an inquisition of lunacy, the County Court refused to confirm it as being against the weight of evidence, and an appeal was taken from this refusal. It was held that under section 2336 of the *New York Code of Civil Procedure*, providing that "upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury upon the question submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition as jus-

tice requires," the County Court is vested with large discretion, and the court above, on appeal, will not interfere with this decision. *In re Abbey*, (Supreme Ct.) 6 N. Y. Supp. 437.

The Court of Common Pleas in *Pennsylvania* has no power to set aside an inquisition of lunacy on the ground that the finding is in conflict with the evidence. In this state a traverse of the inquisition is a matter of right given by statute, which traverse is to be tried by jury, and if it were within the power of the court to set aside the inquisition on the merits of the case it would in effect virtually nullify the right of a traverse and the consequent right to trial by jury. And aside from the question of power to set aside an inquisition on the ground of its being contrary to the evidence, it is difficult to see how this could be done, since the testimony taken on the inquisition is no part of the record, there being no provision for its reduction to writing, nor for bills of exception to bring it on the record for review. *In re Weaver*, 116 Pa. St. 225.

2. *In re Lindsley*, 43 N. J. Eq. 9; *Gaul's Estate*, 7 W. N. C. (Pa.) 522.

But a Court of Chancery will not set aside an inquisition taken under a commission of lunacy obtained with a view to setting aside the marriage of the alleged lunatic, when the jury have found that the woman was not an idiot or lunatic, though of weak understanding. Such irregularity in the proceedings of the commissioner and jury will not induce the court to set aside the inquisition and to order a new one in a case of such delicacy, and when the court is satisfied that substantial justice has been done. *Ex p. Glen*, 4 Desaus. (S. Car.) 546. See *supra*, II. 13. *Finding and Verdict*.

3. *In re Abbey*, (Supreme Ct.) 6 N. Y. Supp. 437; *Matter of Mason*, 51 Hun

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the same as those justifying the setting aside of the original inquisition, with perhaps one or two additional cases.<sup>1</sup>

**18. Traverse** — *a. GENERAL USE OF.* — Where a party is aggrieved by the finding of an inquisition of lunacy, the proper procedure is by a direct appeal to the court by means of a traverse.<sup>2</sup>

*b. WHETHER MATTER OF RIGHT OR OF DISCRETION.* — In *England* a traverse to an inquisition has been held to be a right by law.<sup>3</sup> In some of the *United States* the granting of it has

(*N. Y.*) 138; *Jackson v. Jackson*, 37 *Hun* (*N. Y.*) 306; *Hovey v. Harmon*, 49 *Me.* 269. See *supra*, II. 16. *a. Authority for*; and II. 8. *Issue to Be Tried.*

**Necessity of New Petition.** — Where a commission in lunacy fails to agree an alias commission may be appointed on the original petition. *Com. v. Eldridge*, 2 *Chest. Co. Rep. (Pa.)* 333; *Marples's Case*, 15 *Pa. Co. Ct. Rep.* 310. But it is held that a new commission cannot issue upon the original petition where the proceedings under the first are set aside. *In re Hinchman*, *Bright* (*Pa.*) 181, 7 *Pa. L. J.* 268.

**Changing Mode of Trial.** — It was objected that even if the court had power under *New York Code Civ. Pro.* to grant a new trial on an inquisition of lunacy, still it had no right to change the mode of trial from a trial before a commission and jury to a trial before the court and jury, to be held at a trial term of that court. The objection was held untenable. *Matter of Mason*, 51 *Hun* (*N. Y.*) 138, *following Jackson v. Jackson*, 37 *Hun* (*N. Y.*) 306.

1. See *supra*, II. 16. *b. Grounds for.*

**Finding Incorrect or Against Evidence.** — *Matter of Lawrence*, 28 *N. J. Eq.* 331; *Matter of Fitzgerald*, 30 *N. J. Eq.* 59; *Matter of Collins*, 18 *N. J. Eq.* 254; *Matter of Lasher*, 2 *Barb. Ch. (N. Y.)* 97; *Matter of Mason*, 51 *Hun* (*N. Y.*) 138; *In re Abbey*, (*Supreme Ct.*) 6 *N. Y. Supp.* 437.

**Finding Produced by Bias or Previous Opinion.** — *Tebout's Case*, 9 *Abb. Pr. (N. Y. Supreme Ct.)* 211.

**Irregularity in Summoning Jury.** — *Matter of Wager*, 6 *Paige* (*N. Y.*) 11.

**Improper Interference with Jury.** — *Matter of Arnhout*, 1 *Paige* (*N. Y.*) 497.

**Disagreement of Jury.** — *Com. v. Eldridge*, 2 *Chest. Co. Rep. (Pa.)* 333; *Marples's Case*, 15 *Pa. Co. Ct. Rep.* 310.

**Change in Condition of Party.** — *Matter of Collins*, 18 *N. J. Eq.* 254.

**2. Hambright's Estate**, 10 *Lanc. (Pa.)* 161; *H. v. S.*, 4 *N. H.* 60.

**Awarding Feigned Issue Instead of Formal Traverse.** — The practice of the Court of Chancery of *New York* was to award a feigned issue in all cases where a traverse would be proper, instead of allowing a formal traverse. *Matter of Tracy*, 1 *Paige* (*N. Y.*) 580; *In re Russell*, 1 *Barb. Ch. (N. Y.)* 38.

**General Summary of Procedure.** — The Court of Chancery of *New York* had the whole jurisdiction in regard to idiots and lunatics, and it would direct the course of proceedings, on the traverse of the inquisition returned, in such manner as might be most useful and expedient, so as best to inform its conscience and afford the safest conclusion as to the existence of the fact of lunacy. The lunatic might be brought into court after the inquisition was returned, and an inquiry be made by inspection, or an issue be awarded to ascertain, by a verdict at law, the existence or continuance of the lunacy. The most usual and proper course was to have the issue made up and prepared by the Court of Chancery instead of delivering over the record and traverse after the attorney-general had joined issue thereon to the court of law. At the time of directing the issue at law the court would, if necessary, make a provisional order for the care of the lunatic's estate until the question of lunacy was determined. *In re Wendell*, 1 *Johns. Ch. (N. Y.)* 600.

**In South Carolina** it was held that a Probate Court has no jurisdiction to grant a traverse to an inquisition finding a party to be of unsound mind. Such jurisdiction is vested in the Court of Common Pleas. *Walker v. Russell*, 10 *S. Car.* 82.

**3. Ex p. Wragg**, 5 *Ves. Jr.* 450.

been held discretionary with the court,<sup>1</sup> while in others the traverse is a matter of right.<sup>2</sup>

*c.* WHEN ALLOWED. — In pursuance of its proper discretion, the court should allow a traverse whenever there exists a reasonable doubt of the justice of the jury's finding.<sup>3</sup>

*d.* WHEN DENIED. — But where the finding was clearly right, or the court has no doubt of the mental status of the party, traverse should be denied.<sup>4</sup>

*e.* TO WHOM ALLOWED — **Lunatic.** — A person found by an inquisition to be a lunatic has legal capacity to traverse.<sup>5</sup>

**Petitioner.** — And the petitioner may traverse an inquisition in favor of sanity.<sup>6</sup>

**Party Having No Interest.** — A mere stranger cannot resort to this proceeding; in order to entitle one to it he must have some interest in the question at the time of the return.<sup>7</sup>

1. **England.** — Matter of Fust, 1 Cox 418.

**New Jersey.** — Matter of Lindsley, 46 N. J. Eq. 358; Matter of Vanauken, 10 N. J. Eq. 186.

**New York.** — Matter of Mason, 1 Barb. (N. Y.) 436; Matter of Tracy, 1 Paige (N. Y.) 580; *In re M'Clean*, 6 Johns. Ch. (N. Y.) 440; *In re Russell*, 1 Barb. Ch. (N. Y.) 38; Matter of Clapp, 20 How. Pr. (N. Y. Supreme Ct.) 385.

2. **In Vermont** an inquisition of lunacy is traversable as a matter of right, and may be sent from a court of chancery to a court of law to be tried by a jury. *Shumway v. Shumway*, 2 Vt. 339.

**In Pennsylvania** a traverse is a matter of right within three months; after that it is a matter of discretion. *Benedict's Lunacy*, 3 Kulp (Pa.) 96.

3. *In re Russell*, 1 Barb. Ch. (N. Y.) 38; Matter of Vanauken, 10 N. J. Eq. 186; *DeHart v. Condit*, 51 N. J. Eq. 611.

**Traverse Directed on Appeal.** — In Matter of James, 35 N. J. Eq. 58, the party was found to be of unsound mind, but on an appeal from the decree of the chancellor it was held that the testimony taken under the inquisition did not satisfactorily show that the subject was of unsound mind, and the decree was reversed and the case remitted, with instructions that the appellant be permitted to traverse the inquisition or that an issue be directed. See also Matter of James, 36 N. J. Eq. 547.

**Lunatic's Examination Dispensed With Where Application Is in Interests of Another Party.** — Leave to traverse the inquisition should not usually be granted without the lunatic having been examined privately by one of the masters of

the Court of Chancery; but in this case the chancellor was satisfied that the application was substantially in the interest of the one whose conveyance was overreached by the inquisition, and as the affidavits showed that it was a case of sufficient doubt to entitle him to ask for a feigned issue, such an issue was directed upon his filing a stipulation to be bound by the final decision thereon. Matter of Christie, 5 Paige (N. Y.) 242.

4. **Leave to Traverse Refused.** — Leave to traverse an inquisition will be refused where three costly inquisitions have already been had, and it appears from a personal examination of the alleged lunatic by a master in chancery that she is mentally incapable of demanding the right to traverse. Matter of Lindsley, 46 N. J. Eq. 358.

And where the lunacy at the time the inquisition is found is not questioned, but a traverse is sought to vary the time at which the lunacy commenced, to exempt from its operation a will executed by the lunatic within the period of the lunacy, with respect to which the inquisition is not conclusive, it will not be granted. *Covenhoven's Case*, 1 N. J. Eq. 19.

5. *Walker v. Russell*, 10 S. Car. 82.

In *New Jersey* it has been held that a person found to be a lunatic may appear and traverse the inquisition by attorney, but an idiot must appear before the court in person. *Covenhoven's Case*, 1 N. J. Eq. 19.

6. *Ex p. Dickinson*, 1 W. N. C. (Pa.) 96.

7. *Armstrong v. Short*, 1 Hawks (N. Car.) 11.

Thus on an inquisition returned

**Party Having Interest.** — On the score of interest, when an inquisition upon a person alleged to be of unsound mind relates back so that the right to property that he has sold may be drawn in question, the purchaser may traverse the inquisition; usually, however, upon a stipulation to be bound by the final decision upon such traverse.<sup>1</sup>

**f. ISSUE TO BE TRIED.** — The issue to be tried on the traverse is the same one tried on the original inquisition.<sup>2</sup>

**g. WHERE TRIED.** — The traverse should, as a general rule, be tried in the district where the commission was executed; but that seems to be a matter of discretion with the judge or chancellor ordering the traverse.<sup>3</sup>

**h. BURDEN OF PROOF.** — The effect of a finding on an inquisition being *prima facie*, the burden of disproof is thrown on the respondent.<sup>4</sup>

finding a person lunatic or of unsound mind at that time and for five years last past, a third person representing himself to be the attorney in fact of the alleged lunatic, under a letter of attorney executed within that period, and stating that he had transacted business of the alleged lunatic to a considerable amount, and advertised and sold part of his real estate, the alleged lunatic himself having executed and delivered the deeds therefor, and that by the finding of the inquisition he (the attorney) is endangered in the contracts entered into by virtue of said letter of attorney, cannot be heard upon petition by him praying that the inquisition may be quashed, or a new commission issued, or a traverse ordered; he is not interested as a purchaser whose title might be affected by the inquisition, neither is he liable as vendor, the lunatic himself having executed the deeds; he has no interest which entitles him to be heard. *Covenhoven's Case*, 1 N. J. Eq. 19.

1. *Nailor v. Nailor*, 4 Dana (Ky.) 340; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Matter of Christie*, 5 Paige (N. Y.) 242; *Gensemer's Estate*, 170 Pa. St. 96.

**Traverse Personally or by Joinder with Lunatic.** — The alienee of the supposed *non compos* may himself traverse, or may join in the lunatic's traverse. *Medlock v. Cogburn*, 1 Rich. Eq. (S. Car.) 477.

**Abandonment of Issue by Counsel.** — Where the court had directed a feigned issue to try the question of lunacy, and a third person whose conveyance was overreached by the inquisition had consented to join in the issue and to be bound by the result thereof, it was held

that the counsel for the respective parties to the suit were not authorized to abandon the trial of the issue without the sanction of the court, and to leave the validity of the lunatic's conveyance to be decided in some other mode. *Matter of Giles*, 11 Paige (N. Y.) 243.

**Death of Lunatic as Affecting Traverse by Grantee.** — In *New York* it is held that where a person, after having been adjudged a lunatic, conveys land, his death is no bar to a traverse of the inquisition by his grantee, whose conveyance is invalidated by the inquisition. *In re Owens*, (C. Pl.) 18 N. Y. Supp. 850.

In *Pennsylvania* it is decided that the death of an alleged lunatic, after traverse taken, will end the proceedings, although the traverse was taken by a person whose title to land was affected by the inquisition. The lunatic's death, however, will not affect the decree confirming the inquisition. *Gensemer's Estate*, 170 Pa. St. 96.

2. *M'Elroy's Case*, 6 W. & S. (Pa.) 451. See *supra*, II. 8. *Issue to Be Tried*.

**Duty of Committee to Take Issue and Oppose Traverse.** — Where, by order of the court, an inquisition of lunacy is allowed to be traversed by an inquisition to be framed and made up for trial at the circuit, it is the plain duty of the committee appointed under the inquisition to oppose the traverse, and to see that the issue is properly tried and not suffered to go by default. *Matter of Clapp*, 20 How. Pr. (N. Y. Supreme Ct.) 385.

3. *Ex p. Wilson*, 11 Rich. Eq. (S. Car.) 445. See *supra*, II. 9. *Venue of Inquisition or Trial*.

4. *McGinnis v. Com.*, 74 Pa. St. 245.



i. **DEATH OF PARTY AS AFFECTING.** — A traverse of an inquisition will not be set aside because of the death of the alleged lunatic since the taking of the traverse and before the trial of the issue.<sup>1</sup> And where a person, after having been duly adjudged a lunatic, conveys land, his death is no bar to a traverse of the inquisition by his grantee.<sup>2</sup>

j. **ACTION OF COURT ON RETURN OF.** — It seems that when the finding on the traverse has been returned, the court awarding it may investigate the matter on its merits and either set aside the finding or confirm it, as justice may require.<sup>3</sup>

k. **COSTS.** — The costs of a traverse appear to be governed by the same general principles as the costs on the original inquisitions, as far as such principles are applicable.<sup>4</sup>

**Commencement and Conclusion.** — This entitles the commonwealth to the commencement and conclusion on the trial of a traverse to a finding in lunacy. *Com. v. Haskell*, 2 Brews. (Pa.) 491.

1. *Davidson v. Fry*, 11 Lanc. (Pa.) 357.

2. *In re Owens*, (C. Pl.) 18 N. Y. Supp. 850.

But in *Pennsylvania* it is held that the death of an alleged lunatic after traverse will end the proceedings, although the traverse was taken by a person whose title to property was affected by the inquisition. *Gensemer's Estate*, 170 Pa. St. 96.

3. **Finding Set Aside.** — An inquisition was found and the court allowed a traverse. The traverse jury found a similar verdict against the party, whereupon an appointment of a committee of his person and estate was moved by a petitioner and the alleged lunatic moved to dismiss the proceedings. It was held that it was the duty of the judge hearing these motions, he having presided at the trial and heard all the evidence, and having a full and fair opportunity of knowing in a reliable manner the mental condition of the party in question, to dispose of the whole matter on its merits and, if the verdict was unsatisfactory, to set it aside and dismiss the proceedings. *Matter of Shaul*, 40 How. Pr. (Herkimer County Ct.) 204.

**Finding Confirmed.** — Where, after a person has been found a lunatic by the jury summoned by virtue of a commission of lunacy, a feigned issue out of chancery is applied for and obtained to try the question as to the unsoundness of his mind, and upon the trial of such issue the jury find that the alleged

lunatic is not of unsound mind, the proceeding upon the commission will be discharged, and he will be restored to full control of his property. *Matter of Giles*, 11 Paige (N. Y.) 638.

4. See also *infra*, II. 20. *Costs*.

**Costs of Unsuccessful Traverse Charged on Estate.** — Formerly, in *New York*, the expenses to be charged on the estate of the lunatic in case of a traverse were limited to twenty-five dollars; and in no case of an unsuccessful traverse could the solicitor of the traverser have any allowance out of the estate. *Matter of Van Cott*, 1 Paige (N. Y.) 489. But now the court may, in its discretion, make the reasonable costs and expenses a charge upon the lunatic's estate, and this although traverse proves unsuccessful. *Carter v. Beckwith*, 128 N. Y. 312.

**Costs Imposed on Party Traversing.** — Where, on the petition of a relative of a lunatic, who had received from the lunatic a deed of a farm a few days before the finding of the inquisition of lunacy, an issue was awarded to try the fact of lunacy, and on the trial the person was found to have been a lunatic for several years preceding, the party traversing the inquisition was ordered to pay the costs. *In re Folger*, 4 Johns. Ch. (N. Y.) 169.

**Costs Charged to Lunatic, but Not on Estate.** — On the petition of a lunatic for the discharge of his committee, on the ground of restored sanity, it is in the sound discretion of the court to allow him to traverse the inquisition, or to try the question on a feigned issue; and where the lunacy was satisfactorily established in the first instance, and the opinion of the court, after repeated applications of the party

**19. Review of Proceedings**—*a. BY APPEAL*—(1) *Whether and When Appeal Lies.*—In the absence of statutory authorization it is believed that no appeal from an adjudication in lunacy proceedings will be allowed.<sup>1</sup> This, however, has been the subject of legislative enactment in various states, by which the appeal has been expressly given.<sup>2</sup>

(2) *Who May Appeal.*—The party who has been declared a lunatic by inquisition has often capacity personally to prosecute the appeal.<sup>3</sup> But a mere stranger, with no interest in the result, cannot have the case thus reviewed.<sup>4</sup>

(3) *Appellate Regulations and Procedure.*—The right of appeal

for the discharge of his committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the industry and skill of his wife, and barely sufficient for the maintenance of herself and children and of her husband. *In re M'Clellan*, 6 Johns. Ch. (N. Y.) 440.

1. *Studabaker v. Markley*, 7 Ind. App. 368; *Sparrow v. Ingham* Circuit Judge, (Mich. 1896) 67 N. W. Rep. 112; *Willis v. Lewis*, 5 Ired. L. (N. Car.) 14; *Ray v. Ray*, 11 Ired. L. (N. Car.) 357; *Darnell v. State*, 24 Tex. App. 6.

2. *Chase v. Hathaway*, 14 Mass. 222; *Shumway v. Shumway*, 2 Vt. 339; *Cooper v. Summers*, 1 Sneed (Tenn.) 453; *Fentress v. Fentress*, 7 Heisk. (Tenn.) 428.

Under Rev. Stat. Ill. 1874, c. 85, p. 681, entitled "An act to revise the law in relation to the commitment and detention of lunatics," no appeal will lie from a finding and order of the County Court in a proceeding to inquire into the alleged insanity of a person. An appeal is not compatible with the nature of this proceeding, for oftentimes when a person is found to be insane it is dangerous to allow him to be at large, and it would be inconvenient and often hazardous to allow the person to go at large while an appeal was pending. But though no appeal will lie from the finding of a court that the party is insane, yet the twentieth section of the Act of March 21, 1874, provides that when any patient committed to a hospital shall be restored to reason he shall be discharged, and that if he be detained afterwards, contrary to his wishes, he shall have the privilege of a writ of habeas corpus at all times. Here is a remedy provided by the Act

for the case of a sane person more speedy than that of an appeal. *People v. Gilbert*, 115 Ill. 59.

By Act of 1877 an appeal from the order of a Probate Court is given to the Circuit Court. *Snyder v. Snyder*, 142 Ill. 60.

**Iowa**—*Appeal from Refusal to Grant Rehearing.*—By statute in Iowa (McClain's Code, 391), it is provided that any person found insane by the commissioners of insanity may appeal to the Circuit Court within ten days after the finding of the commissioners is filed. In this case no appeal was taken from such finding, but afterwards a rehearing was asked, and, upon the commissioners' refusal to grant it an appeal was taken therefrom to the Circuit Court. It was held that since there was no statute authorizing a rehearing, it followed that no appeal from such refusal could be allowed. The appeal provided for was from the finding of the commissioners, and not from their refusal to reconsider the case. *Wilson v. State*, 66 Iowa 487.

3. *Cuneo v. Bessoni*, 63 Ind. 524.

4. An appeal may be entered by the lunatic in a period of sanity. *Formby v. Wood*, 19 Ga. 581.

4. *Rorback v. Van Blarcom*, 20 N. J. Eq. 461.

**From What Judgment Petitioner May Appeal.**—In a proceeding to have a person adjudged of unsound mind the petitioner who institutes the proceeding is not a real party in interest, and after the proceeding is instituted the function of the petitioner is at an end; but if the petition should fail, the law imposes upon him the liability for costs; and the petitioner, not being a party to the merits of the case, can appeal from the judgment of the court only in so far as it affects his liability for costs. *Studabaker v. Markley*, 7 Ind. App. 368.

being given by statute, the appellate principles and procedure are to be governed by the regulations prescribed or by the methods obtaining in general appellate practice in similar cases.<sup>1</sup> These regulations will, in general, determine whether there is to be a trial *de novo*,<sup>2</sup> and whether the Appellate Court is limited to an affirmance or reversal or may go further and order a new inquisition, etc.<sup>3</sup>

*b. BY WRIT OF ERROR.* — According to the doctrine of some of the states, writ of error will lie to review proceedings in lunacy.<sup>4</sup>

**1. Mississippi** — *Time for Appeal and Removal of Disability.* — Where a party has been found *non compos mentis* by the bill and proceedings in the court below, and he desires to appeal therefrom, he need not await the removal of his disability, and if the appeal be taken by his guardian or next friend it need not be within the time allowed for appeal of sane persons. And where an appellant was found to be insane by the bill in subsequent proceedings in chancery, and the appellee desires to plead in bar of the appeal, the plea, to be good, must aver the removal of the disability existing when the decree was given and the lapse of the requisite period to bar appeal after the removal of such disability and before the appeal. *Finney v. Speed*, 71 Miss. 32.

**Tennessee** — *Effect of Appeal on Original Judgment.* — An appeal in the nature of a writ of error provided by Acts 1811, c. 62, § 11, and 1813, c. 78, § 2, from the Circuit to the Supreme Court, suspends but does not abrogate the judgment of the Circuit Court in a lunacy case until a judgment shall be pronounced in the Supreme Court. If the appeal in error be dismissed or abated, the judgment of the Circuit Court remains in force. *Thomasson v. Kercheval*, 10 Humph. (Tenn.) 322.

**Texas** — *Allowance of Proof of Sanity.* — On an appeal from the decision of the County Court adjudging a party insane and appointing a guardian, the District Court considered the judgment conclusive and refused to allow the vendee of the adjudged lunatic to show by proof that the party was in fact sane at the date of the sale of his property. The Court of Appeals held this to be error, and that while the original judgment was suspended by the appeal, it was only *prima facie* evidence of the lunacy of the vendor, and that his vendee should have been allowed to prove sanity at the time of the sale. *Grimes v. Shaw*, 2 Tex. Civ. App. 20.

**Vermont** — *Jurisdiction on Appeal Where Trial Court Has No Jurisdiction.* — In *Cleveland v. Hopkins*, 2 Aik. (Vt.) 394, it was held *arguendo* that if the court from which an appeal in lunacy proceedings issued had no jurisdiction of the matter, the appellate court could take none.

**2. Illinois** — *Trial De Novo.* — A trial of an appeal from the order of the Probate Court adjudging a person insane is given to the Circuit Court by the Act of 1877, and on such appeal the trial is to be *de novo*, and the latter court may appoint a conservator of the respondent, the same as the Probate Court might have done. On the trial *de novo* the Circuit Court stands in the shoes of the Probate Court, and is clothed with the same powers and jurisdiction as that court. *Snyder v. Snyder*, 142 Ill. 60.

**Michigan**. — Where an appeal is taken from an order of the Probate Court adjudging the appellant incompetent and appointing a guardian of his person and estate, the case stands for trial upon the original petition, and if the Probate Court acquired jurisdiction by citation, service, and appearance, it is immaterial, so far as the retrial on the appeal is concerned, what errors were committed upon the hearing in the Probate Court, or whether or not the probate judge who heard the case was disqualified to hear it and to make the order appealed from. *Matter of Leonard's Estate*, 95 Mich. 295.

**3. Matter of Breesee**, 82 Iowa 573; *Cooper v. Summers*, 1 Sneed (Tenn.) 453; *Fentress v. Fentress*, 7 Heisk. (Tenn.) 428.

**4. In Tennessee** the alleged lunatic may prosecute a writ of error in proper person, and upon the proper oath, from an adverse judgment in a proceeding of inquisition. *Davis v. Norvell*, 87 Tenn. 36.

**In Mississippi** the decree of the bankrupt court finding a party to be bank-

But in others this form of review is considered inapplicable.<sup>1</sup>

*c.* BY CERTIORARI. — Erroneous or irregular proceedings in lunacy cases may generally be reviewed by certiorari.<sup>2</sup>

**20. Costs — Proper Tribunal to Tax.** — The taxation of costs should be by the court or tribunal properly authorized to do so.<sup>3</sup>

**Discretion of Court.** — In the absence of express statutory provisions to the contrary it seems that the entire matter of costs rests in the sound discretion of the court having jurisdiction of the inquisition, and this discretion has been directly given by statute in some of the states.<sup>4</sup>

**Imposing Costs on Petitioners.** — In the exercise of this discretion the general test is whether the petitioners acted upon probable cause, in good faith, and for the benefit of the supposed *non compos*.<sup>5</sup>

rupt cannot be collaterally attacked by showing that the party was a lunatic at the time of the rendition of the decree. In such a case the court proceeds in error of fact, and the mistake could only be pointed out by writ of error *coram nobis*. *Saunders v. Mitchell*, 61 Miss. 321.

**Michigan — Mandamus as a Remedy.** — One who has been adjudged an incompetent person, and who delays for six years to take the usual method of testing the validity of the proceedings, which is by certiorari or writ of error, is not in a position to invoke the discretionary writ of mandamus to compel the Probate Court to hear his petition to set aside the incompetent order because of alleged jurisdictional defects appearing upon the face of the proceeding, he alleging in such application that he was never incompetent. But mandamus is a proper remedy to compel the Probate Court to proceed to a hearing and determination, upon a proper petition, of the present competency of one who has been adjudged an incompetent person. *Coot v. Willett*, 93 Mich. 304.

**1. Ohio.** — Where a prisoner on trial for crime has been found to be sane, under the *Ohio* Act of 1877 (Rev. Stat., § 7240), error will not lie to reverse such proceedings for alleged errors therein, before the party's conviction; nor after conviction, such proceedings not being final in their nature. *Inskeep v. State*, 36 Ohio St. 145.

**Pennsylvania.** — Here it is held that error does not lie from the Supreme Court to the Court of Common Pleas on an inquest finding a person to be a lunatic, *Gest's Case*, 9 S. & R. (Pa.) 317; and that the judgment of the Com-

mon Pleas quashing an inquisition is revisable by the Supreme Court by certiorari, but not by writ of error, *Com. v. Beaumont*, 4 Rawle (Pa.) 366. But in *McGinnis v. Com.*, 74 Pa. St. 245, it was held that a writ of error lies to the rulings and charge of the court on the trial of a traverse of the findings in proceedings of lunacy, and that issues of fact, whether by way of traverse or feigned issue, when tried before a jury according to the course of the common law, are subjects of writs of error.

**2.** See article CERTIORARI, vol. 4, p. 1.

**3.** *Gulick v. Conover*, 15 N. J. L. 420; *Com. v. Quinter*, 2 Woodw. (Pa.) 377; *Freeman's Appeal*, 22 W. N. C. (Pa.) 173.

**4.** *Matter of Van Cott*, 1 Paige (N. Y.) 489; *Ebling's Estate*, 134 Pa. St. 227; *Clark's Case*, 22 Pa. St. 466; *Hasenplug's Appeal*, 106 Pa. St. 527.

**In Pennsylvania** it was held on error that when the inquisition has found the fact of lunacy, and thus justified the proceedings, it would be a severe measure of justice to impose all the costs upon the petitioner prosecuting the proceedings, unless there was some special and sufficient reason in support of such practice. *In re Weaver*, 116 Pa. St. 225. The statute, however, does not confer upon the court the power to make an order on the executor of an alleged lunatic who died before inquisition found, for the payment of such costs. *Ebling's Estate*, 134 Pa. St. 227.

**5.** If the finding of the inquisition be that the party is sane, and that there was no probable cause for the proceedings, this is sufficient to cast the costs upon the petitioner. *Ex p. Birth*, 1 Kulp (Pa.) 101.

**Imposing Costs on Defendant.** — Costs may be imposed upon the defendant in the inquisition proceeding.<sup>1</sup>

**Apportionment of Costs.** — In a proper case costs may be apportioned between the defendant and the petitioner.<sup>2</sup>

**Charging Lunatic's Estate with Costs.** — The costs adjudged against a lunatic may be made a charge against his estate.<sup>3</sup>

In **Indiana** the discretion does not appear to exist, and under Rev. Stat. Ind. 1881, § 2548, if the jury find that the person against whom the complaint is filed is not of unsound mind, the court must render judgment for costs against the person making such complaint. *Galbreath v. Black*, 89 Ind. 300. And if the court, in its discretion, and without objection from the petitioner, permits a dismissal of the proceedings in insanity, it may also award costs against the person who needlessly instituted the inquiry. *Ruhlman v. Ruhlman*, 110 Ind. 314.

If the Proceeding Was Instituted in Good Faith and upon Probable Cause, the petitioner need not and usually will not be made to pay the costs, even though the party be found to be sane. *Matter of Giles*, 11 Paige (N. Y.) 638; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Matter of Arnhout*, 1 Paige (N. Y.) 497; *Matter of McAdams*, 19 Hun (N. Y.) 292; *Carter v. Beckwith*, 128 N. Y. 312; *Matter of White*, 17 N. J. Eq. 274. But in *Matter of Farrell*, 51 N. J. Eq. 353, it was held that upon a commission in the nature of a writ *de lunatico inquirendo*, where the alleged lunatic is found to be of sound mind, or the commission is superseded before a guardian is appointed, the prosecutor cannot be allowed his costs and expenses, however meritorious his conduct may have been, there being no fund out of which they can be directed to be paid.

**Prima Facie Evidence of Good Faith and Probable Cause.** — Where a jury legally impaneled have found the party proceeded against to be a lunatic, such finding is *prima facie* evidence that the petitioner proceeded in good faith and from probable cause, although another jury, upon the trial of a feigned issue, finds the other way. *Matter of Giles*, 11 Paige (N. Y.) 638.

1. *Hassenplug's Appeal*, 106 Pa. St. 527; *Clark's Case*, 22 Pa. St. 466.

**New Jersey.** — The Act of March 23, 1887 (P. L. 48), does not authorize the charge of the fees of jurors and com-

missioners upon the estate of the alleged lunatic, if he shall be found to be of sound mind. *Matter of Farrell*, 51 N. J. Eq. 353.

**Illinois.** — Under Rev. Stat. Ill., c. 85, § 13, where the jury on the trial for insanity find a party insane and a pauper, the costs of the proceeding, including the fees of the jury, are to be paid out of the county treasury. If the party be found to be insane but not a pauper, the costs of the proceeding, including the fees of the jury, are to be paid by the petitioner, and judgment may be awarded against him therefor, or such costs shall be paid by his guardian, conservator, or relatives, as the court may direct. *Union County v. Axley*, 53 Ill. App. 670.

2. Where the petition for the inquest was supported by but one affidavit, and five out of the six jurors found that the respondent was not a lunatic, the court divided the costs between the petitioner and the respondent. *In re Graybill*, 2 York (Pa.) 109. See also *Com. v. Reeves*, 140 Pa. St. 258.

3. *Matter of Lofthouse*, 3 N. Y. App. Div. 139.

**Costs on Traverse.** — See *supra*, II. 18. *k. Costs.*

**Manner of Perfecting Claims.** — The costs and expenses in a proceeding to declare a person incompetent, and for the appointment of a committee, are not perfected claims till the court has fixed the amount and ordered them to be paid, after which they may be presented as valid obligations against the estate of the lunatic, who has since died. *Matter of Lofthouse*, 3 N. Y. App. Div. 139.

**Services of Medical Experts.** — Medical experts called in to examine as to the mental condition of a person who is before the court on a habeas corpus, cannot have their claims for such services allowed against the estate of the relator in a subsequent commission of lunacy which adjudged the party a lunatic, such claimants not being present at the inquisition. *Rogers's Appeal*, 119 Pa. St. 178.

**Death of Party.** — The death of the alleged lunatic before the confirmation of the inquisition does not oust the court of jurisdiction over the question of costs.<sup>1</sup>

**21. Supersedeas of the Commission on Restoration to Mental Soundness.** — *a.* PETITION. — If a person adjudged incompetent has been restored to sound mind and desires to have the fact of restoration tested, a petition should be presented to the court, setting forth his recovery and praying that the commission be superseded and that he be restored to the management of his person and estate.<sup>2</sup> By whom this petition should be made, seems to be not entirely settled.<sup>3</sup>

*b.* NOTICE. — Proper notice of the application for supersedeas or the pendency of proceedings thereon should be given.<sup>4</sup>

*c.* METHOD OF DETERMINING RESTORATION — **England.** — Under the English practice the petition for a supersedeas is heard before the chancellor in person, without a reference. And the commission will not be superseded without the evidence of physicians and the attendance of the lunatic in person. If the chancellor doubts, a traverse is permitted or an issue ordered.<sup>5</sup>

**United States.** — In this country it is sometimes provided by statute that the restoration to reason is to be determined by a proceeding like the one by which the party was determined

1. *Ex p.* Russell, 1 C. Pl. Rep. (Pa.) 34; Matter of Lofthouse, 3 N. Y. App. Div. 139.

**Costs on Supersedeas of Commission.** — See *infra*, II. 21. *b.* Notice.

2. Gillespie *v.* Thompson, 7 Ind. 353; Hovey *v.* Harmon, 49 Me. 269; Matter of Price, 8 N. J. Eq. 533.

3. In **Indiana** a person under guardianship as a lunatic cannot, under Rev. Stat. 1852, have the fact of his restoration to sound mind tried and determined on his own personal application therefor. The allegation of restoration should be made by some person other than the lunatic. Gillespie *v.* Thompson, 7 Ind. 353.

In **Maine** it is decided that though the petition is ordinarily signed by the former lunatic, yet there seems to be no reason why it may not be by the guardian. Hovey *v.* Harmon, 49 Me. 269.

In **New Jersey**, to obtain an order of reference to a master to inquire whether a party is restored to sanity, a petition of the person previously adjudged a lunatic should be presented. The petition of the committee, it seems, is not sufficient in this state. Matter of Price, 8 N. J. Eq. 533.

4. A commission should not be super-

seded upon a hearing without notice, nor upon *ex parte* affidavits, even with the assent of the guardian. Matter of Weis, 16 N. J. Eq. 318.

**Notice to Next of Kin or Presumptive Heirs.** — In **Michigan** notice of the application of a person found *non compos* to be discharged from guardianship on the ground of his restored competency must be given to the next of kin or presumptive heirs of the applicant; and mandamus will not lie to compel a circuit judge to vacate an order dismissing the appeal of an incompetent person from the order of the Probate Court denying his application for a discharge from guardianship, where the record fails to show all such proper service. Storms *v.* Allegan Circuit Judge, 99 Mich. 144.

**Petition by Guardian.** — Under the statute of **Maine** no notice of the proceeding to supersede the commission and remove the guardian is necessary when the petition therefor is made by the guardian himself. Hovey *v.* Harmon, 49 Me. 269.

5. Matter of Weis, 16 N. J. Eq. 318. Citing *Ex p.* Bampton, Moseley 78; *Ex p.* Ferrars, Moseley 332; Matter of Sombre, 1 Phil. 436; Matter of Gordon, 2 Phil. 242.

insane.<sup>1</sup> But in most instances the manner of this determination rests in the sound discretion of the court. It may direct the petitioner to appear before the court personally for inspection and examination, or adopt the more usual course of referring the matter to a referee or master to take evidence as to the petitioner's state of mind and to report the evidence and his opinion thereon to the court.<sup>2</sup>

*d.* ISSUE TO BE DECIDED. — The question to be determined is whether the person previously adjudged insane has so far regained his reason as to be capable of managing his person and estate.<sup>3</sup>

*e.* WHEN SUPERSEDED. — Where the court is satisfied that a former incompetent has recovered his reason it will supersede the commission and restore the party to his liberty and the custody of his estate.<sup>4</sup>

*f.* WHEN NOT SUPERSEDED. — If the party be not restored the guardianship will be continued.<sup>5</sup>

1. Redden *v.* Baker, 86 Ind. 191.

By statute in *Illinois* it is provided that if an insane person be restored to his reason, he shall have restored to him what there remains of his property and estate. It intends that the court making the previous orders may require the case to be redocketed, an issue formed upon the petition, and a trial had; if it be found that the person has regained his reason, the conservator is to be ordered to return the property to him, otherwise the relief will be refused and the property permitted to remain in the hands of the conservator, subject to the further order of the court. The proceeding is, in substance, a further proceeding in the original cause. *Ayers v. Mussetter*, 46 Ill. 472.

2. *Hovey v. Harmon*, 49 Me. 269; *Matter of Rogers*, 5 N. J. Eq. 46; *Matter of Weis*, 16 N. J. Eq. 318; *In re Hanks*, 3 Johns. Ch. (N. Y.) 567.

The petitioner has no legal right to have the question of his sanity submitted to and determined by a jury; but the manner of its determination, whether upon affidavits, by personal examination of witnesses in court, by reference to a referee to take the evidence and report thereon, or by trial before a jury, is in the discretion of the court. *Matter of Blewitt*, 138 N. Y. 148.

3. *Cochran v. Amsden*, 104 Ind. 282.

4. *Ex p. Drayton*, 1 Desaus. (S. Car.) 144.

If a person under guardianship is so

far restored to reason as to be capable of managing his estate, the guardianship should be discharged. *Cochran v. Amsden*, 104 Ind. 282.

**Partial Restoration.** — In some cases, where the recovery appears to be partial, the court may partially restore to the person his former rights without an entire restoration or supersedeas. *Matter of Burr*, 2 Barb. Ch. (N. Y.) 208.

5. *Cochran v. Amsden*, 104 Ind. 282.

**Party Insane with Lucid Intervals.** — A commission of lunacy will not be superseded where it is shown by the evidence that the party is liable at any moment to be excited beyond his control; that he is, in fact, an insane man with lucid intervals. *Ex p. Helmbold*, 35 Leg. Int. (Pa.) 291.

**Discharge of Committee of Person Without Discharge of Committee of Estate.** — Where a person has been found to be a lunatic, and committees of his person and estate have been appointed, the committee of the person will not be discharged upon the petition of the lunatic alleging that he is so far restored to reason as to be able to govern himself, when it does not appear that he is yet competent to manage his estate, and no application is made for the discharge of the committee of the estate. *Matter of Burr*, 17 Barb. (N. Y.) 9.

**Appeal from Refusal to Discharge Guardian.** — On appeal from the refusal of a probate judge to discharge the guardian of a person found *non compos*, the latter claiming to be restored to reason,

*g.* DEATH OF PARTY AS BAR TO PROCEEDINGS. — In some jurisdictions the death of the lunatic bars a proceeding to supersede the commission on the ground of subsequent recovery.<sup>1</sup>

*h.* COSTS. — It is held that where a proceeding to set aside the guardianship of an insane person is unsuccessful, the costs should be taxed to the plaintiff, and not to the guardian or estate of such insane person.<sup>2</sup>

**22. Effect of Inquisition as Evidence.** — An inquisition of lunacy simply makes a *prima facie* case, and is not conclusive evidence on the question of incapacity.<sup>3</sup> *A fortiori* it is not conclusive against third persons who were not parties to it.<sup>4</sup>

**III. INSANITY AS A COLLATERAL ISSUE — 1. In Suits in Chancery** — *a.* DETERMINATION BY CHANCELLOR. — A court of chancery has original jurisdiction, to be exercised in its sound discretion, to try all questions of fact without the intervention of a jury; and if the sanity of a party is involved in a chancery suit the court is not bound to submit an issue to be tried by a jury if it can decide of itself, to its own satisfaction, upon the evidence; the aid of a jury being merely to inform its conscience.<sup>5</sup>

the appellant need not give bonds to prosecute the appeal. *M'Donald v. Morton*, 1 Mass. 543.

1. This is so under N. Y. Code Civ. Pro., § 2344; *In re Owens*, (C. Pl.) 18 N. Y. Supp. 850.

2. *Cochran v. Amsden*, 104 Ind. 282.

3. *Lucas v. Parsons*, 23 Ga. 267; *Hunt v. Hunt*, 13 N. J. Eq. 161; *Hill v. Day*, 34 N. J. Eq. 150; *Mott v. Mott*, 49 N. J. Eq. 192; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Keys v. Norris*, 6 Rich. Eq. (S. Car.) 388.

4. *Field v. Lucas*, 21 Ga. 447; *Den v. Clark*, 10 N. J. L. 217.

A petitioner in proceedings *de lunatico inquirendo* is not a party to the record in such sense that he is bound by the finding, and precluded from showing that the lunatic was sane, in an action to set aside a deed or mortgage executed by the lunatic. *Hughes v. Jones*, 116 N. Y. 67.

5. *Smith v. Carll*, 5 Johns. Ch. (N. Y.) 118; *Alexander v. Alexander*, 5 Ala. 517; *Harding v. Handy*, 11 Wheat. (U. S.) 103; *Brown v. Miner*, 128 Ill. 148.

As to submission of issue where insanity is involved in a will case, see article PROBATE AND ADMINISTRATION.

**Pennsylvania.** — The Chancery Court in Pennsylvania has no power, at the instance of a third party, to institute a summary inquiry as to the sanity of a suitor before it, decree him insane, and proceed to make orders and decrees in

accordance therewith. If a party to a suit in equity is insane, or becomes so pending the proceedings, and that fact becomes apparent to the chancellor, he has doubtless the power to make such orders in the premises as will preserve the *status quo* of the cause, and thus afford an opportunity to those whose interest or duty it may be to do so, to institute proper proceedings for the determination of the question of insanity, and the appointment of a committee to represent the *non compos* and protect his interests; but he has no power to assume jurisdiction and determine the fact of insanity himself. After a person has been found insane, in the mode pointed out by law, jurisdiction of his person and estate cannot, of course, be questioned. *Meurer's Appeal*, 119 Pa. St. 115.

**The Findings of Fact by a Master** as to the mental condition of a grantor, confirmed by the court below, are to be treated as if established by the verdict of a jury, and not to be disregarded except for plain mistake. *Doran v. McConlogue*, 150 Pa. St. 98.

**New and Cumulative Matter Insufficient to Sustain Bill of Review.** — If the mental incapacity of a party in a chancery suit was considered and passed upon by the court in the proceedings sought to be reviewed, new matter which merely tends to establish the fact of incapacity, and which might have been procured before by reasonable diligence, is not



**b. DETERMINATION BY ISSUE TO JURY.** — Where, however, a doubt on this question is produced in the mind of the court, either from the nature of the evidence or from a conflict thereof, it is competent for the court to inform its conscience by directing an issue to a jury; to determine the matter, and in case of such doubt this course should usually be pursued.<sup>1</sup>

**The Verdict of a Jury** on the trial of a feigned issue out of chancery, in a case of insanity, being merely advisory to the chancellor, he may adopt or disregard it, and enter a decree confirmatory or contrary to the finding, as, in his judgment, the weight of evidence may justify.<sup>2</sup>

sufficient to sustain a bill of review. *McDowell v. Morrell*, 5 Lea (Tenn.) 278.

1. *Wallace v. Bevard*, Wright (Ohio) 114; *Fishburne v. Ferguson*, 84 Va. 87; *Atwood v. Smith*, 11 Ala. 894. For general practice on issues to jury in insanity cases, see article ISSUES TO JURY.

**Issue to Determine Continuance of Insanity.** — Pending a bill by the guardian of a lunatic to set aside conveyances upon the ground that they were made by his ward when of unsound mind, the court will, at any stage of the cause, even after argument upon application of parties to the suit, properly verified and security given for costs, order a writ of inquisition to issue to ascertain, in the mode prescribed by law, whether the lunatic is still of unsound mind. *Yourie v. Nelson*, 1 Tenn. Ch. 275.

**On Bill to Set Aside Marriage**, on the ground of mental incapacity to enter into a marriage contract, the court may award an issue to a jury to ascertain that fact. *Doe v. Roe*, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 344.

**Denial of Insanity by Party in Whose Name Suit Brought.** — Where a suit in equity is brought in the name of an alleged *non compos* by his next friend, and the party asks for a dismissal thereof, and denies his incompetency, the fact thus put in issue should be tried by a jury ordered by the chancellor. *Howard v. Howard*, 87 Ky. 616.

**Court Not Directing Issue in Proper Case.** — In *Myatt v. Walker*, 44 Ill. 485, a bill in equity was filed by heirs to set aside deeds made by the ancestor during his lifetime, on account of insanity. The evidence was voluminous, doubtful, and conflicting, and the appellate court reversed the decree of the court below, because an issue was not

directed to try the question of sanity, and directed such an issue to be framed.

**Insanity Only Part of Cause Submitted.**

— Where the question of insanity is the only one defendant asked to have submitted to a jury, he cannot object that this was the only part of the cause submitted. *Pankey v. Raum*, 51 Ill. 88.

**Issue as to Particular Date on Ex Parte Petition of Friend.** — It is irregular, and sanctioned by no rule of chancery practice, to direct a special issue as to the lunacy of a party upon particular dates to be tried in a court of law upon an *ex parte* petition of a friend of the lunatic. *Whitlock v. Smith*, 13 Fla. 385.

2. *Titcomb v. Vantyle*, 84 Ill. 371; *Harding v. Handy*, 11 Wheat. (U. S.) 103.

**Weight Attached to Verdict of Jury.** — Where an issue of insanity is directed from a Court of Chancery to be tried by a court of law the verdict of the jury upon the issue is entitled to great consideration; but where the proof before the chancellor in the first instance did not warrant him in directing the issue, or, in other words, when the case made at the hearing was such as to entitle one party or the other to an immediate decree, no weight whatever can attach to the jurors' finding of the issue. *Atwood v. Smith*, 11 Ala. 894.

**Practice Where Party Is Dissatisfied with Verdict of Jury.** — Where the question of insanity has been raised by the pleading in a suit in the Chancery Court, and it was directed to be tried by a jury in the Circuit Court, if either party is dissatisfied with the verdict an application should be made, not to the court in which the issue was tried, but to the court where the cause is pending. Upon such motion that court will not, like a court of law, grant a new trial upon the ground merely that improper testimony was received or proper

**2. In Action at Law.** — The determination of sanity or insanity in an action at law is generally the province of the jury, and is regulated by the principles governing the determination of other matters of fact in such actions.<sup>1</sup>

**3. In Criminal Cases.** — See *infra*, IV. 5. *In Criminal Cases.*

**IV. INSANITY AS A DEFENSE** — **1. Right to Allege Insanity.** — Whatever the ancient common-law rule may have been,<sup>2</sup> the American courts have always held that any one may present insanity on his part as a defense.<sup>3</sup>

**2. Under Special Plea** — *a. GENERALLY.* — The defense of insanity may, and sometimes must be, presented by a special plea to that effect.<sup>4</sup>

testimony rejected. Where the court is satisfied that, notwithstanding the improper reception or rejection of evidence, the verdict ought to have been the same, it will not grant a new trial. *Alexander v. Alexander*, 5 Ala. 517.

**Duty of Chancery and Appellate Court.** — In this case the preponderance of the legal testimony was clearly against the sanity of the grantor, both before and after the execution of the deed, and no lucid interval at the time of the execution of said deed was proved; it was error, therefore, to have directed the issue. It was the duty of the chancellor to have disregarded the verdict of the jury and to have set aside the order directing the issue, and to have entered a decree upon the proofs as they stood at the time the issue was ordered. And it is the duty of the appellate court, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the state of the proofs at the time the issue was ordered, and, if satisfied that the chancellor has improperly exercised his discretion in directing the issue, to render a decree, notwithstanding the verdict, according to the merits, as disclosed by the proofs on the hearing when the issue was ordered. *Anderson v. Cranmer*, 11 W. Va. 582.

**1.** Where there is evidence for and against sanity the question is for the consideration of the jury, under proper instructions from the court, and not for final adjudication by the judge. *Gainesville v. Caldwell*, 81 Ga. 76.

Thus, in an action for personal injuries, it is a question for the jury whether the injury caused the person to become insane, as he afterwards did, or whether the insanity resulted from other causes. *Texas, etc., R. Co. v.*

*Bailey*, (Tex. Civ. App. 1894) 27 S. W. Rep. 302.

Difference of opinion between the judge and jury, on the question of insanity, where the evidence is conflicting, does not authorize the, former to set aside the verdict. *Hill v. Nash*, 41 Me. 585.

**2.** See Am. and Eng. Encyc. of Law (2d ed.), title *Insanity*.

**3.** *Connecticut.* — *Webster v. Woodford*, 3 Day (Conn.) 90.

*Illinois.* — *McCormick v. Littler*, 85 Ill. 62.

*Indiana.* — *Harbison v. Lemon*, 3 Blackf. (Ind.) 51.

*Kentucky.* — *Taylor v. Dudley*, 5 Dana (Ky.) 309.

*Maine.* — *Thornton v. Appleton*, 29 Me. 298.

*Maryland.* — *Owings' Case*, 1 Bland (Md.) 370.

*Massachusetts.* — *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Allis v. Billings*, 6 Met. (Mass.) 415.

*Missouri.* — *Tolson v. Garner*, 15 Mo. 494.

*New Hampshire.* — *Lang v. Whidden*, 2 N. H. 435.

*New York.* — *Rice v. Peet*, 15 Johns. (N. Y.) 503.

*North Carolina.* — *Morris v. Clay*, 8 Jones L. (N. Car.) 216.

*Pennsylvania.* — *Crawford v. Scovell*, 94 Pa. St. 48.

*South Carolina.* — *M'Creight v. Aiken*, Rice L. (S. Car.) 56.

See in general upon this subject, Am. and Eng. Encyc. of Law (2d ed.), title *Insanity*.

**4. In General** it seems that the party may have his choice between the special plea and the general issue. *Mitchell v. Kingman*, 5 Pick. (Mass.)

**6. NATURE OF.** — Such a plea is one in the nature of a plea of confession and avoidance, or in the nature of a plea in abatement, depending on whether it is offered as a defense on the merits, or in abatement of a criminal prosecution, on the ground of present insanity.<sup>1</sup>

431; *Young v. Stevens*, 48 N. H. 133; *Burke v. Allen*, 29 N. H. 106.

**Georgia** — *Insanity at Time of Trial.* — By Code of Georgia, §§ 4673 and 4299, it is the practice, where insanity at the time of the trial is insisted on, to file a special plea to that effect and to try such plea by a special jury; and in no case can this special defense be put in without an averment of the existence of this diseased condition of the mind at that time. *Danforth v. State*, 75 Ga. 614; *Fogarty v. State*, 80 Ga. 450.

The plea of insanity provided for in section 4334 of Irwin's Code is, in its nature, a plea the object of which is to prevent a trial on the merits; and though it may cover insanity at the time of the act, its essence is that the prisoner is insane at the trial, and it must contain that allegation. *Long v. State*, 38 Ga. 491.

**Alabama** — *Criminal Cases.* — By statute in Alabama (Acts 1888-89, § 4, pp. 742-746), it is provided that in prosecutions for murder, rape, robbery, or burglary, or any grade of these crimes, "where the defense of insanity is set up, it shall be interposed by special plea at the time of his [the defendant's] arraignment, which in substance shall be 'not guilty by reason of insanity;' which plea shall be entered of record upon the docket of the trial court. Such plea shall not preclude the usual plea of the general issue, which shall not, however, put in issue the question of irresponsibility of the accused by reason of his alleged insanity, this question being triable only under the special plea." By sections 5 and 6 of the act it is required that the jury shall return a special verdict on the question of the defendant's sanity *vel non*. *Perry v. State*, 87 Ala. 30; *Maxwell v. State*, 89 Ala. 150.

Under these provisions, therefore, it is proper for the court to reject all evidence as to the defendant's mental condition when attempted to be put in under a plea of not guilty. *Perry v. State*, 87 Ala. 30; *Maxwell v. State*, 89 Ala. 150; *Ward v. State*, 96 Ala. 100.

The foregoing act relating only to the

mode of procedure, it applies to all cases tried since its passage, although the offense was committed before that date. *Perry v. State*, 87 Ala. 30.

*Verification of Plea Amounting to Non Est Factum.* — A special plea setting forth that the deed sued on was not the deed of the defendant, because at the time of its execution he was a lunatic, which plea is not verified by affidavit, is bad on demurrer. All pleas of *non est factum* must by statute in Alabama be verified; and since the defense of insanity could properly be given in evidence under this plea, it would be strange to allow such statements to go unverified simply by making a special plea of them. *Winston v. Moffet*, 9 Port. (Ala.) 518.

**New York** — *Plea on Arraignment.* — There is no provision in the statutes of New York for a plea of insanity except that authorized by section 336 of the Code Crim. Pro., which is required to be made upon arraignment. *People v. McElvaine*, 125 N. Y. 596.

**Wisconsin.** — By Rev. Stat. Wis., §§ 4697-4699, it is provided that in criminal actions the defense of insanity shall be specially pleaded. *Bennett v. State*, 57 Wis. 69.

**1. Plea in Nature of Confession and Avoidance.** — A plea of insanity is of itself, and of necessity, a plea in the nature of a plea of confession and avoidance, the courts differing as to the quantum of evidence to sustain it. Such a plea is but a bare denial of a part of the government's case; it admits the act charged, but avers that there was no criminal intent accompanying the act, and therefore denies the act charged. This being the case, it is wholly immaterial whether testimony as to the dying declarations of the deceased was properly received in evidence or not. *State v. Pagels*, 92 Mo. 300.

**Plea in Nature of Plea in Abatement** — *Verification.* — In *Texas* it is held that a plea of insanity, being in the nature of a plea in abatement, if not sworn to is bad on general exception; and the mere filing of such unverified plea on the day set for trial will not delay the

c. REQUISITES AS TO FILING, AVERMENTS, ETC. — The plea must be filed at the proper time,<sup>1</sup> must contain all necessary averments,<sup>2</sup> and the court should be satisfied of its correctness.<sup>3</sup>

3. Under General Issue. — Unless controlled by statutory provision it is believed that the defense of insanity may always be raised and given in evidence under the general issue, or pleas of a like general nature.<sup>4</sup> These general pleas go to the merits of

further progress of the case until the question of the plaintiff's sanity be investigated. *Allen v. Pannell*, 51 Tex. 165.

1. Filing After Motion for Continuance Overruled. — In *Georgia* it is held that when a motion is made to continue a criminal case, at the calling of the case the movant must take all his grounds; he cannot, after his motion has been overruled, file a special plea of insanity based upon facts known at the time of the first motion, and then move to continue because not ready to try that plea. *Long v. State*, 38 Ga. 491.

Filing After Several Continuances. — Where a plea of insanity in an action of replevin was not filed until after several continuances and the beginning of the trial, it is properly stricken out. *Jetton v. Smead*, 29 Ark. 372.

2. Insanity at Time of Trial. — Thus if the essence of the plea is that the prisoner is insane at the time of a criminal trial, it must directly allege this diseased condition of the mind at that time. *Long v. State*, 38 Ga. 491; *Danforth v. State*, 75 Ga. 614; *Fogarty v. State*, 80 Ga. 450.

Insanity at Time of Contracting — *Allegation of Continuing Disability*. — An answer to a complaint for specific performance against the heirs of a decedent, which alleges as a defense insanity of decedent at the time the contract was made, need not allege that it was a continuing disability. *Sheets v. Bray*, 125 Ind. 33.

*Necessity of Restoration of Receipts*. — In an action on a contract, the defendant may plead insanity without restoring what the insane person received under the contract, in cases where the ability does not remain of restoring what was received in specie. *Rea v. Bishop*, 41 Neb. 202.

3. Plea in Bar of Sentence, Without Proper Support. — A party on trial for crime was suggested to be insane, and being tried by a commission appointed for the purpose, was found to be of sound mind. He being called for sen-

tence, offered a plea of insanity in bar of sentence, that he had since become insane and was then so. There were no affidavits of friends, counsel, physician, or jail attendant accompanying the plea, nor was a single specific fact stated which might move the court to further inquiry. The court refused to entertain the plea, and on appeal such refusal was held correct. *Com. v. Buccieri*, 153 Pa. St. 535.

4. *Alabama*. — *Walker v. Clay*, 21 Ala. 797; *Winston v. Moffet*, 9 Port. (Ala.) 518.

*California*. — *People v. Olwell*, 28 Cal. 456.

*Delaware*. — *Allen v. Babcock*, 1 Harr. (Del.) 348.

*Louisiana*. — *State v. Reed*, 41 La. Ann. 581.

*Massachusetts*. — *Mitchell v. Kingman*, 5 Pick. (Mass.) 431.

*New Hampshire*. — *Burke v. Allen*, 29 N. H. 106; *Young v. Stevens*, 48 N. H. 133.

*New York*. — *Ostrander v. People*, 28 Hun (N. Y.) 38; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *People v. McElvaine*, 125 N. Y. 596.

*Virginia*. — *Baccigalupo v. Com.*, 33 Gratt. (Va.) 807.

*West Virginia*. — *Gruber v. State*, 3 W. Va. 699.

*Georgia*. — *Insanity at Time of Commission of Offense*. — Under the Georgia law and practice the defense of insanity at the time of the commission of the crime, if insisted on, must be made under the plea of not guilty; it goes to the very vitals of the case, and if satisfactorily made out would finally acquit the defendant of the charge against him and entitle him to go without a day, absolutely freed and discharged of the offense for which he was indicted. *Danforth v. State*, 75 Ga. 614.

*Withdrawal of Special Plea*. — Thus on arraignment in a criminal case the court required the defendant to plead guilty or not guilty. To this he objected, but proposed to plead insanity. The court permitted this plea, but

the case, and under them every defense in repelling or mitigating and reducing the offense to a lower grade is admissible.<sup>1</sup>

**4. Burden and Extent of Proof.** — Where the act of a party is sought to be avoided upon the ground of mental imbecility, either as a defense for crime, or in excuse of civil liability, the proof of such incapacity lies upon him who alleges it.<sup>2</sup> This is

required also the plea of guilty or not guilty. On the trial of the plea of insanity, before the special jury, no evidence was introduced on either side, and the court withdrew the plea and discharged the jury. This was held not to be error on the part of the court, since the defense of insanity at the time the act was done was, in fact, but a branch of the plea of not guilty, and if no evidence was introduced under the special plea it was proper for the court to withdraw it and allow the defense of the case to be covered by the general issue. *Long v. State*, 38 Ga. 491.

*Special Plea Filed, but Tried on General Issue — Instructions.* — Where the defendant filed a special plea of insanity, but did not insist that there should be a trial on that plea, going to trial on the general issue of not guilty, and relying on the insanity of the defendant to show that he was not guilty of the offense charged, it was not error for the court to refuse to charge the jury that they might find a verdict either for or against the special plea of insanity, the court charging the jury that they might find the defendant guilty or not guilty of the charge under the evidence. *Anderson v. State*, 42 Ga. 9.

*Instructions as to Proper Method of Pleading.* — It is not error for a judge to refuse to charge that "the defense that the prisoner was insane at the time the deed was done must, under the law of Georgia, be made under the general issue." What is a proper pleading in a case is for the court and not for the jury, and it is improper for the court to charge a jury upon that subject. *Fogarty v. State*, 80 Ga. 450.

**Effect on General Issue of New Trial.** — Where a defendant who had been arraigned pleaded not guilty of the ground of insanity, was tried, and convicted, the fact that a new trial had been granted does not affect the validity or affect the former plea; it stands as a statement of defendant's defense, unless the court permits him to withdraw it or otherwise disposes of it, and

a new arraignment and plea is not necessary. *People v. McElvaine*, 125 N. Y. 596.

**Effect of General Issue on Right to Open and Conclude Case.** — In the trial of an indictment for murder the defense of insanity, under the plea of not guilty, does not change the nature of the issue so as to give the affirmative to the defendant, and entitle the defendant to the opening and closing argument to the jury. *Loeffner v. State*, 10 Ohio St. 598.

**Trial under General Issue After Finding by Commission — New York.** — The provisions of the New York laws authorizing the court to appoint a commission to pass upon the question, the sanity of a person who is on trial for crime, are permissible only, and not compulsory. The finding of the commission does not prevent the person from litigating the question of his sanity over again upon the trial, under a general plea of not guilty. *Ostrander v. People*, 28 Hun (N. Y.) 38.

1. A defendant on trial for murder entered the following plea: "I admit the killing, but was insane at the time of the commission thereof; therefore, not guilty." The court rejected all of the plea except that of "not guilty." It was held that such action was proper, as under the plea of not guilty every defense in repelling, or mitigating and reducing the offense to a lower grade was admissible. *State v. Potts*, 100 N. Car. 457.

2. *Alabama.* — *Rawdon v. Rawdon*, 28 Ala. 565.

*Arkansas.* — *Jenkins v. Tobin*, 31 Ark. 306; *Coates v. State*, 50 Ark. 330; *Casat v. State*, 40 Ark. 511.

*Georgia.* — *Carter v. State*, 56 Ga. 463.

*Indiana.* — *Achey v. Stephens*, 8 Ind. 411.

*Minnesota.* — *Bonfanti v. State*, 2 Minn. 123.

*Missouri.* — *State v. Klinger*, 43 Mo. 127.

*Ohio.* — *Loeffner v. State*, 10 Ohio St. 598.

because a man is always presumed to be sane until the contrary is shown, but when this presumption is overcome, the burden of proving sanity is on the party averring it.<sup>1</sup> These allegations must be sustained by a preponderance of evidence or to the reasonable satisfaction of the jury.<sup>2</sup>

**5. In Criminal Cases — a. INSANITY AT OR AFTER TIME OF TRIAL — (1) Generally.** — It is a rule of universal application, and founded on the broad principles of humanity, that no insane person shall be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state; and if a party charged with crime is considered by the court to be thus incapacitated it will not allow the trial to proceed until that question has been settled, and if it is settled in favor of the insanity will remand the party to prison, or send him to an asylum or hospital, as occasion may require.<sup>3</sup>

*Pennsylvania.* — *Com. v. Haskell*, 2 Brews. (Pa.) 491.

*Virginia.* — *Baccigalupo v. Com.*, 33 Gratt. (Va.) 807.

*United States.* — *U. S. v. Ridgeway*, 31 Fed. Rep. 144.

**Commencement and Conclusion of Case.** — A direct effect of this rule is that the party alleging the insanity is entitled to the opening and concluding argument before the jury. *Jenkins v. Tobin*, 31 Ark. 306.

Thus, in an action on a contract, the plaintiff averred that he had paid a subsequent sum of money to a third person for the benefit and at the request of the defendant. Without denying these allegations, the defendant pleaded insanity. It was held that under this state of the issue the defendant was required first to introduce testimony, and was entitled to the opening and concluding of the case. *Rea v. Bishop*, 41 Neb. 202.

1. *Rawdon v. Rawdon*, 28 Ala. 565; *Achey v. Stephens*, 8 Ind. 411; *Noel v. Karper*, 53 Pa. St. 97; *Tozer v. Saturlee*, 3 Grant's Cas. (Pa.) 162.

Where, in a suit for the cancellation of deeds, a general derangement of the grantor's mind has been established, the party claiming a lucid interval assumes the burden of proof thereof, which ought to go to the natural state of his mind and habits, and not merely to accidental interims and the degree of self-possession in any particular act. *Fishburne v. Ferguson*, 84 Va. 87.

2. *Alabama.* — *State v. Marler*, 2 Ala. 43.

*Arkansas.* — *Coates v. State*, 50 Ark. 330; *Casat v. State*, 40 Ark. 511.

*Georgia.* — *Carter v. State*, 56 Ga. 463.

*Indiana.* — *Achey v. Stephens*, 8 Ind.

411.

*Missouri.* — *State v. Klinger*, 43 Mo.

127.

*Ohio.* — *Loeffner v. State*, 10 Ohio St.

598.

*South Carolina.* — *State v. Paulk*, 18 S. Car. 515.

*Virginia.* — *Baccigalupo v. Com.*, 33 Gratt. (Va.) 807.

3. *California.* — *People v. Ah Ying*, 42 Cal. 18.

*Iowa.* — *State v. Arnold*, 12 Iowa

479.

*Maryland.* — *Devilbiss v. Bennett*, 70 Md. 554.

*Massachusetts.* — *Com. v. Bråley*, 1 Mass. 103; *Com. v. Hathaway*, 13 Mass. 299.

*New Jersey.* — *State v. Peacock*, 50 N. J. L. 34.

*New York.* — *Freeman v. People*, 4 Den. (N. Y.) 9; *People v. McElvaine*, 125 N. Y. 596.

*North Carolina.* — *State v. Harris*, 8 Jones L. (N. Car.) 136.

*West Virginia.* — *Gruber v. State*, 3 W. Va. 699.

**Causing Party in Asylum to Appear before Court from Time to Time for Examination.** — Where a person charged with the commission of a crime has been committed to the asylum for the insane because of insanity supervening after the offense, and existing at the time he was called upon to plead, the court does not lose jurisdiction by reason of his commitment, but it may, without any discharge or other formal action on the part of the asylum authorities, cause him, from time to

The Reason why an insane person should not be tried for an offense is that he is disabled by an act of God from making a just defense if he has one. There may be circumstances lying in his private knowledge which would prove his innocence, of which he can have no advantage because they are not known to the persons who undertake his defense.<sup>1</sup>

(2) *Duty of Court to Have Preliminary Trial* — (a) **Where Doubt Exists.** — If the court, before or during the progress of a criminal trial, either from observation or upon suggestion of counsel, has facts brought to its attention raising a reasonable doubt as to the sanity of the defendant, the question should be settled by a proper preliminary proceeding before another step is taken.<sup>2</sup>

time, to be brought before the court for examination, and whenever it is ascertained that he is competent to plead, may put him upon trial. *State v. Pritchett*, 106 N. Car. 667.

**Prisoner Not Entirely Sane, but of Right Comprehension.** — A prisoner, though not entirely sane, may be put upon his trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings then pending against him, and can rationally conduct his defense. *Freeman v. People*, 4 Den. (N. Y.) 9.

**Appeal in Issue of Insanity as Ground for Postponement of Trial.** — The trial on the main charge in an indictment will not be postponed because of an appeal on the issue of insanity. Such a proceeding is sustained neither by reason nor authority, and would be very inconvenient in practice. *People v. Moice*, 15 Cal. 330.

1. *Freeman v. People*, 4 Den. (N. Y.) 9.

2. *Jones v. State*, 13 Ala. 153; *People v. Ah Ying*, 42 Cal. 18; *State v. Arnold*, 12 Iowa 479; *State ex rel. Chandler*, 45 La. Ann. 696; *State v. Peacock*, 50 N. J. L. 34.

**New York.** — Under New York Code of Criminal Procedure, § 658, providing for the appointment of a commission to examine a person alleged to be insane who is being tried criminally, or is under an indictment for crime, the power vested in the court is not mandatory, but is simply a power to be exercised in its discretion. However, it is the duty of the court, when the subject is brought to its attention by responsible parties, itself to make a sufficient inspection and examination to determine whether the application is made in good faith and upon plausible ground, and the apparent facts thus

discovered are made the condition of the right of the court to institute the statutory inquisition. *People v. McElvaine*, 125 N. Y. 596.

**Implication of Doubt on Part of Court.** — The fact that evidence upon the insanity of a defendant was allowed to go to the jury in a criminal case, and that they were instructed to find a verdict that the defendant was then insane, if they were satisfied from the evidence that he was so, implied a doubt on the part of the court as to his sanity, and under the provisions of the Criminal Practice Act the trial should have been suspended until that question was settled. *People v. Ah Ying*, 42 Cal. 18.

In *People v. Lee Fook*, 85 Cal. 300, *recognizing and distinguishing People v. Ah Ying*, 42 Cal. 18, the doctrine was recognized that where evidence was allowed to go to the jury and they were instructed to find a verdict that the defendant was then insane, if they were satisfied from the evidence that he was so, there was implied a doubt on the part of the court as to the sanity of the defendant which would make it a duty to have the issue of insanity determined; but it was held that both of these circumstances must concur to show doubt on the part of the court, and where evidence was allowed to go to the jury on the question of insanity, but the court refused to instruct the jury concerning it, no doubt on the part of the court was shown. Hence, there being no request made by the defendant to have the question of insanity submitted, as required by section 1368 of the *California Penal Code*, as a separate and distinct issue from that of the defendant's guilt or innocence of the defense charged, the court did its whole duty by allowing the evidence to go to the jury as bear-

(b) **Where No Doubt Exists.** — Where, however, no doubt on the part of the court is created as to the sanity of the defendant, it is under no obligation to have the question determined by a preliminary investigation.<sup>1</sup>

(3) *Method of Determination* — (a) **By Court or Without Jury.** — The method of determining the preliminary question of insanity, where not the subject of statutory regulation, is largely within the discretion of the court, which may itself enter upon the inquiry, or adopt some other mode without the aid of a jury.<sup>2</sup>

ing upon the question of the insanity of the defendant, and did not err in not directing a trial to determine it.

1. *People v. Ah Ying*, 42 Cal. 18; *State v. Arnold*, 12 Iowa 479; *State v. Peacock*, 50 N. J. L. 34; *Laros v. Com.*, 84 Pa. St. 200.

**It Is Only in Cases of Doubt** as to the sanity of the prisoner upon arraignment that a preliminary inquiry is to be ordered; and neither the assertion of the prisoner, nor of his counsel, nor the production of affidavits, nor the entry of a plea of present insanity upon the record, can of themselves alone suffice to produce the state of doubt which is a necessary prerequisite to the ordering of the inquiry. They are all necessarily addressed to the court, as there is no other tribunal to entertain them; and it is the court, after all, which must be affected by the various considerations which are supposed to, or in fact do, produce the doubt which must precede any order for an inquiry. *Webber v. Com.*, 119 Pa. St. 223.

If from the appearance and conduct of the prisoner, when called upon to plead, there is reason to believe that he is insane, the court should institute a preliminary proceeding to ascertain his sanity. Yet this must be left to the sound discretion of the court, and if the prisoner pleads to the indictment the omission of the court to institute the preliminary inquiry cannot be assigned as error, though from the facts as set out in the record there may be strong grounds for the belief that the prisoner was insane at the time of the trial. *Jones v. State*, 13 Ala. 153.

In a criminal trial counsel for the defendant tendered an oral plea of not guilty, with a specification alleging insanity, and requested the court to appoint a commission authorized by New York Code of Criminal Procedure, § 658, to examine and report on the question of the present sanity of the defendant,

which motion was denied on the ground that there was nothing in the case to show the court that the defendant was then insane or imbecile. Upon appeal it was held that it was to be inferred that the court made the requisite examination, and no proof of insanity having been given to support the demand for an inquisition, the determination of the motion rested in the discretion of the court, and the latter was justified in refusing it. *People v. McElvaine*, 125 N. Y. 596.

**After Judgment and Before Conviction.** — Where a defendant is brought up for judgment on conviction it is not error for the court, where it entertains no doubt as to his sanity, to refuse to submit the issue of insanity to a jury. *People v. Pico*, 62 Cal. 50; *Bonds v. State*, Mart. & Y. (Tenn.) 143.

2. *State v. Peacock*, 50 N. J. L. 34; *Freeman v. People*, 4 Den. (N. Y.) 9; *State v. Reed*, 41 La. Ann. 581.

**New York — Determination by Commission.** — By N. Y. Code Crim. Pro., § 658, it is provided that the court in its discretion may appoint a commission to inquire into the fact of insanity. See *People v. McElvaine*, 125 N. Y. 596.

But this provision does not confer upon a commission of lunacy appointed under it the power to determine whether or not a person is insane, imbecile, or idiotic to an extent that excuses him from criminal liability for his act, and renders him incapable of understanding the proceedings against him or of making his defense. The examination and opinion of such commissioners are to inform the court upon the question as to whether the defendant is in such a mental condition that he can be required to plead and to proceed to the main issue of not guilty. And the court can adopt or reject their finding as the law and evidence may require. *People v. Rhineland*, (New York County Gen. Sess.) 2 N. Y. Crim. Rep. 335.



(b) **By Special Jury.** — The usual and safest course is to have the matter settled by a jury impaneled for the purpose.<sup>1</sup>

The Verdict of the jury must find directly the fact of sanity or insanity,<sup>2</sup> and on this question their finding is conclusive.<sup>3</sup>

1. *Devilbiss v. Bennett*, 70 Md. 554; *Com. v. Hathaway*, 13 Mass. 299; *Com. v. Braley*, 1 Mass. 103; *Freeman v. People*, 4 Den. (N. Y.) 9; *State v. Harris*, 8 Jones L. (N. Car.) 136; *Webber v. Com.*, 119 Pa. St. 223; *Gruber v. State*, 3 W. Va. 699; *French v. State*, 85 Wis. 400.

**Peremptory Challenges of Jurors** are matters of right only on the trial of the indictment, and such right does not exist in the preliminary trial to ascertain whether or not the defendant is insane. *Freeman v. People*, 4 Den. (N. Y.) 9.

**Louisiana.** — The investigation may be conducted in a manner corresponding to the analogous methods of proceeding resorted to for the purpose of the trial on special issues. *State ex rel. Chandler*, 45 La. Ann. 696.

If made before trial or after conviction the general practice is to submit the issue to a jury impaneled for the purpose, though perhaps the judge may in his discretion adopt some other suitable method of ascertaining the fact. If made during the progress of the trial, the judge's safest course would be to receive the evidence and to submit this special issue to the jury with the general issue; in which case if the jury found the defendant to be insane it would return such verdict by itself without passing upon the general issue; or if it found him sane it would proceed to pass upon the general issue and return both verdicts together. But whatever may be his discretion as to the mode of determination, when this issue is presented he must have it determined in some way. *State v. Reed*, 41 La. Ann. 581.

**Wisconsin** — *Disagreement of Jury.* — Laws of Wisconsin, 1883, c. 164, providing for a special issue on the question of insanity in a criminal case, enacts that "if the jury shall be unable to agree upon a verdict on the trial of such special issue, the court shall, for that reason, discharge them from the further consideration of such special issue as such, and unless such special plea be withdrawn by such accused person or counsel in his behalf, the court shall forthwith order the trial upon the plea

of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty." Under this provision it was held error, where the jury disagreed, for the court to order the trial to proceed before the same jury upon the pleas of not guilty and insanity, such jury not being impartial, since the fact of disagreement showed that some of the jurors had decided that the party was insane and others that he was not; and as the defendant was also deprived of his right to have the jury specially impaneled to try him for the crime charged, and was denied his right to challenge, such a construction of the statute would render it unconstitutional. *French v. State*, 85 Wis. 400.

2. A jury impaneled in a criminal case to determine upon the sanity of the accused should be required to pass directly upon the question of insanity, and a verdict that the accused was "sufficiently sane in mind and memory to distinguish between right and wrong" is defective and argumentative. The issue requires them to find directly whether the prisoner was or was not insane. *Freeman v. People*, 4 Den. (N. Y.) 9.

3. **Plea in Bar of Sentence After Finding of Sanity.** — On the trial of a criminal case the plea of insanity was interposed, upon which the jury found against insanity and rendered a verdict of guilty. Another plea of insanity was interposed in bar of the sentence, alleging that insanity had occurred since the verdict. The court held that such a plea carried with it no right to a trial by jury, and that the jury having found a verdict against the plea of insanity when set up as a defense to the conviction, subsequent insanity could not be set up in disproof of this conviction. Such an appeal at that stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation, but it grants the prisoner no right to a jury trial. *Laros v. Com.*, 84 Pa. St. 200.

**Verdict Not Disturbed by Appellate Court.** — In *People v. Moice*, 15 Cal.

*b. INSANITY AT TIME OF COMMISSION OF CRIME—(1) The Plea of Insanity.*—The plea of insanity in criminal as well as civil cases has been discussed in a former part of this article. See *supra*, IV. 2. *Under Special Plea*; IV. 3. *Under General Issue*.

(2) *Mode of Trial—Fury.*—The defense of insanity at the time of the commission of a crime is generally to be tried by the jury charged with the trial of the indictment.<sup>1</sup>

(3) *Determination from Evidence.*—And they are to determine the fact from the evidence submitted to them on the subject.<sup>2</sup>

330, the defendant was found guilty of murder after an issue on the question of insanity had been submitted to a jury and the fact of his sanity determined. On appeal the court decided that it could not interfere with the verdict, but stated: "We have looked into the evidence upon the question of insanity, and upon the state of facts presented do not feel warranted in setting aside the finding. We may remark, however, that the evidence has created some painful doubts as to whether the prisoner is a fit subject of capital punishment. We suppose that, probably, the question of his sanity may be more fully susceptible of satisfactory ascertainment now than it was at the time of the trial; and the humanity of the learned judge below will, of course, give whatever time or facilities the friends of the defendant could reasonably ask to present his case as favorably as possible for executive clemency if the facts, as now developed, seem to justify such appeal. But our office will not enable us to interfere with the verdict."

**Defendant Called for Trial After Finding of Insanity.**—Where a defendant once found insane is called for trial a second time, if there is any doubt as to his sanity, and the people demand a trial, the court proceeds as at first, and tries the question of sanity anew, and so on to the end, as often as occasion may require. Of course at all such trials the question is as to the present insanity of the defendant; and at all trials after the first, inquiry may commence with the proposition admitted, that he was insane at the time the former verdict was rendered, for on that the verdict is conclusive. *People v. Farrell*, 31 Cal. 576.

1. *Webber v. Com.*, 119 Pa. St. 223.

**Wisconsin.**—Rev. Stat. Wis., §§ 4697-4699, which provide that in criminal actions the defense of insanity shall be

specially pleaded, that the issue upon such special plea shall be first tried by the jury impaneled to try the action, and that the finding of the jury upon that issue shall be final and conclusive upon the question of insanity, are not unconstitutional. *Bennett v. State*, 57 Wis. 69.

So also where insanity is specially pleaded, the trial of that issue and the trial upon the plea of not guilty must be treated as one, and no motion to set aside the verdict upon the special plea and for a new trial need be made by the accused, in order to save his rights, until he is convicted upon the plea of not guilty. *Bennett v. State*, 57 Wis. 69.

In **New York** it is said that the Code of Crim. Pro. contemplates the appointment of a commission of lunacy, after a plea on the merits and before trial, to determine the party's mental condition at the time of the commission of the crime. *People v. McElvaine*, 125 N. Y. 596. But see *People v. Rhineland*, (New York County Gen. Sess.) 2 N. Y. Crim. Rep. 335.

In **West Virginia** it is held that if a jury impaneled to inquire into the mental condition of a party at the time of his trial find the accused insane at that time, they shall proceed to inquire as to his sanity at the time of the commission of the offense. *Gruber v. State*, 3 W. Va. 699.

2. *Harkness v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 476; *Plake v. State*, 121 Ind. 433.

**Question to Be Determined.**—When insanity is interposed as a defense to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. *Freeman v. People*, 4 Den. (N. Y.) 9.

**Receiving Evidence on Main Charge after Verdict of Sanity at Time of Trial.**—The finding of a jury, impaneled in a

(4) *Instructions to Jury.* — The jury should be aided by proper instructions from the court.<sup>1</sup>

(5) *Continuance and New Trial.* — Continuances and new trials in cases where insanity is interposed as a defense are governed by the principles regulating those questions generally.<sup>2</sup>

#### V. ACTIONS AND SUITS BY AND AGAINST INSANE PERSONS—

1. *Actions and Suits By* — *a.* **POWER OF INSANE PERSONS TO SUE.** — Formerly the right of idiots, lunatics, etc., to sue in the courts was not recognized, but this rule, it is believed, has been universally abrogated, and at the present time a lunatic or an insane person is as much entitled to have his rights adjudicated

criminal case to pass upon the insanity of the accused, that he was sane at the time of the trial, is not before the court and is not material on the subsequent trial of the question of guilty or not guilty of the main charge, and notwithstanding such finding the court may and ought to receive the evidence of physicians who have examined the accused after such preliminary trial with the view of ascertaining his mental condition at the time of the alleged offense. *Freeman v. People*, 4 Den. (N. Y.) 9.

1. It is held that in the case of felony, where the defense of insanity is interposed the court must charge the law applicable thereto, whether it be asked for or not. *Thomas v. State*, 40 Tex. 60.

But where the only evidence offered on the defense of insanity in a criminal case was that the accused was of a lower order of intellect than other members of his family, it was not considered sufficient to impose upon the court the duty of charging the jury on the question of insanity. *Powell v. State*, 37 Tex. 348.

It is also held that insanity in a criminal case being a matter of fact to be determined by the jury from the evidence, it is not within the province of the court to instruct the jury that insanity is a physical disease. *Plake v. State*, 121 Ind. 433.

In *State v. Coleman*, 20 S. Car. 441, it was decided that it was not error for a judge to instruct the jury in a criminal case, the defense being insanity, that if a reasonable doubt was raised in their minds as to the defendant's capacity to commit crime their verdict must be "not guilty," but not necessarily "by reason of insanity."

For general treatment of instructions, see article INSTRUCTIONS.

2. **Continuance.** — When a person accused of crime desires the continuance of his case and does not wish to be subjected to cross-examination as to the grounds of the continuance, he must make an affidavit therefor himself. A claim that he was insane at the time he committed the act does not show him to be incompetent to make the affidavit, there being no plea of insanity nor any claim that he was insane at the time of the trial. *Fogarty v. State*, 80 Ga. 450.

A motion for continuance based on the ground that the defendant could prove by an absent witness that he had had epileptic fits on divers occasions was properly overruled, it not being contended that the fact of his having such fits in numerous other instances could not be shown by other witnesses. *Fogarty v. State*, 80 Ga. 450.

**New Trial.** — A new trial on the ground of newly discovered evidence as to the defendant's sanity will not be granted where the evidence is merely cumulative, and was within the knowledge of the defendant, and could have been procured before the trial. *Fogarty v. State*, 80 Ga. 450.

It is no ground for a new trial that new evidence has been discovered in the shape of letters written by the defendant since the crime was committed, which evidence was claimed to establish the defendant's insanity. The letters did not by any means establish the insanity of the defendant, and since he had been thoroughly examined as a witness on the trial, and there was nothing to indicate to the court that he was insane so as to make it the court's duty to try the question of his insanity under section 1368 of the Penal Code, the refusal of a new trial was not error. *People v. O'Neal*, 67 Cal. 378.

as a sane one, and a judgment rendered in such a suit is neither void nor voidable merely because the plaintiff was *non compos*.<sup>1</sup>

*b. SUITS BY NEXT FRIEND* — (1) *Where Insanity Not Adjudicated and No Committee Appointed*. — Where a person of unsound mind has not been so adjudged, or there has been no guardian or committee appointed for him, the suit is to be brought in the name of the incompetent by some responsible party as his next friend.<sup>2</sup>

1. *Leonard v. The Times*, 51 Ill. App. 427; *Speck v. Pullman Palace Car Co.*, 121 Ill. 33; *Chicago, etc., R. Co. v. Munger*, 78 Ill. 300; *Cameron v. Pottinger*, 3 Bibb (Ky.) 11; *Rankin v. Warner*, 2 Lea (Tenn.) 302.

*In a Period of Sanity*, a bill may be entered by a lunatic. *Formby v. Wood*, 19 Ga. 581.

*Suit Begun Before and Continued After Adjudication of Insanity*. — A suit begun before a plaintiff is adjudged insane can properly be prosecuted in the name of the lunatic after he is so adjudged. *Leonard v. The Times*, 51 Ill. App. 427.

*Demurrer to Answer Alleging Insanity*. — In *Gustafson v. Ericksdotter*, 37 Kan. 670, an action was brought by a plaintiff without a guardian, and the answer of the defendant alleged that the plaintiff was a person of unsound mind and incapable of managing her affairs, that the attorney who appeared for the plaintiff had no authority to bring the action, and that the plaintiff had not sufficient capacity to employ an attorney. To this answer the plaintiff demurred, and for reason alleged that the said answer did not state facts sufficient to constitute any defense to plaintiff's action. The demurrer was sustained by the court. On error from this decision it was held that the court erred in sustaining the demurrer, for the reason that the defendant had alleged insanity in his answer, which fact the plaintiff had admitted by the demurrer; and hence, being admittedly an insane person, could not maintain any action.

*A Plea in Abatement by the Defendant* that before and at the time of the commencement of the suit the plaintiff was and still is an insane person, etc., is bad on demurrer; such a plea in abatement must always give the plaintiff a better writ or declaration, so that the party may have an opportunity of correcting his mistake and the plaintiff be enabled to avoid the same objection in

framing his new writ or declaration. Somebody was undoubtedly entitled to maintain this suit against the defendant, and in order to sustain this plea in abatement some one must be therein pointed out who is more entitled to sue than the insane plaintiff. *Chicago, etc., R. Co. v. Munger*, 78 Ill. 300.

2. *Arkansas*. — *Jetton v. Smead*, 29 Ark. 372.

*Delaware*. — *Penington v. Thompson*, 5 Del. Ch. 328.

*Georgia*. — *Reese v. Reese*, 89 Ga. 645.

*Illinois*. — *Ryder v. Topping*, 15 Ill. App. 216.

*Kentucky*. — *Newcomb v. Newcomb*, 13 Bush (Ky.) 544.

*Minnesota*. — *Plympton v. Hall*, 55 Minn. 22.

*North Carolina*. — *Smith v. Smith*, 106 N. Car. 499.

*Tennessee*. — *Parsons v. Kinzer*, 3 Lea (Tenn.) 342.

*Texas*. — *Holzheiser v. Gulf, etc., R. Co.*, 11 Tex. Civ. App. 677.

The suit of a lunatic resident having a guardian should be brought by the guardian, but where the lunatic is a nonresident, having neither a guardian nor a committee authorized to sue in his behalf in this state, it seems that if he can sue at all it must be by information, or by the appointment or authorization by the court of some one to sue in his behalf as next friend. He cannot maintain the action in his own name without having some one joined with him to be responsible at least for the costs. *Pelham v. Moore*, 21 Tex. 755.

*Virginia*. — *Bird v. Bird*, 21 Gratt. (Va.) 712.

*In Iowa* an action cannot be maintained by one as next friend of an insane person, since the Code, § 2569, requires actions by insane persons to be brought by a guardian. *Tiffany v. Worthington*, (Iowa 1896) 65 N. W. Rep. 817.

*Appointment of Next Friend Where There Is Conservator*. — Notwithstanding

(2) *Where Committee's Interests Are Adverse.* — Another case where the lunatic may sue by next friend is where, although he has a committee, the interests of the two are adverse.<sup>1</sup> Sometimes, in such case, the suit may be brought by the attorney-general or the officer representing the state for the time being.<sup>2</sup>

(3) *Substitution of Guardian ad Litem for Next Friend.* — A special guardian may in some jurisdictions maintain the suit,<sup>3</sup> and the court has the power to supersede the next friend by the substitution of a guardian *ad litem* in his stead, if it would be for the benefit of the lunatic so to do.<sup>4</sup>

c. **SUITS BY COMMITTEE OR GUARDIAN.** — Where a *non compos* is under the charge of a committee or guardian, a suit in his behalf is properly brought by the committee or guardian in his own name, in the name of the lunatic, or in the name of both, as the case may be.<sup>5</sup>

**2. Actions and Suits Against** — a. **GENERAL PRINCIPLES AFFECTING** — (1) *Suits Against Lunatics Personally.* — A lunatic is liable to suit or action upon his debts, liabilities, or obligations, and where no adjudication of the insanity has been made, and no committee or guardian appointed for him, the suit may be brought against him personally.<sup>6</sup>

there is already a conservator for a lunatic, possessing general authority as such by statute, a court may in its discretion appoint a conservator or next friend for a particular purpose. *Ryder v. Topping*, 15 Ill. App. 216.

**Suit by Lunatic as Coplaintiff.** — A person who is actually *non compos mentis*, but who has not been found to be so under a writ *de lunatico inquirendo*, may be permitted to sue as coplaintiff with another, who may be treated as his committee and required to give bond to account for any money directed to be paid to him for the use of the lunatic. *Owings's Case*, 1 Bland (Md.) 372.

**Method of Objecting to Bill Improperly Brought.** — If a complainant appear upon the face of the bill in chancery to be a lunatic, and no next friend or committee is named in the bill, the objection may be raised by demurrer or by motion to take the bill from the files. *Norcom v. Rogers*, 16 N. J. Eq. 484.

**Persons Incapable of Acting for Themselves**, though not idiots or lunatics, may sue by next friend; and the addition to one's own name of the words "by his next friend, A B," will not vitiate the proceedings. *Wilson v. Oldham*, 12 B. Mon. (Ky.) 55.

**Suit in Two States by Same Next Friend.** — A lunatic may maintain an action in

one state on a judgment recovered in another state, suing by the same next friend in both cases. *Cook v. Thornhill*, 13 Tex. 293.

**Determination of Sanity in Suit by Next Friend.** — A lunatic or person *non compos mentis* having no legal guardian may sue by any competent person as his next friend, and where the question of sanity or insanity is involved in the subject-matter in the suit, the question may be tried irrespective of whether a commission of lunacy has been issued or not. *Reese v. Reese*, 89 Ga. 645.

**As to Next Friend, Generally Treated**, see article NEXT FRIEND.

1. *Norcom v. Rogers*, 16 N. J. Eq. 484; *Bird v. Bird*, 21 Gratt. (Va.) 712.

2. *Atty.-Gen. v. Panther*, Dick. 748; *Norcom v. Rogers*, 16 N. J. Eq. 484; *Bird v. Bird*, 21 Gratt. (Va.) 712.

3. *Abrahams v. Vollbaum*, 54 Tex. 226.

4. *King v. McLean Asylum*, 64 Fed. Rep. 331. See also *King's Case*, 161 Mass. 46.

5. Suits by the committee or guardian of an insane person are exhaustively treated in the article GUARDIANS, vol. 9, p. 886, to which the reader is referred for such practice.

6. *Ex p. Northington*, 37 Ala. 496; *Maloney v. Dewey*, 127 Ill. 395; *Runberg v. Johnson*, 11 Civ. Pro. Rep.

(2) *Suits Against Lunatics Under Guardianship*.—For treatment of this subject and the practice matters pertaining thereto, see article GUARDIANS, vol. 9, p. 886.

(3) *Restraint by Equity of Actions at Law*.—In some of the states, principally those in which the jurisdiction of the Chancery Court over the property of insane persons is complete, that court may interfere to restrain suits at law against a lunatic, and upon equitable proceedings, duly conducted for the purpose, may satisfy the object of the suit.<sup>1</sup>

(4) *Effect of Judgment*.—A judgment or decree against a lunatic is not on that account void.<sup>2</sup> It cannot be questioned collaterally, and unless set aside in a direct proceeding such judgment is of undoubted validity.<sup>3</sup>

(5) *Setting Aside Judgment*.—Such direct proceedings may

(Brooklyn City Ct.) 283; Van Horn v. Hann, 39 N. J. L. 207; Hines v. Potts, 56 Miss. 347.

**Action on Judgment Against Lunatic**—*North Carolina*.—On a judgment of the court against a lunatic rendered prior to his lunacy, where no property can be seen which ought to be sold under execution from the court the plaintiff will be granted leave to proceed on the judgment for its payment, by action in the Superior Court of the proper county. Adams v. Thomas, 83 N. Car. 521.

**Revival of Judgment Rendered Prior to Adjudication of Lunacy**.—Although the statute prescribing the mode of reviving judgments has not specifically provided for the case of a judgment obtained against a person subsequently found to be of unsound mind, yet the judgment in such case may be revived by an action against the defendant and his committee. Such a judgment can be satisfied by execution after the defendant is found to be of unsound mind. McNeas v. Thompson, 5 Bush (Ky.) 686.

**Wife as Party to Suit Against Lunatic**.—The wife of an insane man is a proper party defendant in an ejectment suit, she being the active defendant and withholding possession of the premises. Bensieck v. Cook, 110 Mo. 173.

**Determination of Sanity at Marriage**.—Where a claim or defense depends upon the question whether a person was of sound or unsound mind at the time of his marriage, it is not necessary that there should have been a decree of nullification in his lifetime; the question may be made and decided in a suit

for dower or distribution and the like. Jenkins v. Jenkins, 2 Dana (Ky.) 103.

**Suit for Necessaries Furnished Lunatic**.—If a person has maintained a lunatic for a number of years without being appointed his guardian he cannot sustain a suit in equity against the lunatic for the necessaries furnished, his remedy, if he has one at all, being by an action of assumpsit at law. Tally v. Tally, 2 Dev. & B. Eq. (N. Car.) 385.

**Attachment—Georgia**.—An attachment does not lie in Georgia against a lunatic and his committee, both non-residents of the state. Ross v. Edwards, 52 Ga. 24.

**Attachment Execution—Pennsylvania**.—And an attachment execution cannot issue against a lunatic defendant in Pennsylvania. Harmstead v. Kingsley, 3 W. N. C. (Pa.) 64.

1. Clarke v. Dunham, 4 Den. (N. Y.) 262; Crippen v. Culver, 13 Barb. (N. Y.) 424; L'Amoureux v. Crosby, 2 Paige (N. Y.) 423; Brasher v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242; Karr v. Creveling, 2 N. J. L. J. 119; Bulows v. O'Neill, 4 Desaus. (S. Car.) 394.

2. Shirleys v. Taylor, 5 B. Mon. (Ky.) 99; Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; White v. Hinton, 3 Wyoming 753. See Am. and Eng. Encyc. of Law (2d ed.), title *Insanity*.

3. Noel v. Modern Woodmen of America, 61 Ill. App. 597; Boyer v. Berryman, 123 Ind. 451. See Am. and Eng. Encyc. of Law (2d ed.), title *Insanity*.

**Irregularities in Procedure** resulting in a judgment against an insane person cannot be taken advantage of in a collateral attack. Pollock v. Horn, 13 Wash. 626.

often be maintained and judgments set aside thereunder in proper cases.<sup>1</sup>

**b. SERVICE OF PROCESS**—(1) *On Lunatic Personally*—  
(a) **Generally.**—Where a defendant to an action is insane, but either has never been judicially declared so or has had no guardian appointed, the summons or process should in general be served upon him personally, and such will usually be a valid service.<sup>2</sup>

**Where Personal Notice Is Required** it should positively appear that such service was made upon the lunatic or was brought to his

**1. Opening Judgment—In Wisconsin.**—Under Rev. Stat., § 2832, it is proper to open a judgment by default rendered against a garnishee who was insane when summons was served, and to allow the party to answer. *Bond v. Neuschwander*, 86 Wis. 391.

**In Pennsylvania** if, pending a proceeding on a writ of lunacy, a judgment has been entered against the defendant and a few days thereafter inquisition is found that the defendant was *non compos mentis*, the court will open the judgment so as to let in the defense and will set aside the execution established on it; but it will order the judgment to stand as a security until further proceedings. *Ash v. Conyers*, 2 Miles (Pa.) 94.

**Judgments by Default.**—In *Wisconsin* provision is made by Rev. Stat., § 2832, for opening a judgment by default against a garnishee who was insane when summons was served. It being made to appear to the court that such a judgment had been rendered against a guardian who was insane at the service of the summons, the court ordered the judgment vacated absolutely instead of allowing it to stand as security to the party pending the determination of the issue. It was held that the plaintiff was not thereby prejudiced, since the property in the hands of such guardian, being real estate, could be transferred only by authority of the court. *Bond v. Neuschwander*, 86 Wis. 391.

**In Maine** a judgment recovered on default against a person admitted to have been *non compos mentis* at the time of the proceeding in the case will be reversed on a writ of error brought by his administrator after his decease. It seems, however, that an action brought against a *non compos* for necessities constitutes an exception; but in such case the party should plead the fact in bar of the suit. *Leach v. Marsh*, 47 Me. 548. In this case it was said that the case of a judgment on default,

against a person admitted to have been *non compos*, is to be distinguished from such cases as *King v. Robinson*, 33 Me. 114, where the fact of unsoundness of mind was not admitted, and the defendant appeared by attorney and judgment was rendered upon a trial and verdict.

**Judgments by Confession.**—Judgments confessed by a person insane at the time, with a sale under execution thereon to the persons in whose favor they were confessed, are properly set aside. *Crawford v. Thomson*, 161 Ill. 161.

**Discretion of Chancellor.**—The chancellor will exercise his discretion in setting aside a replevy bond, even where the defendant who gave it was of unsound mind at its date; and where it was for a just debt, and clear of fraud or the use of other undue means, will refuse to interfere or to set aside the sale made under execution thereon. *Shirleys v. Taylor*, 5 B. Mon. (Ky.) 99.

**In South Carolina** a party cannot be relieved against a judgment at law on the ground that he was a lunatic, unless it appears that he was not represented. *Henderson v. Mitchell*, Bailey Eq. (S. Car.) 113.

**See Generally** article JUDGMENTS.

**2. Sacramento Sav. Bank v. Spencer**, 53 Cal. 737; *Gerster v. Hilbert*, 38 Wis. 609; *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194.

It is no objection to an action for partition or sale of lands, that two of the adult defendants were persons of unsound mind at the time the action was commenced, if they had not been judicially found to be so. No proceedings having been instituted to inquire into the mental condition of these parties, they stood before the world with the presumption of sanity in their favor, and the personal service of the summons and complaint conferred jurisdiction of these persons. *Prentiss v. Cornell*, 31 Hun (N. Y.) 167, *affirmed* in 96 N. Y. 665.

knowledge. A sufficient service may, however, in some cases, be made by leaving the notice at the party's residence, or with his attorney, etc.<sup>1</sup>

(b) **Where Personal Service Cannot Be Effected.** — Formerly, where personal service could not be effected upon the lunatic defendant, the practice was to enforce an appearance by issuing a writ of *distringas*.<sup>2</sup> Now, when the requisite personal service cannot be made, the matter is regulated by the state statutes providing for publication, etc., where personal service fails, and relating either directly to lunacy cases or to service of process generally.<sup>3</sup>

(2) *On Committee or on Lunatic and Committee.* — If the party be under the management of a committee or guardian, service of process should be upon the committee, or upon both the committee and the lunatic.<sup>4</sup>

1. In *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194, it was held that the service should be upon the lunatic himself, and that a summons served upon one with whom the person of unsound mind resides is not good. But in *Doe v. Roe*, 3 M. & G. 87, 42 E. C. L. 54, where a copy of the declaration was left at the house of the lunatic, and his attorney on the same day by letter acknowledged receipt of the copy, this was held to be a proper and sufficient service, though the defendant at the time was confined in an insane asylum.

A summons in an action for debt was issued against a lunatic, and it appeared that the sheriff's deputy to whom the writ was delivered for service called at the house of the defendant named therein, and was informed that the defendant was a lunatic and could not be seen. The sheriff's deputy thereupon explained the business in hand to the wife of the lunatic, then in charge of his person, and exhibited to her the summons. She referred him to her son, by whom the lunatic's estate was managed, whom the deputy saw and to whom he showed the writ, afterwards returning it to the sheriff with an oral statement of what he had done. The sheriff returned the writ indorsed by him "summoned." At the following trial term two attorneys appeared for the defendant. In a proceeding in equity to set aside the judgment as null and void it was held that, under the circumstances, a sufficient service of the summons was shown. A lunatic defendant of full age properly defends by attorney, the law presuming him of sufficient capacity for that purpose.

The appearance of the defendant in obedience to its command gave the court jurisdiction over the case. *Stigers v. Brent*, 50 Md. 214.

2. **As to Writ of *Distringas* generally,** see *DISTRINGAS, WRIT OF*, vol. 7, p. 33. And as to its use to effect appearance in insanity proceedings, see *Blake v. Cooper*, 11 C. B. 680, 73 E. C. L. 680; *Humphreys v. Griffiths*, 6 M. & W. 89; *Branson v. Moss*, 6 M. & W. 420; *Rawson v. Moss*, 8 D. P. C. 412; *Jones v. Evans*, 8 D. P. C. 425; *Lambert v. Hayward*, 2 Dowl. & L. 406; *Banfield v. Darell*, 2 Dowl. & L. 4; *Dodson v. Warne*, 1 D. P. C. N. S. 848; *Starkie v. Skilbeck*, 6 D. P. C. 52; *Spiller v. Benson*, 1 Dowl. & L. 650.

3. A statute authorizing nonresident defendants to be brought into court by publication in a newspaper of the pendency of proceedings applies as well to lunatic defendants as to sane persons. *Sturges v. Longworth*, 1 Ohio St. 544.

4. *Snowden v. Dunlavy*, 11 Pa. St. 522; *Hulings v. Laird*, 21 Pa. St. 265.

**Service of Notice for Substitution of Attorney.** — Where the attorney of a lunatic ceases to act, the notice to substitute another attorney must be served on the committee of the lunatic. *Rutherford v. Folger*, 20 N. J. L. 115.

**Service upon Both Committee and Lunatic** was held proper in *Heller v. Heller*, 6 How. Pr. (N. Y. Supreme Ct.) 194; *Justice v. Ott*, 87 Cal. 530. But in *Cates v. Woodson*, 2 Dana (Ky.) 452, it was held that upon a bill against a lunatic in custody of a committee service upon the committee was sufficient, and that it was not proper to subpoena the lunatic himself.



c. METHOD OF APPEARANCE AND DEFENSE — (1) *Generally*. — Where a party *non compos mentis*, but not an idiot, is sued at law, the rule is general that he must, if an infant, appear and defend by guardian, but if an adult his appearance and defense must be by attorney.<sup>1</sup> This is undoubtedly the common-law doctrine, and obtains at present where it has not been abrogated or changed by statute.

In Equity the party is to appear by guardian *ad litem*.<sup>2</sup>

(2) *By Attorney*. — The appearance of a lunatic of full age being by attorney, the court may appoint one for such purpose.<sup>3</sup> And this is held to exclude the power of a court to appoint a guardian *ad litem* for an insane adult.<sup>4</sup>

**Personal Service on Party Under Guardianship** — *Michigan*. — An insane person under guardianship continues liable to suit and to the personal service of summons. *Ingersoll v. Harrison*, 48 Mich. 234.

**Service upon Party Incapable of Comprehension** — *Connecticut*. — In an action against an insane person process was served upon him, but he was not capable of comprehending the nature of the process or what was his duty as a party in the cause; he did not appear, no guardian was appointed for him, and no one appeared in his behalf. Judgment, however, was rendered against him. It was held that such a service of process was but an idle ceremony and carried with it no validity, and even if the judgment was not impeachable at law a court of equity would have restrained its enforcement. Therefore where such a judgment was obtained in one state and sought to be enforced by an action thereon in another, and claims on the estate of the deceased lunatic, consisting of the judgment and costs of the action, were presented to the commissioners, they were justified in rejecting such claims. *Litchfield's Appeal*, 28 Conn. 127.

**Appearance Curing Failure of Notice** — *Missouri*. — Notwithstanding a failure of notice, if the alleged insane person enters a general appearance to the proceeding a judgment against him will be binding, or at least not open to collateral attack. *Crow v. Meyersieck*, 88 Mo. 411.

1. Chitty on Pleading (16th ed.), p. 577; *Ex p. Northington*, 37 Ala. 496; *Buchanan v. Rout*, 2 T. B. Mon. (Ky.) 114; *Cameron v. Pottinger*, 3 Bibb (Ky.) 11; *M'Creight v. Aiken*, Rice L. (S. Car.) 56.

An Idiot must appear in person. Chitty on Pleading (16th ed.), p. 577; *Beverley's Case*, 4 Coke 124b. See *Cameron v. Pottinger*, 3 Bibb (Ky.) 11.

**For General Matters Pertaining to Appearances**, see article APPEARANCES, vol. 2, p. 588.

2. Buswell on Insanity, p. 153; *Westcomb v. Westcomb*, Dick. 233; *Wilson v. Grace*, 14 Ves. Jr. 172. See *infra*, V. 2. c. (4) (a) *Generally* — In Equity and at Law.

3. *Ex p. Northington*, 37 Ala. 496; *Faulkner v. M'Clure*, 18 Johns. (N. Y.) 134.

In New Jersey a lunatic, if personally sued, must appear by attorney. *Van Horn v. Hann*, 39 N. J. L. 207.

**Maryland** — *Attorney Submitting Cause to Court Without Jury*. — The Constitution of Maryland, art. 4, § 8, provides that "the parties to any cause may submit the same to the court for determination without the aid of a jury," and under this any party capable of being sued, and of appearing in person or by attorney, is capable of giving his assent to a submission of his case to the court. Hence a lunatic, having the capacity to sue and be sued, is capable of giving such consent, and at any rate he is bound by the acts of his attorney in submitting the case to the court. *Cross v. Kent*, 32 Md. 581.

4. An insane defendant must, if of full age, appear by attorney and not by guardian. Therefore, in a suit to recall or reverse a judgment rendered against such a defendant in a civil action, it cannot be alleged as error that no guardian *ad litem* had been appointed. *King v. Robinson*, 33 Me. 114.

There is no authority for the appointment of a guardian *ad litem* to defend

(3) *By General Guardian or Committee.* — The appearance and conduct of a suit against an insane defendant, by the guardian or the committee, with the practice and procedure pertaining to such suits, will be found treated in the article GUARDIANS, vol. 9, p. 886.

(4) *By Guardian Ad Litem* — (a) *Generally — In Equity and at Law.* — The common law contemplated a difference in the manner of a lunatic's defense at law and in equity; in the former the appearance and defense being by guardian or attorney, as the case might be,<sup>1</sup> and in the latter these duties being performed by guardian *ad litem*.<sup>2</sup> This common-law method, it is said, was uniform and unquestioned, and has never been departed from in this country when the courts have had occasion to consider it directly.<sup>3</sup> However this may be, and whether the change has been caused by a failure of the courts to notice the diversity of procedure in cases at law and in equity, or by the blending of the two jurisdictions in the same court, or by the direction of codes and statutes, yet certain it is that this distinction has not at all times been observed, and guardians *ad litem* have been appointed for lunatic defendants in cases other than those of a purely equity nature.<sup>4</sup>

(b) *Cases Necessitating Guardian Ad Litem — Where There Is No Committee.* — If the lunatic has no committee or guardian, the court should appoint a guardian *ad litem* for him.<sup>5</sup>

*Where There Is Committee.* — And in many cases such a special guardian will be appointed even though there is a general committee or guardian.<sup>6</sup>

an insane adult, but it is error for the court to refuse to allow such a plaintiff to proceed "unless he would first have a guardian appointed by the Probate Court, and notify such guardian of the pendency of the suit." After having an attorney appointed it is the right of the plaintiff to proceed, and if the court refuses to appoint an attorney mandamus will be issued to compel it. *Ex p. Northington*, 37 Ala. 496.

1. See *supra*, V. 2. c. (1) *Generally*.

2. *Westcomb v. Westcomb*, Dick. 233; *Wilson v. Grace*, 14 Ves. Jr. 172; *Van Horn v. Hann*, 39 N. J. L. 213.

3. *Van Horn v. Hann*, 39 N. J. L. 213.

4. *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Bensieck v. Cook*, 116 Mo. 173; *Boyd v. Dodson*, 66 Cal. 360; *Security L. & T. Co. v. Kauffman*, 108 Cal. 215; *Sturges v. Longworth*, 1 Ohio St. 552.

The *Arkansas* statute (Sand. & H. Dig. (1894), § 5650 *et seq.*) regulating proceedings against lunatics adopts substan-

tially the former practice in equity and makes it applicable to all proceedings. It is therefore incumbent on the court, in every civil case where an insane person is a defendant, to see to it that he is represented on the record by a proper guardian, and it is error as in a proceeding against an infant to proceed without it. *Arrington v. Arrington*, 32 Ark. 674.

5. *Fietsam v. Kropp*, 6 Ill. App. 144; *Hinton v. Bland*, 81 Va. 588; *Steifel v. Clark*, 9 Baxt. (Tenn.) 466; *Harrison v. Rowan*, 4 Wash. (U. S.) 202.

6. *The General Committee or Guardian* is often appointed the guardian *ad litem*. See *infra*, V. 2. c. (4) (e) *Who Appointed*.

*Guardian Ad Litem in Addition to General Guardian.* — The summons in an action against an incompetent person may be served on both the incompetent and his guardian; and it is then the duty of the guardian to appear and defend the action. If deemed expedient, the court may also appoint a guardian

**Where Committee's Interests Conflict.** — This will certainly be done if the committee's or guardian's interests are adverse to the lunatic.<sup>1</sup>

(c) **Duty of Court to Appoint, and Effect of Failure Thereof.** — Wherever the necessity for a guardian *ad litem* exists it is the duty of the court to appoint one,<sup>2</sup> but it seems, in the absence of direct legislation to the contrary, that the failure of the court to make the appointment is not a jurisdictional defect, but an irregularity which does not render the judgment void.<sup>3</sup>

*ad litem* to represent the incompetent. *Justice v. Ott*, 87 Cal. 530.

**Counsel to a Nonresident Defendant** may be appointed his guardian *ad litem*, with notice, notwithstanding the prior appointment of a guardian for the defendant in the state of his domicile. *Emery v. Parrott*, 107 Mass. 95.

**Continuation of Guardian Ad Litem After Appointment of General Guardian.** — A guardian *ad litem* for an insane wife, appointed by the Circuit Court to protect her rights in an action for divorce, continues to be such guardian until removed by the court which appointed him; and his functions are not suspended by the subsequent appointment by the County Court of a general guardian for her, but he is the proper person to prosecute a petition to the court for a modification of the judgment in that action as to the support of the wife. *Hicks v. Hicks*, 79 Wis. 465.

**Notice of Application to Appoint Guardian Ad Litem.** — Where it appears from the complainant's own bill that the party proceeded against has been found to be a lunatic, and that his estate is under the care of a committee, as by his own showing he is not entitled to a personal answer from the lunatic, he has no claim to notice of the application to appoint a guardian *ad litem* to appear and answer, any more than he would be in the case of a defendant who is proceeded against as an infant. *New v. New*, 6 Paige (N. Y.) 237.

1. *Hinton v. Bland*, 81 Va. 588; *Marx v. Rowlands*, 59 Wis. 110.

**Under Code of Iowa**, where proceedings have been commenced by a guardian of a person of unsound mind, which affect the property interests of the ward, and an order is asked contrary to the interests of the latter, the court should appoint a guardian *ad litem* to defend for the lunatic, but it has no jurisdiction to make such appointment before proper service of notice of the proceed-

ing has been made upon the ward. *Matter of Hunter's Estate*, 84 Iowa 388.

2. *Austin v. Bean*, 101 Ala. 133; *Mansfield v. Mansfield*, 13 Mass. 412; *McAlister v. Lancaster County Bank*, 15 Neb. 295; *Kuhn v. Kilmer*, 16 Neb. 699; *Markle v. Markle*, 4 Johns. Ch. (N. Y.) 168; *Hanley v. Brennan*, 19 Abb. N. Cas. (N. Y. City Ct.) 186; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Sturges v. Longworth*, 1 Ohio St. 554.

Where it is suggested that a party has become insane the court should appoint a guardian *ad litem*. *Fietsam v. Kropp*, 6 Ill. App. 144; *Denny v. Denny*, 8 Allen (Mass.) 311; *Davenport v. Davenport*, 5 Allen (Mass.) 464; *Mansfield v. Mansfield*, 13 Mass. 412; *Copus v. Kauffman*, 3 Edw. Ch. (N. Y.) 370.

**Guardian for Person Not Party to Action.** — A court has no jurisdiction to appoint a guardian *ad litem* for a person alleged to be insane who is not made a party to the action. *Boyd v. Dodson*, 66 Cal. 360.

**Service of Process on Proceeding to Appoint Guardian.** — The actual service of process on a lunatic defendant, found to be such by inquisition of the court, may be dispensed with as a prerequisite to the appointment of a guardian *ad litem*, where it is shown that the service would be dangerous to the health of the lunatic. *Speak v. Metcalf*, 2 Tenn. Ch. 214.

**Guardian Ad Litem Failing to Answer or Act.** — In *Sturges v. Longworth*, 1 Ohio St. 552, it was held error for the court to decree against a lunatic without an answer from the guardian *ad litem*, for that was the object of his appointment. But in *Foster v. Jones*, 23 Ga. 168, it was held that if one be appointed by the court guardian *ad litem* and accepts the trust, a judgment against the lunatic will be good notwithstanding the guardian fails to act.

3. *Johnson v. Pomeroy*, 31 Ohio St.

(d) **Determination of Insanity Before Appointment.** — The court should be reasonably satisfied as to the state of the defendant's mind before appointing the guardian *ad litem*, but it appears to be the better doctrine that a regular adjudication of insanity is not a prerequisite.<sup>1</sup> This rule, however, is not universally followed, and in at least one state has been changed by statute.<sup>2</sup>

(e) **Who Appointed.** — Where a lunatic defendant has a general guardian or committee the latter will ordinarily be appointed his guardian *ad litem*.<sup>3</sup> But if there be no committee or guardian, or being one, if his interest is adverse to the lunatic, some other capable and responsible party will be appointed.<sup>4</sup>

247; *Sturges v. Longworth*, 1 Ohio St. 554; *McAlister v. Lancaster County Bank*, 15 Neb. 295; *Kuhn v. Kilmer*, 16 Neb. 699.

1. *Hunter v. Hatfield*, 12 Hun (N. Y.) 381, affirmed in 73 N. Y. 600; *Hanley v. Brennan*, 19 Abb. N. Cas. (N. Y. City Ct.) 186.

A summons in an action of ejectment must be served personally upon the defendant who is insane in fact, though never judicially declared so, but the court may and should appoint a guardian *ad litem* for such defendant whenever the fact appears that he is insane and has an interest in the action requiring protection. *Gerster v. Hilbert*, 38 Wis. 609.

**Institution of Inquiry.** — In order to determine whether it is necessary to appoint a guardian *ad litem* if there be a doubt as to the insanity of the defendant, the court should institute an inquiry as to the state of the defendant's mind at the time. *Campbells v. Bowen*, 1 Rob. (Va.) 255.

**Court Satisfied by Certificate of Physician, etc.** — But where the court is satisfied by a certificate of the attending physician of the hospital in which the lunatic has been placed, or by such other proof as the nature of the case would admit, that the intellectual infirmity of the defendant is such, arising from madness, age, or any other cause, as to render him unable to manage his own affairs, on application a guardian *ad litem* may be appointed for him and charged to defend the suit on his behalf, without there having been an inquisition of insanity. *Post v. Mackall*, 3 Bland (Md.) 486.

**Appointment of Special Guardian Not an Adjudication of Insanity.** — The appointment of a special guardian for a defendant as a lunatic is a mere matter of routine, and not an adjudication of

lunacy. *Spencer v. Popham*, 5 Redf. (N. Y.) 425.

2. **Alabama.** — Where the insanity of the defendant has been found by inquisition, the practice settled by *Exp. Northington*, 37 Ala. 496, of appointing an attorney to defend the lunatic, will be followed. But where this incapacity has not been judicially determined, an attorney will not be appointed, but a continuance of the case will be granted, that the question of sanity may be determined. *Hollingsworth v. Chapman*, 50 Ala. 23.

**Massachusetts.** — By Rev. Stat. Mass., c. 76, § 18, the court is required to determine judicially the fact of the insanity of the respondent, as a condition precedent to the exercise of the authority to appoint a guardian *ad litem*. Such appointment is therefore *prima facie* evidence of the respondent's insanity, in any subsequent stage of the cause. *Little v. Little*, 13 Gray (Mass.) 264.

3. *Westcomb v. Westcomb*, Dick. 233; *Wilson v. Grace*, 14 Ves. Jr. 172; *Symmes v. Major*, 21 Ind. 443; *New v. New*, 6 Paige (N. Y.) 237; *Van Horn v. Hann*, 39 N. J. L. 213; *Sturges v. Longworth*, 1 Ohio St. 552.

4. Where a defendant has been found a lunatic by a regular commission and is then in custody as such, it is a matter of course for him to answer by his committee without any special order for that purpose; but where it appears that the lunatic is interested in the subsequent traverse, it then becomes necessary to appoint a disinterested capable person as his guardian to answer for him. *Hewitt's Case*, 3 Bland (Md.) 184.

It is to be observed, even in cases where the lunatic has a regular guardian, in the absence of statutory enactment on the subject, that the practice

## VI. SALE, LEASE, AND MORTGAGE OF PROPERTY — 1. Sale —

**a. PERSONAL PROPERTY.** — It is in most cases safest, where the committee desires to dispose of the personal property of his insane ward, to obtain an order of court vesting him with such authority, but it may or may not be necessary, according to the statutes and doctrines of each particular state.<sup>1</sup>

**b. REAL PROPERTY** — (1) *Power of Court to Authorize — Jurisdiction.* — In *England* it was formerly considered that independent of statutory authorization the Court of Chancery had no power to direct a sale of a lunatic's lands for payment of his debts.<sup>2</sup> But now, both there and in this country, the court may empower the committee or guardian to sell the estate of his insane ward, in proper cases, and this whether the power be expressly given by statute or considered as a branch of inherent chancery jurisdiction.<sup>3</sup> These statutes, in most instances,

is for the court to appoint the guardian to defend the particular cause. He does not defend as a matter of course; it is by authority from the court. And although the court might in most cases feel bound to appoint the general guardian, yet it would appear reasonable that when, in the opinion of the court, the guardian of the lunatic, either on account of his residing out of the jurisdiction of the court or for any other cause, was not a proper person to defend the suit, it should have the discretion of appointing some more suitable person to make the defense. *Sturges v. Longworth*, 1 Ohio St. 552.

1. *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Howard v. Thompson*, 8 Ired. L. (N. Car.) 367; *Holden v. Scudder*, 58 Fed. Rep. 932.

2. *Buswell on Insanity*, p. 124.

3. *Ex p. Drayton*, 1 Desaus. (S. Car.) 136.

In *Illinois*, although there was no statute which in terms authorized courts of chancery to entertain applications by the committee for the sale of real estate of his lunatic ward, yet it was held that the Court of Chancery, by virtue of its general power over the estates of idiots, lunatics, etc., had jurisdiction to order the sale of a lunatic's land for her support and maintenance, on a proper application by the conservator, or to pay the conservator for moneys expended by him in supporting such ward, he having no remedy at law. *Dodge v. Cole*, 97 Ill. 338.

Under the *Illinois* statutes of 1845 and 1853 Circuit Courts have the power, upon a proper application of the conservator, to authorize him to sell and

convey the real estate of an insane married woman. It is not necessary in such a conveyance for the husband to be joined. *Gardner v. Maroney*, 95 Ill. 552.

**Sale of Property of Residents and Non-residents.** — The *Illinois* Act of 1853, authorizing the sale, for certain specified purposes, of real estate of any idiot, lunatic, or distracted person, has no reference whatever to nonresident owners. It applies only to cases where the idiot, lunatic, or distracted person and his conservator reside within the state. Sales by nonresident conservators are authorized by the Act of 1865. *Wing v. Dodge*, 80 Ill. 564.

**New York** — *General Chancery Jurisdiction.* — Under the old chancery practice the chancellor was authorized to order the sale of the real estate of a lunatic in the cases specified by the statute. *Matter of Pettit*, 2 Paige (N. Y.) 596.

**Order of Sale Before Commission Returned.** — The Supreme Court has no power to order such sale, upon petition of friends of the incompetent, before a commission has been issued and returned. *Matter of Payn*, 8 How. Pr. (N. Y. Supreme Ct.) 220.

**Maryland** — *Sale Without Previous Inquest.* — Under the 79th section of article 16 of the Code of Maryland, power is given to the court to superintend and direct the affairs of persons *non compos mentis*, both as to the care of their persons and management of their estates, and to make such orders and decrees in regard thereto as may seem proper. The foundation of this jurisdiction is made to depend upon the fact

direct what particular courts may exercise this jurisdiction.<sup>1</sup>

(2) *Necessity for Order of Authorization.*—The property of a lunatic in the hands of a guardian or committee is *in custodia legis*, and neither has a creditor of such lunatic power to subject his property, nor can the guardian or committee sell the real estate, without first obtaining an order of court empowering him so to do.<sup>2</sup>

of the party's being *non compos mentis*. Without such fact, although the party may be of weak or feeble mind, the courts will not undertake to exercise their authority and dispose of the person and estate. For the courts may, under special circumstances, protect the person and estate of the weak-minded without a previous inquest and proof of unsoundness, but the power to divest the citizen of his personal freedom and the control of his property is of an extraordinary and delicate nature, and never to be exercised without the precautions demanded by the law. *Greenwade v. Greenwade*, 43 Md. 313.

*Proceedings Before Ordering Sale.*—By section 86 of article 16 of the Code, authorizing the court to sell so much of the property of the lunatic as may be necessary for his support, or for the payment of all reasonable expenses incurred by his trustee, it is not contemplated that before the sale can be made a regular chancery proceeding should be instituted, the lunatic summoned, a guardian appointed to answer for him, and proof taken under a commission as to whether the expenses were just and reasonable. The above, however, is the method prescribed by section 83 of article 16, where a creditor seeks to collect a debt or enforce his lien by a sale of the lunatic's property. *Matter of Dorney*, 59 Md. 67.

*Presumption of Jurisdiction.*—A Circuit Court making an order empowering the conservator to sell his lunatic's land is presumed to have the requisite jurisdiction, unless the contrary appears from the record; and when this does not appear, the decree or judgment cannot be attacked collaterally for errors or irregularities in the rendition thereof. *Dodge v. Cole*, 97 Ill. 338.

*Sale of Leasehold Estate—Title Conferred.*—In *Ex p. Dikes*, 8 Ves. Jr. 79, it was held that the chancellor might make an order for the sale of the leasehold estate of the lunatic, but that would not make the grantee an absolute title except during the lunacy.

*Sale Pending Traverse to Inquisition.*—A decree for the sale of lands under Act Pa. 1853 (P. L. 563) should not be made pending a traverse to the inquisition. *Meredith's Estate*, 40 Leg. Int. (Pa.) 484.

*Jurisdiction After Death of Lunatic.*—By an order of court, on petition of his committee, the real estate of the lunatic was sold to satisfy his debts, and his heirs brought ejectment against the vendee of the purchaser, attempting to prove on the trial that the lunatic died before the order of sale was granted. Proof was rejected by the court. It was held that the evidence offered was properly excluded, for the Court of Common Pleas had jurisdiction over the estate of the lunatic after death, and the order of sale was therefore not void for want of authority to make it. *Yaple v. Titus*, 41 Pa. St. 195.

1. *In re Brent*, 5 Mackey (D. C.) 352; *Salter v. Salter*, 6 Bush (Ky.) 624; *Matter of Street Opening*, 89 Hun (N. Y.) 525; *Palmer v. Garland*, 81 Va. 444.

2. *In re Woodcock's Trusts*, L. R. 3 Ch. 229; *Griswold v. Butler*, 3 Conn. 227; *Dodge v. Cole*, 97 Ill. 338; *McLean v. Breese*, 109 N. Car. 564; *Adams v. Thomas*, 81 N. Car. 296 [*citing and approving Blake v. Respass*, 77 N. Car. 193; *Smith v. Pipkin*, 79 N. Car. 569; *Matter of Latham*, 4 Ired. Eq. (N. Car.) 231]; *Kennedy v. Johnston*, 65 Pa. St. 451.

*Indiana—Ratification by Guardian, Without Order of Court, of Prior Sale by Lunatic.*—Where, prior to an adjudication of insanity, a person of unsound mind conveyed land, the guardian afterward appointed cannot, without an order of court, ratify such sale and convert the voidable title of the grantee into a valid and unimpeachable one. The guardian, having no authority to convey the lands of his ward without order of court, cannot, by acts of ratification, do the equivalent of conveying, for a guardian cannot do, without direction of the court, that which his ward was powerless to do before

(3) *Application for Order of Sale.*—The application for an order authorizing the sale of lunatics' property should be by petition or bill by the committee or creditor, as the case may be.<sup>1</sup>

(4) *Cases Necessitating Order of Sale.*—The most usual case in which the power exists to sell the insane party's real estate is where such a course is requisite for the maintenance of the lunatic or his family, and to this may be added the cases necessitating such sale for the payment of the party's debts and the education of his children.<sup>2</sup>

restoration to reason, so as to affect the title of his ward's lands. *Funk v. Rentschler*, 134 Ind. 68.

**Mississippi**—*Sale of Lands on Execution.*—Under the Code of Mississippi of 1857, the sale of lands of a lunatic under execution issued on a judgment against his guardian is a nullity, and the purchaser acquires no title. The sale of lands of a lunatic for payment of debts contracted while he was of sound mind could only be made by order of the probate judge. *Saunders v. Mitchell*, 61 Miss. 321.

**West Virginia**—*Compromise of Suit Affecting Condition and Nature of Estate.*—The fact that the committee of an insane person is authorized by law to sue and be sued touching the estate of the insane person does not in and of itself authorize the committee to compromise a suit brought by him, so as to change the condition and nature of the estate of the insane person. He cannot sell or change the estate without authorization from the court. *Hinchman v. Ballard*, 7 W. Va. 152.

1. *Exp. Smith*, 5 Ves. Jr. 556; *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 400.

**Lunatic as a Party.**—Proceedings by a conservator to obtain authorization to sell the land of his lunatic ward are not adversary to the ward, but for his benefit, and therefore the latter is not a necessary party to the proceedings. *Dodge v. Cole*, 97 Ill. 338.

**Requisites of Petition.**—A proceeding to sell the lands of a lunatic, etc., under the *Illinois* Act of 1853, can only be instituted by a conservator of this state and on behalf of a resident of the state, and the petition must show the facts and specify the purposes for which the sale is sought; and these must be for one or more of the objects named in the act. But when application is made by a nonresident conservator or guardian of an insane person, the law does not require the petition to state the purposes for which the property is to be

sold. It seems sufficient to confer jurisdiction for the petition to show that the court of the state where the conservator resides has required the sale, without reference to the application of the proceeds. *Wing v. Dodge*, 80 Ill. 564.

**Maryland**—*By Whom Application Made.*—The only method by which a Court of Chancery is authorized to order the sale of a lunatic's property for his support, or to make a change of investment, is that given by sections 96, 98, art. 16, of the Code of Maryland, which requires the application for such sale to be made by guardian, committee, or trustee of the lunatic. *Hamilton v. Traber*, 78 Md. 26.

**Filing Petition Vests Jurisdiction.**—By the filing of a petition showing the existence of a valid outstanding debt against the lunatic, to settle which requires the disposition of his real property, the court is vested with jurisdiction, which is not divested by subsequent irregularities in the proceedings, unless they were taken in violation of some express provision of the statute. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

**Bill by Husband and Wife.**—Where a wife is sane, a husband may file a bill in the joint names of himself and wife for the partition and sale of the wife's land, or may employ an attorney to file such bill, yet the law presumes that the husband acts with the assent of the wife and as her agent. But if the wife be insane, no such consent can be given, and a sale of the wife's land under such proceedings is simply void. The law requires the proceeds of the sale of a wife's property to be paid over only as she shall direct upon privy examination. This necessarily implies, if she be party plaintiff, that she can give an intelligent assent to the proceedings. *Stephens v. Porter*, 11 Heisk. (Tenn.) 341.

2. *Matter of Pettit*, 2 Paige (N. Y.)

(5) *What Property to Be Sold.*—In the management of a lunatic's estate the welfare of the party is the governing consideration, and it seems that the court may direct any or all of his property to be sold, if it would be for his benefit. It may order personal property to be converted into real, or real into personal,<sup>1</sup> may direct timber on the land to be sold,<sup>2</sup> or decree the sale of a contingent interest in lands held by the lunatic.<sup>3</sup> Whatever of the real estate the committee or guardian disposes of, he must sell it subject to all outstanding liens and incumbrances thereon.<sup>4</sup>

(6) *Effect of Order of Sale.*—A decree of a court of equity directing the sale of a lunatic's property is substantially a decree *in rem* and subjects the property to the control of the court, who will enjoin all creditors from interfering with it except under the direction and with the sanction of the court.<sup>5</sup>

(7) *Notice of Proceedings.*—In the absence of contrary enactments, it is held that no notice of the proceedings resulting in the sale of lands is necessary to be given to the lunatic himself.<sup>6</sup>

596, citing *Matter of Hoag*, 7 Paige (N. Y.) 312. And see *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 400; *Berry v. Rogers*, 2 B. Mon. (Ky.) 308.

The court will not make any order for the sale of a lunatic's property for the payment of his debts unless after such sale there will be left a sufficient maintenance for himself, his wife, and his minor children. *McLean v. Breese*, 109 N. Car. 564; *Adams v. Thomas*, 81 N. Car. 296 [citing and approving *Blake v. Respass*, 77 N. Car. 193; *Smith v. Pipkin*, 79 N. Car. 569; *Matter of Latham*, 4 Ired. Eq. (N. Car.) 231]; *Ex p. Hastings*, 14 Ves. Jr. 182; *Ex p. Dikes*, 8 Ves. Jr. 79.

1. *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347.

2. *In re Salisbury*, 3 Johns. Ch. (N. Y.) 347.

**The Produce of Timber** on the lunatic's estate, cut and sold by order of the court on the report of a master that it would be for his benefit, is personal assets. *Oxenden v. Compton*, 2 Ves. Jr. 69.

3. *Palmer v. Garland*, 81 Va. 444.

4. *Person v. Merrick*, 5 Wis. 231, holding in accordance that a bond executed by the committee conditioned to remove such liens will bind him personally, and not the estate he represents.

5. *Latham v. Wiswall*, 2 Ired. Eq. (N. Car.) 294.

Thus no creditor can seize any portion of the property under an execution

the teste of which is subsequent to the date of the decree. *Latham v. Wiswall*, 2 Ired. Eq. (N. Car.) 294. And the proceeds from the sale of the lands being under the direction of the court, no creditor can claim priority. *Ex p. Latham*, 6 Ired. Eq. (N. Car.) 406.

**Action for Application of Proceeds.**—*New York Code of Civil Procedure*, § 2661, provides that the avails of a lunatic's property must be disposed of under the "order" of the court; but nevertheless an action will lie to have the proceeds of the sale of the lunatic's lands applied to the satisfaction of the plaintiff's mortgage. *Parmerter v. Baker*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 104.

**Exceeding Amount Allowed for Maintenance.**—Under Act of *Pennsylvania*, when the Court of Common Pleas has decreed an allowance for maintenance out of the real estate subject to its control, the amount is not to be exceeded without the sanction of that court. *Guthrie's Appeal*, 16 Pa. St. 321.

6. Under *New York Laws* of 1874, in applying to the court for leave to dispose of the property of an insane person, his committee represents him and is not required to give him notice of the proceedings. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

**In Vermont** a deed of sale by the guardian of a lunatic, of the lunatic's real estate, made by license of the probate judge, was held good to convey the title of the lunatic, notwithstanding



But the question of notice is largely regulated by statute, providing for the giving of it, who are entitled thereto, and the manner of its service, whether personally or by publication.<sup>1</sup>

(8) *Method of Sale* — *Whether Public or Private*. — It is apprehended that the usual method of disposing of a lunatic's real estate is by a public sale thereof, as in other judicial sales;<sup>2</sup> but in certain cases where the interests of the lunatic would be advanced, the sale may be a private one, there being no statute to the contrary.<sup>3</sup>

*By Whom Conducted*. — The conduct of the sale, whether to be by the committee, guardian, or a master, will usually be provided for by statute, or in the decree or order of the court directing it.<sup>4</sup>

*Effect of Errors or Irregularities*. — If the court ordering the sale has jurisdiction of the subject-matter and parties, no errors or irregularities will affect the sale in the title under it. Until reversed the decree confers the power to sell and pass the title, if there was jurisdiction, however erroneous the decree may be.<sup>5</sup>

it did not appear that previous notice was given to any one of an intention to apply to the judge of probate for a license to make such sale. *Smith v. Burnham*, 1 Aik. (Vt.) 84.

1. *Bean v. Haffendorfer*, 84 Ky. 685; *Bennett v. Hayden*, 145 Pa. St. 586; *Wing v. Dodge*, 80 Ill. 564; *Mohr v. Manierre*, 101 U. S. 417; *Willis v. Hodson*, 79 Md. 327.

2. See article JUDICIAL SALES.

Act of *Pennsylvania*, June 13, 1836, §§ 22-24 (P. L. 597), empowers the Court of Common Pleas to authorize the committee of the lunatic to "sell at public sale, or mortgage," his real estate, for specified purposes; and under these provisions the court has no jurisdiction to order a private sale or to entertain a petition therefor. *Bennett v. Hayden*, 145 Pa. St. 586.

3. *Hess v. Rader*, 26 Gratt. (Va.) 746.

Thus where a lunatic's interest in lands consists of fractional parts of lots, and in such proportions and relations to other interests of other owners that it would be most difficult to sell the fractional parts to any other than the joint owners of the other parts, certainly for as much as these joint owners would give, it is competent and proper for the court to decree a private sale of them. The only object of putting up property at public sale is to give the public an opportunity of bidding; and this not for the benefit of the public, but for the owner of the property. When, as in this case, the part owners are the only persons who are

interested in bidding, and therefore no competition can be hoped for, negotiations must take the place of a public sale to prevent the sacrifice of the property. *Palmer v. Garland*, 81 Va. 444.

In the absence of any irregularity, fraud, mistake, or legal surprise, a private sale of a lunatic's land by her guardian, under order of and confirmed by the Court of Chancery, will not be set aside merely because another person has made an offer for the land exceeding by six per cent. the price produced at the guardian's sale, which increased amount would not repay the purchasers for their outlay and damages in effecting the sale. *Matter of Leary*, 50 N. J. Eq. 383.

4. *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 400; *McLean v. Breese*, 109 N. Car. 564. See generally article JUDICIAL SALES.

*Committee to Ask Assistance from Court*. — The court having jurisdiction of the lunatic and his estate is invested with full chancery power in the premises, and if assistance becomes necessary to the committee to enforce the orders and decrees of the court in disposing of the lunatic's property, the said committee may invoke the court's aid in like manner as a receiver in other equity proceedings. *Shaffer v. List*, 114 Pa. St. 486.

5. *Wing v. Dodge*, 80 Ill. 564; *Dutcher v. Hill*, 29 Mo. 271; *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525. And see generally article JUDICIAL SALES.

(9) *Report and Confirmation of Sale.* — It seems to be usual for the manner and terms of sale, etc., to be reported to the court for its confirmation. These questions are governed generally by the principles obtaining in other judicial sales of like nature.<sup>1</sup>

(10) *Setting Aside Sale.* — The sale may be set aside by the court where it is characterized by unfairness, fraud, hardship, etc.<sup>2</sup>

2. *Lease.* — The court may direct a lease of the lunatic's lands by his committee or guardian, when it would be for his benefit.<sup>3</sup> If in the judgment of the committee the interests of the *non compos* would be promoted by leasing part or the whole of the property, he should represent the facts to the court and ask its instructions. He cannot generally make such lease upon his own authority and without an order of court therefor.<sup>4</sup>

3. *Mortgage.* — The power to mortgage the lands of a lunatic and the procedure thereon appear to be governed in general by the principles pertaining to the sale and lease thereof, and are often prescribed in the same statutes.<sup>5</sup>

1. See the article JUDICIAL SALES; Brasher v. Cortlandt, 2 Johns. Ch. (N. Y.) 400; Hess v. Rader, 26 Gratt. (Va.) 746.

2. See article JUDICIAL SALES; Stone v. Cromie, 87 Ky. 173; Crawford v. Thomson, 161 Ill. 161.

3. *In re Wynne*, L. R. 7 Ch. 229; *Ex p. Jermyn*, 3 Swanst. 131.

4. *Foster v. Marchant*, 1 Vern. 262; *Pharis v. Gere*, 110 N. Y. 336; *Shaffer v. List*, 114 Pa. St. 486; *Hinchman v. Ballard*, 7 W. Va. 152.

In *Treat v. Peck*, 5 Conn. 280, it was held that under the statute of 1808 the conservator of an idiot was not empowered by virtue of his office to make a lease of such idiot's real estate; the statute having given the power exclusively to the County Court.

But, in *Palmer v. Cheseboro*, 55 Conn. 114, the foregoing case was reviewed, and it was said that when that case was decided the statute with regard to conservators gave them authority only "to take care of and oversee"

the estates of their wards, and that the court properly held that this did not give them power to make such leases from year to year; but the Act of 1885 gives larger authorities to conservators, providing that they "shall have the charge of" and "shall manage" the estate of their wards; and this, the court decided, conferred on the conservator power to make a lease for a reasonable time of his ward's real estate, inferentially without order of court.

5. See *supra*, VI. 1. *Sale*; and VI. 2. *Lease*; and see *Foster v. Marchant*, 1 Vern. 262.

Under the *New York Laws* of 1874, § 17, tit. 1, c. 446, upon an application of the committee of an insane person for leave to mortgage his real estate for the payment of his debts, it is not necessary for the committee to execute a bond for moneys which are come into his hands; it is a matter of discretion with the court whether or not to require a bond. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

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